

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH KOLKATA

**BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.42/KOL/2024
Assessment Year: 2010-11**

City Shoppe Estates Limited 35, Pasari House, Ballygunge Park, West Bengal-700019. (PAN: AAACJ6882A)	Vs.	DCIT, Central Circle-4(3), Kolkata
(Appellant)		(Respondent)

Present for:

Appellant by : Shri A. K. Tulsian, FCA

Respondent by : Shri Umakanta Dhrupati, Addl. CIT, DR

Date of Hearing : 13.03.2024

Date of Pronouncement : 08.04.2024

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of Ld. CIT(A), Kolkata-27 vide order No. ITBA/APL/S/250/2023-24/1058370334(1) dated 30.11.2023 passed against the assessment order by DCIT, Central Circle-4(3), Kolkata u/s. 147/143(3) of the Income-tax Act, 1961 (hereinafter referred to as the "Act"), dated 01.11.2017 for AY 2010-11.

2. Grounds raised by the assessee are reproduced as under:

"1. That the Ld. CIT(A), wrongly passed ex-parte order under Section 250 of the Income Tax Act, 1961 without adjudicating the case on merit on the allegation of non-compliance whereas the assessee has not received any notice and it is not clear in which mail the notices were sent. The assessee has given an affidavit that no such notices were received in its e-

mail. Hence, the order of the Ld. CIT(A) without giving proper opportunity of being heard to the assessee, is bad in law and need to be set aside.

2. That the Ld. CIT(A) was wrong in confirming the addition of a sum of Rs. 40,00,000/- as share application money received from two share subscriber's M/s. Terminal Sales (P) Ltd. and M/s. Vanaspati Vinimay (P) Ltd. treating the same as unexplained cash credit u/s. 68 of the IT Act, 1961. The Ld. CIT(A) wrongly confirmed the addition made by the Ld. CIT(A) and made the addition completely ignoring all the documents & evidences furnished by assessee to prove the identity and creditworthiness of the share subscriber companies and relying on the report of the Investigation Wing and Statement of third parties without independent verification and not allowing any opportunity of cross examination.

3. That the Ld. AO as well as Ld. CIT(A) was wrong in charging/confirming interest u/s. 234B of the I. Tax Act.”

3. Brief facts of the case are that assessee filed its return of income on 29.03.2022 reporting total business loss of Rs.1,71,281/-. Subsequently, notice u/s. 148 of the Act dated 30.03.2017 was issued on the assessee. Assessee filed a fresh return in response to notice u/s. 148 on 02.05.2017 and sought copy of reasons to believe recorded by the AO for initiating the said proceedings. In the reasons to believe recorded by the Ld. AO, it is noted that a search and seizure operation u/s. 132 of the Act was conducted in the Pasari Group of cases on 19.03.2014. During the search operation and post search investigation, it was found that the group had floated number of companies and entities which were mere paper companies/entities used to introduce back the unaccounted income generated by it in the guise of share capital and share premium and unsecured loans through host of entry operators. It was further noted that in the year under consideration, assessee had taken benefit of Rs.40,00,000/- from such cash deposit through shell/jamakharchi companies managed and controlled by different entry operators. It was also referred to statement of one Shri Subhas Agarwal recorded u/s. 132 of the Act during the course of search and seizure operation on whose deposition, ld. AO formed the reason to believe that assessee's income

to the extent of Rs.40 lakhs chargeable to tax has escaped assessment.

3.1. In the course of such assessment proceedings, the details of transaction of the assessee in respect share capital raised by it from two companies as tabulated in the reasons to believe recorded by the AO is extracted below:

Cash Given (A)	Ch recd from (Cash given A)	Bank /Branch	A/c No.	Date	Name (Transfer/Recd from Co.	Bank/ Branch	A/c No.	Paid to	Amount	Nature
	Basukmat h Commosal es Pvt. Ltd.	KVB/ S. Sarani	31021 15112 68	16/03/ 10	Terminal Sales Pvt. Ltd	KVB/ S. Sarani	31021 15114 55	City Shoppe Est. Ltd	20 Lakh	Sh. Capital
	Perfect Commosal es P. Ltd.	KVB/ S. Sarani	31021 15112 82	16/03/ 10	Vanaspati Vinimay Pvt. Ltd	KVB/ S. Sarani	31021 15114 31	City Shoppe Est. Ltd	20 Lakh	Sh. Capital

