

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
'B' BENCH, KOLKATA**

**Before Shri Sanjay Garg, Judicial Member  
&  
Shri Rajesh Kumar, Accountant Member**

**I.T.A. No. 904/KOL/2023  
Assessment Year: 2009-2010**

**Deepsikha Vinimay (P) Limited,.....Appellant  
C/o. Subash Agarwal & Associates, Advocates,  
Siddha Gibson,  
1, Gibson Lane, Suite 213, 2<sup>nd</sup> Floor,  
Kolkata-700069  
[PAN:AACCD9343C]**

**-Vs.-**

**Assessing Officer, NFAC, Delhi/.....Respondent  
Income Tax Officer,  
Ward-6(1), Kolkata,  
AayakarBhawan,  
P-7, Chowringhee Square,  
5<sup>th</sup> Floor, Room No. 21,  
Kolkata-700069**

**Appearances by:**

*Shri Miraj D. Shah, AR, appeared on behalf of the assessee*

*Shri S. Datta, CIT, D.R., appeared on behalf of the  
Revenue*

**Date of concluding the hearing :January 02, 2024**

**Date of pronouncing the order :January 09, 2024**

**O R D E R**

**Per Shri Rajesh Kumar, Accountant Member:-**

The assessee is in appeal before the Tribunal against the order of ld. Commissioner of Income

Tax(Appeals), National Faceless Appeal Centre (NFAC), Delhi dated 22.08.2023, which is arising out of the order under section 147 r.w.s. 254 read with section 144B of the Income Tax Act, 1961 for A.Y. 2009-10 framed by ld. Assessing Officer, National Faceless Assessment Centre, Delhi.

2. The issue raised in Ground No. 1 is not pressed by the ld. Counsel for the assessee at the time of hearing. Therefore, the same is dismissed as not pressed.

3. The issue raised in Ground No. 2 is against the confirmation of addition of Rs.10,00,00,000/- by the ld. CIT(Appeals) as made by the ld. Assessing Officer on account of unexplained cash credit under section 68 of the Act in respect of share capital/share premium.

4. The facts in brief are that the assessee filed its return of income on 28.08.2009 declaring total loss of Rs.3,575/-. Thereafter the case of the assessee was reopened under section 147 of the Act and assessment under section 143(3) read with section 147 of the Act was completed vide order dated 09.02.2012 determining total income at Rs.29,175/-. Thereafter the ld. PCIT set aside the said assessment order by passing a revisionary order under section 263 of the Act dated 04.03.2014 thereby directing the ld. Assessing Officer to frame the assessment afresh after taking into account the specific

directions. In pursuant to the said revisionary order, the assessment was completed vide order dated 10.03.2015 passed under section 144/263/147/143(3) making an addition of Rs.10,00,00,000/- as unexplained cash credit under section 68 of the Act, when the assessee failed to comply with the notices issued by the ld. Assessing Officer.

5. Again before the ld. CIT(Appeals), the assessee did not appear and the ld. 1<sup>st</sup> Appellate Authority also dismissed the appeal of the assessee by passing an *ex-parte* order due to non-appearance of the assessee.

6. The Coordinate Bench on assessee's appeal restored the issue to the file of ld. Assessing Officer for deciding the issue afresh. Accordingly, the ld. Assessing Officer issued notice under section 142(1) of the Act dated 06.08.2021, which was duly served upon the assessee whereby the assessee was called upon to furnish the complete details of the shareholders to which the shares were allotted on high premium. The assessee in reply to the same vide letter dated 21.08.2021 uploaded various documents. The ld. Assessing Officer on perusal of the same noticed that the assessee during the year had issued/allotted 10,00,000 equity shares at face value of Rs.1/- per share and at a premium of Rs.99/- per share to nine parties. According to the ld. Assessing Officer, the share subscribers did not have enough

