

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

श्री राजपाल यादव, उपाध्यक्ष (कोलकाता क्षेत्र)

एवं

श्री राजेश कुमार, लेखा सदस्य
के समक्ष

Before

SRI RAJPAL YADAV, VICE PRESIDENT

&

SRI RAJESH KUMAR, ACCOUNTANT MEMBER

I.T.A. No.: 855/KOL/2023

Assessment Year: 2014-15

Orthy Impex Pvt. Ltd.....Appellant
[PAN: AABCO 8995 Q]

Vs.

ITO, Ward-14(3), Kolkata.....Respondent

Appearances:

Assessee represented by – Sh. S.K. Pransukha, FCA.

Department represented by – Sh. Vijay Kumar, Addl. CIT.

Date of concluding the hearing : October 11th, 2023

Date of pronouncing the order : November 6th, 2023

ORDER

Per Rajesh Kumar, Accountant Member:

This appeal preferred by the assessee is against the order passed by Learned Commissioner of Income-tax (Appeals)-NFAC, Delhi [hereinafter referred to Ld. 'CIT(A)'] dated 25.05.2023 for the Assessment Year (in short 'AY') 2014-15.

2. At the outset, we note that there is a delay of 24 days in filing the appeal. The assessee has filed affidavit dated 14.08.2023 explaining the reason for delay in filing the appeal. We note that the assessee has explained the delay by submitting that the director of the assessee company who is looking after the taxation other matters was out to Bangladesh and therefore, the documents were sent to him which took quite some time and hence, the delay in filing the appeal of 24 days. In our opinion, the delay is for sufficient reasons and the assessee is not benefitted by delayed filing of appeal. Accordingly, we are inclined to condone the delay and admit the appeal for adjudication.

3. The only issue raised by the assessee is against the confirmation of addition of Rs. 1,53,31,318/- by Ld. CIT(A) as added by the Assessing Officer (in short ld. 'AO') on account of unexplained share capital/share premium u/s 68 of the Act.

4. The facts in brief are that the assessee filed the return of income on 05.01.2015 showing total loss at Rs. 3,69,272/-. The case of the assessee was selected for scrutiny through CASS and statutory notices were duly issued and served upon the assessee. The assessee did not comply to the said notices resulting into framing of assessment *ex-parte* on the basis of information available with the AO. The AO on the basis of information before him observed that the assessee company was incorporated on 09.09.2013 and a sum of Rs. 1,53,31,318/- was credited in the books of accounts as share capital/share premium. The sums credited from the price of share capital of Rs. 37,75,000/- and share premium of Rs. 1,06,55,728/- and share application money

pending allotment of Rs. 9,00,590/-. The AO observed that since this is the first year of existence of the company, the AO issued notices u/s 133(6) of the Act on the basis of the information available in respect of shareholders obtained from Form 20B and Annexures available on the database of Ministry of Corporate Affairs. The AO issued notices to 17 subscribers. However, only notices to 11 subscribers were served whereas out of which 11 complied with the said notices who did not respond whereas notice in the case of 4 subscribers could not be delivered and served. Thereafter the assessee was required to produce the directors of the subscriber companies on 05.12.2016 at 12:30PM from whom the money was received. Thereafter the case was adjourned a couple of time. However, the assessee failed to produce anyone on the statutory dates. Thereafter, the AO issued notice u/s 131 of the Act to the directors/principal officer of the assessee company by e-mail as well as speed post directing for personal appearance on 09.11.2016. However, there was no compliance. Finally, a show cause notice was issued on 13.12.2016 as to why the money raised should not be treated as unexplained cash credit and added back to the income of the assessee. Finally, the AO added the said amount to the income of the assessee as unexplained share credit on the ground that the assessee has failed to prove identity, creditworthiness and the genuineness of the transaction. In the appellate proceedings Ld. CIT(A) also dismissed the appeal of the assessee.

5. After hearing the rival contentions and perusing the material on record including the two remand reports furnished by the AO

and replies of the assessee to the said remand reports. We observe that undisputedly during the year the assessee has raised share capital by issuing equity shares at a premium and accordingly received Rs. 1,53,31,318/-. Originally the assessee did not attend the proceedings before the AO which resulted passing of *ex-parte* order and even the summons issued u/s 131 of the Act were not complied with. We note that the assessee has share at a premium after obtaining the valuation report from the Chartered Accountant a copy of which is placed at page no. 74-81 of the paper book. We also note that the assessee furnished the evidences before Ld. CIT(A) which Ld. CIT(A) forwarded to the AO for remand report. We note that in the first remand proceeding the AO did not give any opportunity to the assessee to present his case and when this issue was raised before Ld. CIT(A), Ld. CIT(A) again called for a remand report and in the second remand proceeding the assessee was given an opportunity to represent its case and assessee filed all the evidences in respect of share subscribers.

6. We note that the assessee has filed the names and addresses of the subscribers, their balance sheets, net worth, bank statements and ITRs etc. along with copies of PAN. However, the AO has not examined these documents and only harped on the technicalities to draw adverse inference. In our opinion, the assessee has filed all the evidences concerning the identity and creditworthiness of the investors and their net worth available with the subscriber companies. We also note that the reply received in response to the summons issued u/s 133(6) of the Act were also available with the AO and the assessee vide letter dated

11.07.2023 through RTI has called for the order sheet entries, copies of notices issued u/s 133(6) of the Act and replies received in response thereto, notice u/s 143(2) of the Act and proof of service thereof and notice u/s 142(1) of the Act and document filed by the assessee. However, the AO vide letter dated 25.05.2020 has expressed his inability to supply these documents in view of the merger of three ranges and dislocation of normal office activities and assured the assessee as soon as information/details are collected the same would be supplied to the assessee. However, till date nothing have been supplied to the assessee. We observe from the perusal of the order of the authorities below that none of the authorities below has carried out any investigation looking into the matter. So far as the issue of share at a premium are concerned, we note that the same were issued on the basis of the valuation report by the technical expert. Under the circumstances we are not in a position to concur a conclusion drawn by the Ld. CIT(A). Besides, the mere non-production of share holders/directors of the assessee before the AO cannot 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 *CIT vs. Orissa Corporation Ltd.* in [1986] 159 ITR 78 (SC) in which the Hon'ble 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 (P) Ltd vs CIT* reported in 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. Similar ratio has been laid down by the Hon’ble Mumbai High Court in the case of CIT Vs Orchid Industries (P) Ltd. reported in 397 ITR 136 (Bom) 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.

7. 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.

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

Kolkata, the 6th November, 2023.

Sd/-
[Rajpal Yadav]
Vice-President

Sd/-
[Rajesh Kumar]
Accountant Member

Dated: 06.11.2023

Bidhan (P.S.)

Copy of the order forwarded to:

- 1. Orthy Impex Pvt. Ltd., 1203, Down Town Uniworld City, Raherhat, New Town, Kolkata-700 156.**
- 2. ITO, Ward-14(3), Kolkata.**
3. CIT(A)-NFAC, Delhi.
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

//True copy //

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata