

IN THE INCOME TAX APPELLATE TRIBUNAL KOLKATA BENCH 'C', KOLKATA

**BEFORE DR. MANISH BORAD, HON'BLE ACCOUNTANT MEMBER
AND SHRI SONJOY SARMA, HON'BLE JUDICIAL MEMBER**

**ITA No. 921/KOL/2023
Assessment Year: 2012-13**

Nice Vintrade Pvt. Ltd. 1 st Floor, 134/1, M.G. Road, Burrabazar, Kolkata-700007. PAN: AACCN 8291 M (Appellant)	vs	ITO, Ward-9(1), Kolkata (Respondent)
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Present for:

Assessee by : Shri Sunil Surana, AR

Revenue by : Shri Arun Kumar Meena, JCIT

Date of Hearing : 08.02.2024

Date of Pronouncement : 03.05.2024

ORDER

PER SONJOY SARMA, JM:

This is an appeal preferred by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals), NFAC, Delhi (hereinafter referred to as the Ld. CIT(A)"] dated 19.07.2023 for the AY 2012-13.

2. Issue raised in ground no. 2 to 5 is against the order of Ld. CIT(A) confirming the order of AO wherein the AO has made addition of Rs. 1,20,00,000/- on account of share capital / share premium as unexplained cash credit u/s 68 of the Act.

3. Facts in brief are that the assessee filed return of income on 28.09.2012 declaring total income of Rs. 46,650/-. The case of the assessee was selected for scrutiny and statutory notices were duly issued and served upon the assessee. The AO during the assessment proceedings called for various information/details which were furnished by the assessee. The AO observed on the

basis of said details/evidences filed by the assessee that it has issued shares at a huge premium without any justification to issue equity shares at such high premium. The AO accordingly issued summon u/s 131 of the Act to the director of assessee-company requiring him to personally appear. Besides the AO directed the assessee to produce the directors of the investing/subscribing companies in order to verify the identity and creditworthiness of the shareholders and genuineness of these transactions. The AO thereafter noted that the assessee has failed to produce all the shareholders/directors of the investing companies with evidences as required in terms of the summons issued to the assessee. Finally the AO recorded a findings that due to non-compliance on the part of the shareholders in producing all the details as requisitioned in the summons issued u/s 131 of the Act, the identity and creditworthiness of the shareholders and genuineness of the transactions could not be verified and hence the same was added as unexplained credit to the income of the assessee in the assessment framed u/s 143(3) of the Act dated 19.03.2015.

4. In the appellate proceedings, the Ld. CIT(A) dismissed the appeal of the assessee by passing a very cryptic order thereby upholding the assessment framed by the AO u/s 143(3) of the Act.

5. The Ld. A.R vehemently submitted before us that the first appellate authority has grossly ignored and overlooked all the facts on record by dismissing the appeal of the assessee. The Ld. A.R drew our attention to page no. 36 to 101 of PB which contained the index of details of allottees comprising their names, addresses, PANs, no. of shares allotted and total amount received by the

assessee on account of allotment of equity share capital/share premium. At page no. 102 the assessee filed the details of share applicants and share application details as on 31.03.2012 comprising names of share holders, their net worth and amount paid to the assessee company which sufficiently proved the creditworthiness of these transactions. The Ld. AR stated that the assessee has filed all the evidences/details/information such as audited accounts, shareholders allotment letters, bank statements, memorandum of article of associations, source of source and ledger copies etc. The Ld. A.R argued that the AO has solely and merely made an addition on the ground that though the assessee furnished all the evidences concerning the investors however the summons were not complied with which were issued u/s 131 of the Act calling upon the assessee to personally appear along with directors and principal officers of investor companies along with details as required therein. The Ld. A.R contended that the authorities below have failed to carry out any meaningful enquiry into the said evidences furnished by the assessee and jumped to the conclusion that the identity, creditworthiness of the investors and genuineness of the transactions were not proved by overlooking and ignoring the facts on record that the assessee has raised share capital/share premium from 2 subscribers from page 102 of PB. The Ld. A.R stated that all these facts are placed before the authorities below, the same had been overlooked and disregarded. The Ld. A.R vehemently argued that the addition made on the ground of non-compliance to the summons issued u/s 131 of the Act is unsustainable in the eyes of law where the assessee has furnished all the evidences concerning the

investments/subscriptions received by the assessee during the instant year. The Ld. A.R submitted that the assessee has furnished all these evidences before the AO and he has failed to carry out any investigation and reached a wrong conclusion that the identity and creditworthiness of the investors and genuineness of the transactions were not proved. In defense of arguments the Ld. A.R relied on the following decisions:

1. *CIT vs. Orissa Corporation Ltd. in [1986] 159 ITR 78 (SC)*
2. *DCIT vs. Rohini Builders [2002] 256 ITR 360(Guj)*
3. *Crystal Networks (P)Ltd vs CIT reported in 353 ITR 171 (C)*
4. *ITO Vs M/s Cygnus Developers India Pvt. Ltd. (ITA No. 282/Kol/2012)*
5. *CIT Vs Orchid Industries (P) Ltd 397 ITR 136 (Bom)*”

Finally the ld AR prayed before the bench that the order of ld CIT(A) may be set aside and the AO may be directed to delete the addition.

6. The Ld. D.R while controverting the arguments of the Ld. A.R submitted that the assessee company is a shell company and issued shares at a very high premium without any justification for the same as the assessee was not having any sound business track or any financial strength justifying the issue at such high premium. The Ld. D.R submitted that three ingredients as envisaged in the provisions of Section 68 of the Act were not satisfied. The ld. D.R also submitted that the transactions done by the assessee are circular transactions. The Ld. D.R therefore submitted that these transactions are bogus and intended to have been entered into in order to route black money back into the books and therefore the appellate order may be affirmed.

7. We have heard the rival submissions and perused the material on record carefully as placed before us. The undisputed facts are that the assessee has issued shares to two private limited companies are available at page no. 102 of PB. The assessee has complied with the directions of the AO in the matter of furnishing evidences comprising names, addresses, share allotment letters, bank statements, memorandum of article of association, source of source, ledger copies which were duly filed before the AO. The Ld. CIT(A) has affirmed the order of AO which was passed by the AO on the sole basis and foundation that the summon issued u/s 131 were not complied with by the assessee wherein the AO has directed the directors of the assessee company to appear personally along with principal officers/directors of the subscribing companies. We note that though the authorities below have failed to carry out any meaningful and substantive enquiry into the evidences filed by the assessee and without any enquiry, the identity and creditworthiness of the investors and genuineness of the transactions were doubted which seemed without any basis. On the other hand the assessee has discharged its onus by furnishing all the evidences before the AO and thereafter the burden shifted to the authorities below which have not been discharged. We also note that AO has relied on the statement of parties which were never confronted to the assessee for cross-examination. It is trite law that no addition can be made to the income of the assessee where the assessee has not been confronted with the evidences collected by the AO at the back of the assessee. Moreover the addition was made on the ground of non-compliance to summons u/s 131. In our opinion, the said

appellate order affirming the addition appears to be incorrect and cannot be sustained. We find support from the decision of Hon'ble Supreme Court in the case of CIT Vs Orissa Corporation Ltd. (supra)

“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.”

7.1 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 (supra) 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.”

7.2. The case of is also covered by the decision of the coordinate bench in ITO Vs M/s Cygnus Developers India Pvt. Ltd. (supra) 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.”

7.3. Similar ratio has been laid down by the Hon’ble Mumbai High Court in the case of CIT Vs Orchid Industries (P) Ltd (supra) 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.

8. In the instant case before us also, the assessee has furnished all the evidences as regards 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 set aside the order of Ld. CIT(A) by allowing the appeal of the assessee. The appeal of the assessee is allowed.

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

Order pronounced in the open court on 03.05.2024

Sd/-

Sd/-

(Dr. MANISH BORAD)
ACCOUNTANT MEMBER

(SONJOY SARMA)
JUDICIAL MEMBER

Kolkata, Dated: 03.05.2024
Biswajit, Sr. P.S.

Copy to:

1. The Appellant: Nice Vintrade Pvt. Ltd.
2. The Respondent: ITO, Ward-9(1), Kolkata.
3. The CIT,
4. The CIT (A)
5. The DR

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By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata