

आयकर अपीलीय अधिकरण  
कोलकाता 'बी' पीठ, कोलकाता में  
**IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA 'B' 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.: 18/KOL/2021**

**Assessment Year: 2012-13**

***ACIT, Circle-1(1), Kolkata.....Appellant***

***Vs.***

***M/s. Gold Rush Sales and Service Limited.....Respondent  
[PAN: AAACG 9537 B]***

**C.O. No. 9/KOL/2021**

**Arising out of I.T.A. No.: 18/KOL/2021**

**Assessment Year: 2012-13**

***M/s. Gold Rush Sales and Service Limited.....Appellant  
[PAN: AAACG 9537 B]***

***Vs.***

***ACIT, Circle-1(1), Kolkata.....Respondent***

**Appearances:**

***Assessee represented by*** – Sh. Percy G. Pardiwalla, Sr. Adv., Sh. Devashish A. Mehrotra & G.G. Mehrotra, A/R.

***Department represented by*** – Sh. P.P. Barman, Addl. CIT, Sr. D/R.

Date of concluding the hearing : July 27<sup>th</sup>, 2023

Date of pronouncing the order : August 31<sup>st</sup>, 2023

**ORDER**

**Per Rajesh Kumar, Accountant Member:**

This appeal preferred by the Revenue and the cross objection filed by the assessee are against the order passed by Learned Commissioner of Income-tax (Appeals)-6, Kolkata [hereinafter referred to as Ld. 'CIT(A)'] dated 24.09.2020 for the Assessment Year (in short 'AY') 2012-13.

2. At the outset, the registry has pointed out that there is a delay of 3 days in filing the appeal by the revenue. The ld. DR has submitted before the bench that in order to file the appeal, the documents have to go through various stages and processes in the hierarchy for obtaining approval and hence the said delay in filing the appeal. Considering the facts and submissions of the rival sides, we are inclined to condone the delay of 3 days in filing the appeal and appeal is admitted for adjudicated.

3. The issue raised by the assessee in ground no. 1 is against the order of Ld. CIT(A) deleting the addition of Rs. 2,34,00,000/- made by the Assessing Officer (in short ld. 'AO') u/s 68 of the Act for undisclosed cash credit.

4. The facts in brief are that the assessee filed its return of income declaring total income at Rs. 3,14,79,262/- on 29.09.2012 for AY 2012-13. The case of the assessee was selected for scrutiny through CASS and statutory notices were duly issued and served upon the assessee. The assessee is engaged in the business of automobile dealership for Tata passenger cars, spare parts, accessories and workshop for servicing the vehicles etc. Ld. AO

during the course of assessment proceedings observed from the return of income that the assessee has issued equity shares thereby raising share capital through the issue of equity shares at huge share premium amounting to Rs. 6,16,39,640/-. Thereafter, Ld. AO further noted that out of the said amount only Rs. 2.34 Cr was raised during the year and the balance of equity shares were by way of issue of bogus shares out of reserve and surpluses. Ld. AO also reproduced the details of shares issued amounting to Rs. 2.34 Cr comprising 12,15,000 shares to ten parties consisting of Rs. 1,21,50,000/- as share capital and Rs. 1,12,50,000/- as share premium. The assessee furnished before Ld. AO all the evidences comprising names, addresses, copy of bank account evidencing the receipt of subscription through banking channels, audited profit and loss account, share application forms etc. as required by Ld. AO. Ld. AO also issued summons u/s 131 of the Act dated 09.03.2015 to the assessee calling upon the assessee to substantiate the identity and creditworthiness of the share subscribers and genuineness of the transactions. Ld. AO noted that the directors of the assessee company did not appear personally in compliance to the summon issued u/s 131 of the Act on 09.03.2015 and however, duly acknowledged having filed the necessary details called for. Ld. AO noted that simply furnishing of the details and evidences would not prove the identity and creditworthiness of the investors and the genuineness of the transactions. Finally, Ld. AO made the addition on account of non-compliance to the summons issued on the part of the assessee by

treating Rs. 2.34 Cr as unexplained cash credit and added the same to the income of the assessee.

5. In the appellate proceedings, Ld. CIT(A) allowed the appeal of the assessee by giving a detailed finding that the assessee has substantiated the three ingredients of Section 68 of the Act i.e. identity and creditworthiness of the shareholders and genuineness of the transactions and mere issuing of shares at a premium would not make the subscription of equity shares subscription value to be liable to be added to the income of the assessee u/s 68 of the Act. While deciding the issue Ld. CIT(A) has relied on a series of decisions in the case of *CIT Vs. Gagandeep Infrastructure (P.) Ltd.* reported in *394 ITR 680 (Bombay)* wherein the Hon'ble Court has held that the proviso to Section 68 of the Act has been introduced in the Finance Act, 2012 w.e.f. 01.04.2013 which would be effective from AY 2013-14 onwards and not for the subject assessment year. Ld. CIT(A) also observed that the decision of Hon'ble Apex Court in the case of *PCIT Vs. Ami Industries (India) (P.) Ltd.* reported in *[2020] TS-67-HC-2020(Bom)* has distinguished the ratio laid down by the Hon'ble Apex Court in the case of *PCIT Vs. NRA Iron & Steel Pvt. Ltd.* *[2019] TS-106-SC-2019 (SC)*.

6. After hearing the rival contentions and perusing the material on record, we find that undisputedly the assessee has filed the evidences/details as called for by Ld. AO in respect of the share subscribers of Rs. 2.34 Cr which has not been commented by Ld. AO in the assessment proceedings nor any defect has been pointed out meaning thereby that no further verification of these evidences was carried out by Ld. AO. We note that though there was a non-

compliance to the summon issued u/s 131 of the Act by the directors of the assessee company, but the just mere non-compliance to the summon issued u/s 131 of the Act cannot be a ground for adding the share capital/share premium raised by the assessee during the year as unexplained cash credit u/s 68 of the Act. We note that Ld. CIT(A) has considered all the facts of the case and after passing a very detailed order has allowed the appeal of the assessee. We note that Ld. CIT(A) has followed a series of decisions as stated above. In our opinion, the mere non-compliance to the summons issued u/s 131 of the Act is not sufficient to make the addition u/s 68 of the Act. The case of the assessee finds support from the decision of Hon'ble Apex Court in the case of *PCIT Vs. Himachal Fibers Ltd.* reported in [2018] 98 *taxmann.com* 173 (SC) wherein the Hon'ble Court has upheld the order passed by Hon'ble Delhi High Court in the case of *CIT Vs. Kamdhenu Steel & Alloys Ltd.* reported in [2012] 19 *taxmann.com* 26 (Delhi) wherein the Hon'ble Court has held that where the assessee has filed all evidences concerning to the money raised by way of share capital/share premium and filed confirmation of share applicants, bank account details and have shown that payments were through account payee cheques then it could be said that the assessee has discharged the initial burden and just because some of the creditors/share applicants could not be found at the address given, it would not give the Revenue the right to invoke Section 68 of the Act without bringing any additional and substantive materials to prove that the money raised does not satisfy the requirement of section 68 of the Act. We find support

from the decision of Hon'ble Supreme Court in the case of Orissa Corporation Ltd. in 159 ITR 78 (SC) (supra) wherein the Hon'ble Apex Court has held as under:

*“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.”*

6.1. 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 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.”

6.2. 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.”

6.3. 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. 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 uphold the order of Ld. CIT(A) by dismissing the appeal of the Revenue.

7. The second issue raised by the Revenue is against the deletion of addition of Rs. 39,13,556/- u/s 14A of the Act by Ld. CIT(A) as made by Ld. AO.

8. The facts in brief are that Ld. AO during the course of assessment proceedings observed that the assessee was holding investments which were capable of generating exempt income. Ld. AO noted that the assessee has claimed expenses of interest payment in the profit and loss account. Ld. AO also noted that since the assessee has not maintained separate books of accounts for expenses incurred in relation to income not forming part of the total income and therefore, the same cannot be ascertained from the books of accounts of the assessee and accordingly, invoked Section 14A of the Act read with Rule 8D of the Rules and made the disallowance at Rs. 39,13,556/- comprising interest of Rs. Rs. 37,40,481/- under Rule 8D(2)(ii) of the Rules and Rs. 1,73,075/- under Rule 8D(2)(iii) of the Rules.

9. In the appellate proceedings Ld. CIT(A) deleted the addition made by Ld. AO u/s 14A of the Act by relying on the decision in

the case of *Cheminvest Ltd. vs CIT* reported in [2015] 378 ITR 33 (Delhi) and *CIT Vs. Ashika Global Securities Ltd.* in ITAT 100 of 2014 GA \_2122 of 2014.

10. After hearing the rival contentions and perusing the material on record, we find that undisputedly the assessee has not earned an exempt income during the year and it is a settled position of law that if the assessee has not earned any exempt income, no disallowance is required to be made u/s 14A of the Act. We note that Ld. CIT(A) has passed the appellate after following the decision of Hon'ble Delhi High Court in the case of *Cheminvest Ltd. (supra)* and *Ashika Global Securities Ltd. (supra)*. Accordingly, we are inclined to uphold the order of Ld. CIT(A) by dismissing the appeal of the Revenue.

**CO:9/Kol/2021**

11. The CO has been filed by the assessee in support of appellate order passed by the Ld. CIT(A). Since we have dismissed the appeal of the revenue, the CO becomes infructuous and is accordingly dismissed.

12. In the result, the appeal filed by the Revenue and CO by the assessee are dismissed.

***Kolkata, the 31<sup>st</sup> August, 2023.***

Sd/-  
[Sonjoy Sarma]  
Judicial Member

Sd/-  
[Rajesh Kumar]  
Accountant Member

Dated: 31.08.2023

*Bidhan (P.S.)*

*Copy of the order forwarded to:*

- 1. ACIT, Circle-1(1), Kolkata.**
- 2. M/s. Gold Rush Sales and Service Limited, 2<sup>nd</sup> Floor, Laha Paint House, 7, Chittaranjan Avenue, Kolkata-700 072.**
3. CIT(A)-6, Kolkata.
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

*//True copy //*

By order

Assistant Registrar  
ITAT, Kolkata Benches  
Kolkata