amount to subscribe the shares of the assessee-company. In order to independently verify the issue, the ld. Assessing Officer also issued notices under section 133(6) of the Act to the subscribers and called upon them to furnish copies of the share applications, number of shares allotted, amount of shares, amount paid for shares, copies of ledger account with the assessee, details of source of acquisition along with copy of Bank Statements from 01.04.2008 to 31.03.2009 and copies of return, balance-sheets and annexures for the last three years. All the shareholders furnished their replies before the ld. Assessing Officer except three shareholders, namely M/s. Ankur Suppliers Pvt. Limited, Daniel Commotrade Pvt. Limited and M/s. Sumeru Retailers Pvt. Limited, who did not file the details qua the Bank statements despite being required in the notice issued under section 133(6) of the Act. The ld. Assessing Officer noted that in respect of other shareholders that for each credit entry, there was corresponding debit transaction either on the same day or in the succeeding day, which is quite unusual and appears to be dubious in nature. Further for source of investments, the subscribers stated that the same was out of share application money/share premium from other shareholders/other companies, who had also invested in the subscribers companies, but they failed to furnish details/proof of exact source of investments. According to the ld. Assessing Officer, these companies were nothing but shell companies and are

engaged in providing accommodation entries. Finally after analyzing the net worth of the share subscribers in paras 9.5 & 9.6, the ld. Assessing Officer, by relying on the decision of PCIT -vs.- NRA Iron & Steel Pvt. Limited (2019) 412 ITR 161(SC), added the entire amount to the income of the assessee under section 68 of the Act as unexplained cash credit.

7. The ld. CIT(Appeals) also affirmed the order of ld. Assessing Officer by holding that the ratio laid down by the Hon'ble Apex Court in the case of CIT -vs.- Lovely Export (2008) 216 CTR 195 (SC) and various other decisions of the Hon'ble High Courts and Tribunal, which were prior to the decision of the Hon'ble Supreme Court on the issue of applicability of section 68 of the Act qua receipt of share capital/share premium in the case of PCIT -vs.- NRA Iron & Steel Pvt. Limited (2019) 412 ITR 161(SC). The ld. CIT(Appeals) observed and held that the assessee could not establish the identity and creditworthiness of the persons in the sense of financial capacity and the genuineness of the transactions to the satisfaction of the ld. Assessing Officer and consequently dismissed the appeal of the assessee.

8. The ld. A.R. vehemently submitted before the Bench that the identity and creditworthiness of the subscribers and genuineness of the transactions were fully proved before the ld. Assessing Officer as well as before the ld.

CIT(Appeals). However, both the authorities below have failed to take cognizance of the evidences filed by the assessee and also without carrying out any inquiry/investigation came to the conclusion that the identity, creditworthiness of subscribers and genuineness of the transactions were doubtful. The ld. A.R. drew our attention to pages no. 159 to 563, which comprised of the details/documents/evidences furnished by the assessee before the ld. Assessing Officer. The ld. A.R. submitted that the assessee filed ITR acknowledgments, audited financial accounts, share application forms, share allotment advices, Bank statements, Memorandum & Articles of Associations, replies dated 31.01.2012 & 18.09.2021 to the notices under section 133(6), reply dated 27.02.2015 in response to notice issued under section 131 and also copies of assessment orders u/s 143(3) of the Act or copies of intimations under section 143(1) of the Act in all the cases. The ld. A.R. also referred to page no. 2 of the paper book, which contains the details of net worth of the subscribers and the amount subscribed by those investors in the share capital of the assessee-company as ratio to the networth. The ld. A.R. stated that the subscribers have huge net worth to invest in the assessee-company and the observations of the ld. Assessing Officer that these companies were either having negative income or very meagre income, did not carry any force as the investments were made out of the

net worth and not out of the income of the subscribers. The ld. A.R. also submitted that where the assessee has furnished all the evidences before the ld. Assessing Officer in respect of share subscribers and the share subscribers also assessed to tax, then, in order to examine the source of investment, the ld. Assessing Officer has to examine the individual assessments of the share subscribers and if required, the additions can be made in the hands of the share subscribers if the ld. Assessing Officer doubts the net worth of the subscriber companies or he has to write to the AO's of the individual share subscribers for taking action. The ld. A.R. in defence of his agreements also relied on the decisions of the Hon'ble Calcutta High Court in the case of PCIT -vs.-Sreeleathers in ITAT/18/2022 in GA/02/2022 dated 14.07.2022 and CIT -vs.- Dataware Private Ltd ITAT 263 of 2011 in in GA/2856/2011 dated 21.09.2011. The ld. A.R. also submitted that the decision relied upon by the authorities below in the case of PCIT -vs.- NRA Iron & Steel Pvt. Limited (2019) 412 ITR 161(supra) has been rendered on different facts by the Hon'ble Apex Court. The ld. A.R. submitted that in this case of NRA Iron & Steel Pvt. Limited (supra), the Inspector was deputed but shareholders were not found. However, in the present case before us, the share subscribers were very much available on the given addresses and also assessed to tax and the assessments were framed. The ld. AR argued that and they have even

responded to the notices issued under sections 133(6) and 131 of the Act. Finally ld. A.R. prayed that the order of ld. CIT(Appeals) may kindly be set aside and ld. Assessing Officer may be directed to delete the addition.

9. Per contra, ld. D.R. vehemently opposed to the arguments of ld. A.R. by submitting that money has been invested by the subscribers out of net worth, which is made up of share capital/share premium and submitted that all are suspicious and bogus in nature. The ld. A.R. submitted that the net worth of the assessee is on account of share capital and share premium and not on account of any income earned during the year or in the preceding years. Rather ld. A.R. submitted that the share subscribers have incurred losses over the years and therefore the creditworthiness and genuineness are in doubt.

10. In rebuttal, ld. A.R. submitted that the contention of the ld. D.R. would have been correct, if the net worth of the subscribers had eroded by incurring huge losses but this is not happened in case of any of the of the subscribers at hand as the losses incurred by the subscribers are in few thousands only. Therefore, the arguments of the ld. D.R. is devoid of any merit and may be dismissed.

11. After hearing the rival contentions and perusing the relevant material placed before us, we find that the assessee has raised share capital/share premium from nine entities, the details of which were given in the assessment order in para 2.2. The 10,00,000 equity shares were issued of face value Rs. 1/- at a premium of Rs. 99/- thereby collecting money on account share capital of Rs.10,00,000/- and on account of share premium Rs.9,90,00,000/-. The assessee has filed copies of ITR acknowledgments, audited financial accounts, share application forms, share allotment advices, Bank statements, Memorandum & Articles of Associations, replies dated 31.01.2012 & 18.09.2021 to the notices under section 133(6), reply dated 27.02.2015 in response to notice issued under section 131 and also copies of assessment orders u/s 143(3) of the Act or copies of intimations under section 143(1) of the Act in all subscribers, which are filed in the paper book from pages no. 159 to 563. We also note that the AO issued notices under section 133(6) of the Act to all the subscribers and were duly replied by furnishing all the details/evidences as called for. Besides the AO also issued summons u/s 131 of the Act to all the parties, which were duly replied by the share subscribers copies of which are filed in the paper book as stated above. In our opinion, the assessee has duly discharged its onus by filing evidences before the ld. Assessing Officer and ld. Assessing Officer has acted on the ground that the

subscribers have no creditworthiness to invest in the assessee company as they were not having sufficient income either in the current year or in the preceding years. We note that the AO ignored the fact that these subscribers were having huge networth and have made investments out of that. The ld. AR stated that where the AO has any doubt about the lenders where the assessee has furnished all the evidences before the AO, then the matter should be looked into the hands of the creditors and not the assessee when all the subscribers are duly assessed to tax and even the assessment orders u/s 143(3) of u/s 143(1) of the Act are placed on records. The case of the assessee is supported by the decisions of the Hon'ble Calcutta High Court which are discussed as under:

a) In the case of PCIT -vs.-Sreeleathers(supra) , the Honble Court has held as under:

*“4. Before we examine the correctness of the order passed by the Tribunal and consider whether a substantial question of law arises for consideration in this appeal we need to take note of Section 68 of the Act. This provision deals with cash credits. It states that where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income tax as the income of the assessee of that previous year. The crucial words in the said provision are “assessee offers no explanation”. This would mean where the assessee offers no proper, reasonable and acceptable explanation as regard the amount credited in the books maintained by the assessee. No doubt the Income Tax Act places the burden of proof on the tax payer. However, this is only the initial burden. In cases where the assessee offers an explanation to the credit by placing evidence regarding the identity of the investor or lender along with their confirmations, it has been held that the assessee has discharged the initial burden and, therefore, the burden shifts on the Assessing Officer to examine the source of the credit so as to be justified in referring to Section 68 of the Act. After the Assessing Officer puts the assessee on notice and the assessee submits the explanation with regard to the cash credit, the*