3.2. Ld. AO observed that during the relevant year assessee had raised share application money of Rs. 20 lakh each from Terminal Sales Pvt. Ltd. and Vanaspati Vinimay Pvt. Ltd. These two companies were allotted 20000 shares each of face value of Rs. 10/- each with a premium of Rs. 90/- each. Ld. AO also noted that both the share subscribing companies had replied u/s. 133(6) vide their letter dated 27.10.2017 whereby they had explained the source of their investment made into the assessee company. Ld. AO has also acknowledged that transactions are through cheques. He also noted that mere filing of copies of ITRs/bank statement of the account of subscriber could not absolve the subscriber to the complicity of introducing unaccounted money in its books in the garb of equities. Further, Ld. AO based his conclusion on the statement of one Shri Subhash Agarwal alleged to be an entry operator who had admitted of providing accommodation

entry to the assessee through the companies controlled by him and his associates. Assessment was thus completed by making an addition of Rs. 40 lakh by holding it as unaccounted money in the garb of share capital and share premium in the books of the assessee treating it as unexplained cash credit u/s. 68 of the Act. Aggrieved, assessee went in appeal before the Ld. CIT(A), who confirmed the said addition.

4. Before the Ld. CIT(A) assessee had strongly contended that the cash trail alleged by the Ld. AO in the reasons to believe are unsubstantiated since the table produced therein having column titled as cash given "*is left blank*". It was submitted that assessee had raised the share capital from these two companies who had explained even the source of their own investment. These two companies had made investments into the share capital of the assessee out of sale proceeds of their investment in shares received by them from Harihar Enterprises Pvt. Ltd. It was also submitted by the assessee that without examining the truthfulness of the statement of one Shri Subhash Agarwal, it could not have been used against the assessee without providing an opportunity to cross examine the same. It was also contended that assessee received Rs.20 lakh towards share application money in the preceding year for which the allotment of shares were pending. Further, it was strongly contended that Ld. AO himself has acknowledged that the two share subscribing companies had replied to the notice issued u/s. 133(6) and made all the required submissions. After considering the submissions made by the assessee, ld. CIT(A) confirmed the addition. Aggrieved, assessee is in appeal before the Tribunal.

5. Before us, ld. Counsel for the assessee reiterated the aforesaid submissions. He also referred to paper book containing 109 pages for

various documentary evidence and case laws relied upon. The index of the paper book which demonstrates the documents and details which were furnished is extracted below:

Sl. No.	Particulars of documents	Page No.
A.	Documents pertaining to the assessee i.e. M/s City Shoppee Pvt Ltd	
1	Copy of Audited Accounts of the assessee for the AY 2010-11	1-12
2	Copy of ITR Acknowledgement for AY 2010-11	13
3	Copy of bank statements of the assessee company for the A.Y. 2010-11	14-23
B.	Documents pertaining to the share subscriber i.e., M/s Terminal Sales Pvt Ltd	
4	Copy of Reply of notice u/s 133(6) of Terminal Sales Pvt. Ltd. dated 25.10.2017	24-25
5	Copy of Share Transfer Form in the name of Terminal Sales Pvt Ltd	26
6	Copy of ITR Acknowledgement of Terminal Sales Pvt. Ltd. for AY 2010-11	27
7	Copy of Audited Accounts of Terminal Sales Pvt. Ltd. for the AY 2010-11	28-35
8	Copy of bank statements of Terminal Sales Pvt. Ltd. for the A.Y. 2010-11 reflecting the transaction	36
C.	Documents pertaining to the source of the share subscribers i.e., M/s Harihar Enterprises Pvt Ltd	
9	Copy of ITR Acknowledgement and Audited Accounts of Harihar Enterprises Pvt. Ltd	37-49
10	Copy of Bank Statement of Harihar Enterprises Pvt. Ltd for relevant period	50
D.	Documents pertaining to the share subscriber i.e., M/s Vanaspati Vinimay Pvt Ltd	
11	Copy of Reply of notice u/s 133(6) of Vanaspati Vinimay Pvt. Ltd. dated 25.10.2017	51-53
12	Copy of Share Transfer Form in the name of Vanaspati Vinimay Pvt Ltd	54
13	Copy of ITR Acknowledgement of Vanaspati Vinimay Pvt. Ltd. for AY 2010-11	55
14	Copy of Audited Accounts of Vanaspati Vinimay Pvt. Ltd. for the AY 2010-11	56-63