*Assessing Officer should consider the same objectively before he takes a decision to accept or reject it. In Srilekha Banerjee &Ors. Versus CIT 4, it was held that if the explanation given by the assessee shows that the receipt is not of income nature, the department cannot convert good proof into no proof or otherwise unreasonably reject it. On the other hand, if the explanation is unconvincing, the same can be rejected and an inference shows that the amount represents undisclosed income either from a disclosed or an undisclosed source [CIT Versus Mohanakala (P) 5]. The explanation given by the assessee cannot be rejected arbitrarily or capriciously, without sufficient ground on suspicion or on imaginary or irrelevant grounds (Lal Mohan Krishna Lal Paul Versus CIT 6 and Anil Kumar Singh Versus CIT 7).*

5. Further to be noted that where the assessee furnishes full details regarding the creditors, it is up to the department to pursue the matter further to locate those creditors and examine their creditworthiness. It has been further held in Sivan Pillai (AS) Versus CIT 8 that while drawing the inference, it cannot be assumed in the absence of any material that there has been some illegalities in the assessee's transaction. Thus, more importantly, as held by the Hon'ble Supreme Court in CIT Versus Daulat Ram Rawatmull 9, the onus of proving that the appellant was not the real was on the party who claims it to be so. Bearing the above legal principles in mind, if we examine the case on hand, it is clear that the assessing officer issued show cause notice only in respect of one of the lender M/s. Fast Glow Distributors. The assessee responded to the show cause notice and submitted the reply dated 22.12.2017. The documents annexed to the reply were classified under 3 categories namely: to establish the identity of the lender, to prove the genuineness of the transactions and to establish the creditworthiness of the lender. The assessing officer has brushed aside these documents and in a very casual manner has stated that mere filing PAN details, balance sheet does not absolve the assessee from his responsibility of proving the nature of transaction. There is no discussion by the assessing officer on the correctness of the stand taken by the assessee. Thus, going by the records placed by the assessee, it could be safely held that the assessee has discharged his initial burden and the burden shifts on the assessing officer to enquire further into the matter which he failed to do. In more than one place the assessing officer used the expression "money laundering." We find such usage to be uncalled for as the allegations of money laundering is a very serious allegations and the effect of a case of money laundering under the relevant Act is markedly different. Therefore, the assessing officer should have desisted from using such expression when it was never the case that there was any allegations of money laundering. Paragraph 5.4 and 5.5 of the assessment order are all personal perception and opinion of the assessing officer which needs to be ignored. Much reliance was placed on the statement of Shri Ashish Kumar Agarwal, which statement has been extracted in full in the assessment order and it cannot be disputed that there is no allegation against the assessee company in the said statement. There is no evidence brought on record by the assessing officer to connect the said entry operator with the loan transaction done by the assessee. Therefore, the statement is of little avail and could not have been the basis for making allegations. The assessing officer ignored the settled legal

*principle and in spite of the assessee having offered the explanation with regard to the loan transaction, no finding has been recorded as regards the satisfaction on the explanation offered by the assessee. Therefore, the assessing officer ignored the basic tenets of law before invoking his power under Section 68 of the Act. Fortunately, for the assessee, CIT(A) has done an elaborate factual exercise, took into consideration, the creditworthiness of the 13 companies the details of which were furnished by the assessee. More importantly, the CIT noted that all these companies responded to the notices issued under Section 133 (6) of the Act which fact has not been denied by the assessing officer. On going through the records and the net worth of the lender companies, the CIT has recorded the factual findings that the net worth of those companies is in crores of rupees and they have declared income to the tune of Rs. 45,00,000/- and 75,00,000/-. Therefore, the assessing officer if in his opinion found the explanation offered by the assessee to be not satisfactory, he should have recorded so with reasons. We find that there is no discussion on the explanation offered by the assessee qua, one of the lenders. Admittedly, the assessee was not issued any show cause notice in respect of other lenders. However, they are able to produce the details before the CIT(A) who had in our view rightly appreciated the facts and circumstances of the case. As pointed out earlier, the assessing officer brushed aside the explanation offered by the assessee by stating that merely filing PAN details, balance sheet does not absolve the assessee from his responsibilities of proving the nature of transactions. It is not enough for the assessing officer to say so but he should record reasons in writing as to why the documents which were filed by the assessee along with the reply dated 22.12.2017 does not go to establish the identity of the lender or prove the genuineness of the transaction or establish the creditworthiness of the lender. In the absence of any such finding, we have to hold that the order passed by the assessing officer was utterly perverse and rightly interfered by the CIT(A). The Tribunal re-appreciated the factual position and agreed with the CIT(A). The tribunal apart from taking into consideration, the legal effect of the statement of Ashish Kumar Agarwal also took note of the fact that the notices which were issued by the assessing officer under Section 133 (6) of the Act to the lenders were duly acknowledged and all the lenders confirmed the loan transactions by filing the documents which were placed before the tribunal in the form of a paper book. These materials were available on the file of the assessing officer and there is no discussion on this aspect. Thus, we find that the tribunal rightly dismissed the appeal filed by the revenue.*

6. *For all the above reasons, we find that no question of law much less, substantial question of law arises for consideration in this appeal.*

7. *Accordingly, the appeal fails and is dismissed. No costs”.*

b) In the case of Commissioner of Income Tax -vs.-  
M/s. Dataware Private Limited(supra):-

*“After hearing the learned Advocate for the appellant and after going through the materials on record, we are of the view that no substantial question of law is involved in this appeal.*

*Both the Commissioner of Income Tax (Appeal) and the Tribunal below have in details considered the fact that the share application money was paid by account payee cheque, the creditor appeared before the Assessing Officer, disclosed its PAN number and also other details of the accounts but in spite of that the Assessing Officer did not enquire further from the assessing officer of the creditor but in stead, himself proceeded to consider the profit and loss account of the creditor and opined that he had some doubt about the genuineness of such account.*

*In our opinion, in such circumstances, the Assessing officer of the assessee cannot take the burden of assessing the profit and loss account of the creditor when admittedly the creditor himself is an income tax assessee. 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.*

*So long it is not established that the return submitted by the creditor has been rejected by its Assessing Officer, the Assessing officer of the assessee is bound to accept the same as genuine when the identity of the creditor and the genuineness of transaction through account payee cheque has been established”.*

12. In both the aforesaid decisions, it has been held by the Hon’ble Courts and also by the Coordinate Bench of this Tribunal, where the assessee has filed all the evidences concerning transactions to establish the identity and creditworthiness of the subscribers and to prove the genuineness of the transactions and the ld. Assessing Officer has not carried out any further verification, the addition cannot be made in the hands of the assessee. The AO must examine the issue in the cases of creditors and make the addition there and not in the hands of the assessee. The case of the assessee stands on a better footing as the in the instant case

the share subscribers have even replied to the notices issued u/s. 133(6) of the Act and also to the summons issued u/s. 131 of the Act. We note that the replies of the subscribers are on records. On the basis of the above discussion, we are inclined to hold that assessee has proved all the ingredients of section 68 of the Act by filing all the evidences and the authorities have failed to any substantive evidence or material to the contrary. Accordingly, we set aside the order of Id. CIT(Appeals) and direct the Id. Assessing Officer to delete the addition.

**13. In the result the appeal of the assessee is allowed.**

Order pronounced in the open Court on 09/01/2024.

Sd/-

Sd/-

**(Sanjay Garg)**  
**Judicial Member**

**(Rajesh Kumar)**  
**Accountant Member**

***Kolkata, the 9<sup>th</sup> day of January, 2024***

*Copies to :* (1) Deepsikha Vinimay (P) Limited,  
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(3) Commissioner of Income Tax(Appeals),  
National Faceless Appeal Centre (NFAC), Delhi;

- (4) *Commissioner of Income Tax-;*  
(5) *The Departmental Representative*  
(6) *Guard File*  
*TRUE COPY*

*By order*

*Assistant Registrar,  
Income Tax Appellate Tribunal,  
Kolkata Benches, Kolkata*

***Laha/Sr. P.S.***