	Copy of bank statements of Vanaspati Vinimay Pvt. Ltd. for the A.Y. 2010-11	64
16	Copy of ITR Acknowledgement and Audited Accounts of source company of Vanaspati Vinimay Pvt. Ltd	65-78
17	Copy of Bank Statement of source company of Vanaspati Vinimay Pvt. Ltd.	79
18	Copy of Retraction Affidavit filed before the Ld DCIT on 24.03.2014	80
19	Copy of Retraction Affidavit of Sushil Agarwal, the alleged entry operator, duly sworn before the First Class Magistrate, Kolkata dated 24.03.2014	81-82
E.	Case Laws on the issue that retraction affidavit has no evidentiary value	
20	Copy of Decision of Supreme Court in case of Mehta Parikh & Co. v. CIT [1956] 30 ITR 181	83-92
21	Copy of Decision of High Court of Calcutta in case of PCIT v. Golden Goenka Fincorp Ltd. [2023] 148 taxmann.com 313 (Calcutta) dated 13.01.2023	93-94
22	Copy of Decision of High Court of Gujarat in case of PCIT v. Kunvarji Commodities Brokers (P.) Ltd. [2020] 118 taxmann.com 374 (Gujarat)	96-101
23	Copy of Decision of High Court of Gujarat in case of DCIT v. Narendra Garg & Ashok Garg (AOP) [2016] 72 taxmann.com 355 (Gujarat)	102-107
24	Copy of Decision of Supreme Court in case of PCIT v. Vinita Chaurasia [2018] 98 taxmann.com 414 (SC)	108-109

5.1. Ld. Counsel strongly submitted that the basis of addition made by the Ld. AO is the statement recorded of one Shri Subhash Agarwal in the course of search on Pasari Group. It is important to note that assessee was not subjected to the said search operation. Furthermore, the statement so recorded was later on retracted before the Ld. DCIT on 24.03.2014. In this respect, Ld. Counsel referred to a letter dated 24.03.2014 from Shri Subhash Agarwal confirming that he had retracted his statement for which an affidavit was furnished with the office of DCIT. The said affidavit is duly sworn before the 1st class

Magistrate, Kolkata on 24.03.2014. Thus, the very basis on which the addition was made has no evidentiary value.

6. Ld. AO called for explanation in respect of issue of share capital along with premium to the above two share subscribers. Assessee furnished necessary documentary evidence and explanations before the Ld. AO.

7. According to the Ld. Counsel, details and documents placed on record have not been controverted by the authorities below in any manner whatsoever. According to the Ld. Counsel, the AO has made the addition with a predetermined mind set without taking into consideration exhaustive details and documents which were placed on record both, by the assessee as well as by the share subscribing companies.

8. He placed reliance on the decision of Hon'ble jurisdictional High Court of Calcutta in the case of PCIT Vs. Naina Distributors Pvt. Ltd. in ITAT/113/2023 vide IA No. GA/1/2023 dated 28.06.2023 wherein similar issue has been dealt by the Hon'ble Court. He took us through the said judgment from where the following points emerged:

(a) The Hon'ble Court noted that Ld. Tribunal has independently examined as to the genuinity of the transaction in the matter of raising share capital and that even during the assessment proceedings, the assessee had furnished all the details in respect of the share capital and share premium including the details of the investors who had made their submissions before the AO.

(b) The Hon'ble Court also observed that the Tribunal has noted about the assessee had produced all the documents, disclosed the

names and addresses and PAN of the investors including several other documentary evidence.

(c) Hon'ble Court also observed that AO had issued notices u/s. 133(6) of the Act for carrying out independent verification of the transaction and thus investors duly responded to the said notices and filed the requisite details.

(d) Also, the assessment years framed u/s. 143(3) of the investors were placed on record.

(e) Tribunal also noted that the only reason for making the addition was that the directors of the assessee company did not respond to the summons issued by the AO u/s. 131. Thus, the non-appearance of the director formed the basis of making the addition.

8.1. From the above stated observations and notes, the Hon'ble High Court came to the conclusion that there was no question of law much less substantial question of law which arose for consideration in the said appeal and thus, the appeal filed was dismissed. A reference was also made by the Hon'ble Court to its decision in the case of Crystal Networks Pvt. Ltd. Vs. CIT 253 ITR 171 (Cal) on which the Tribunal had placed its reliance.

9. Per contra, Ld. Sr. DR placed reliance on the orders of the authorities below and submitted that assessee's own income has been infused in the guise of share capital through the investor companies. According to him, assessee could not establish the identity and creditworthiness of the share subscribers and prove the genuineness of the transaction.

10. We have heard the rival contentions and gone through the material available on record. We note that Ld. AO without even going through and discussing the details submitted by the subscriber companies, took an adverse view on the identity, creditworthiness of the subscribers and the genuineness of the transactions. To our mind, Ld. AO could have taken an adverse view only if he could point out the discrepancies or insufficiency in the evidence and details furnished in his office. We draw our force from the decision of the Hon'ble Bombay High court in the case of *PCIT v. Paradise Inland Shipping Pvt. Ltd.* [2017] 84 taxmann.com 58 (Pan) wherein it was held that once the assessee has produced documentary evidence to establish the existence of the subscriber companies, the burden would shift on the revenue to establish their case. We also draw our force from the decision of Hon'ble Jurisdictional High Court of Calcutta in the case of *Crystal Network Pvt. Ltd. v. CIT (supra)* which held as under:

"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 CIT(Appeals) 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 produce of the assessee or not. When it was found by the CIT (Appeal) on fact having examined the documents that the advance given by the creditors have been established the Tribunal should not have ignored this fact finding."

11. Ld. AO has not bothered to discuss or point out any defect or deficiency in the documents furnished by the assessee of the share subscribing companies. These evidences furnished have been neither controverted by the Ld. AO during the assessment proceedings nor anything substantive brought on record to justify the addition made by him. Ld. AO has simply added the amount of share capital and share premium on the basis of statement of on Shri Subhash Agrawal which was eventually retracted. Thus, going by the records placed by the assessee of the two share subscribing companies, it can be safely held that the assessee has discharged its initial burden and the burden shifted on the Ld. AO to enquire further into the matter which he failed to do so. It is also noted from their audited financial statement and chart extracted above that all the investing companies have sufficient own funds available with them to make investment in the assessee.

11.1. A perusal of the impugned first appellate order shows that the Ld. CIT(A) has not discussed anything about the material facts of the case. He has not pointed out any defect and discrepancy in the evidences and details furnished by the assessee but simply cited certain case laws even without pointing out as to how these case laws were applicable to the facts and circumstances of this case. By simply reproducing the contents of the case laws without discussing about their application on the facts of the case, in our view, would not make the order of the Ld. CIT(A) justifiable.

11.2. From the facts and circumstances of the case as already discussed above, we find that the case of the

assessee is squarely covered by the decision of Hon'ble jurisdictional High Court in the case of Naina Distributor Pvt. Ltd. (Supra). We have already summarised the observations and noting as well as the finding arrived at by the Hon'ble High Court in this case which applies on the factual matrix of the present case. Considering the facts and circumstances of the case and respectfully following the decision of the Hon'ble jurisdictional High Court of Calcutta (supra), we find that the assessee has discharged its onus to prove the identity and creditworthiness of the share subscribing companies and the genuineness of the transaction towards issue of share capital of Rs.40,00,000/- during the year. Accordingly, we delete the addition so made by the AO. Grounds taken by the assessee in this respect are allowed.

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

Order pronounced in the open court on 8th April, 2024.

Sd/-
(Sanjay Garg)
Judicial Member

Sd/-
(Girish Agrawal)
Accountant Member

Dated: 8th April, 2024

JD, Sr. P.S.

Copy to:

1. The Appellant:
 2. The Respondent.
 3. CIT(A)-Kolkata-27
 4. The Pr. CIT, Kolkata
 5. DR, ITAT, Kolkata Bench, Kolkata
- //True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata