IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, KOLKATA
[Before Shri Rajesh Kumar, AM& Shri Sonjoy Sarma, JM]

I.T.A. No. 1423/Kol/2023
Assessment Year: 2012-13
&
ITA No. 1424 & 1425/Kol/2023
Assessment Years: 2013-14
&
ITA No. 1426/Kol/2023
Assessment Year: 2014-15

Gem Forgings Pvt. Ltd. 10C, Middleton Row, Kolkata-700071. (PAN: AABCG0227B)	Vs.	Deputy Commissioner of Income-tax, Circle-8(1), Kolkata
Appellant		Respondent

Date of conclusion of Hearing	01.05.2024
Date of Pronouncement	22.05.2024
For the Assessee	Shri Giridhar Dhelia, Advocate & Shri Ashish Rustogi, CA
For the Respondent	Shri Abhijit Adhikary, Addl. CIT

ORDER

Per Shri Rajesh Kumar, AM

All these appeals filed by the assessee are against the separate orders of Ld. CIT(A), National Faceless Appeal Centre (NFAC), Delhi all dated 07.11.2023 for AYs 2012-13 to 2014-15.

2. Since the issue involved in all these appeals are mostly common and, therefore, there being clubbed together, heard together and being disposed of by this consolidated order for the sake of convenience and brevity. First of all, we will take up ITA No. 1423/Kol/2023 for AY 2012-13.

3. Ground no. 1 is general in nature and needs no adjudication.

4. The issue raised in ground no. 2 is against the order of Ld. CIT(A) upholding the order of reopening of assessment u/s. 147 of the Income Tax Act, 1961 (hereinafter referred to as the "Act") which is invalid and not sustainable in the eyes of law.

5. The facts in brief are that the assessee filed return of income on 29.09.2012 declaring total income of Rs.56,34,611/-. The said return was selected for scrutiny and the assessment was framed vide order dated 24.03.2014 passed u/s. 143(3) of the Act assessing the total

income at Rs.4,03,09,100/- which was assailed before the Ld. CIT(A) and vide order dated 20.09.2018 passed by the appellate authority u/s. 250 of the Act a substantial relief was granted to the assessee. Thereafter, appeal effect order was passed by the AO determining the income at Rs.1,87,83,014/-. In the meantime, the AO received information from ADIT (Inv,), Unit -1(2), Kolkata that assessee has availed accommodation entry in the guise of unsecured loan from M/s. Shyamli Fashion Traders Pvt. Ltd. (in short 'SFTPL') during the instant financial year. Upon receiving the information, the AO issued notice u/s. 133(6) of the Act to the assessee with prior approval of PCIT-3, Kolkata asking to furnish the details of transactions with SFTPL which was duly complied with by confirming the transaction of Rs. 50,00,000/- having been received as unsecured loan from the said company on which interest of Rs.4,19,178/- was also paid after deduction at source. Thereafter, the AO reopened the assessment u/s. 147 of the Act by issuing notice u/s. 148 on 07.03.2019 which was duly served upon the assessee. The assessee filed the return of income on 11.03.2019 in compliance thereto and also requested the AO vide letter dated 09.04.2018 to furnish the reasons recorded for reopening of assessment. The AO provided the reasons recorded u/s. 148(2) of the Act vide letter dated 16.04.2019. Thereafter, the assessee filed the objections to the reopening of assessment vide letter dated 18.04.2019 which was duly disposed of vide order dated 17.05.2019. The AO,, during the course of assessment proceedings, required the information from the assessee qua the loan received from SFTPL and also issued notice u/s. 133(6) to the lender besides issuing summon u/s. 131 of the Act, however, the same was returned unserved. The assessee filed before the AO necessary evidences in support of the said loan. Pertinent to note that the assessee paid interest on the said loan after deduction of tax at source which was duly deposited to the government exchequer. Finally, the AO treated the said loan as accommodation entry and non-genuine and accordingly, added the same to the income of the assessee u/s. 68 of the Act besides adding the interest paid thereon of Rs.4,69,178/- in the assessment framed u/s. 147/143(3) of the Act dated 19.11.2019.

6. In the appellate proceeding, the Ld. CIT(A) dismissed the appeal of the assessee by giving a cryptic finding.

7. The Ld. AR vehemently argued before us that the case of the assessee has been reopened invalidly without satisfying the conditions precedent for reopening the assessment as contemplated u/s. 147 of the Act. The Ld. AR submitted before the Bench that in the instant case the AO enquired into the said loan during the course of original assessment assessment and had been examined exhaustively with all evidences. The Ld. AR in order to corroborate his argument referred to page 51 para 1 of the paper book-2 which is a letter addressed to the Dy. Commissioner of Income Tax dated 21.01.2015 wherein the assessee has furnished the details of funds for loan as on 31.03.2012 along with the Balance Sheet, ITR, bank statement of the lender. Thereafter, the Ld. AR referred to page no. 57 and 58 of the paper book-2 which comprised the details of unsecured loans for the FY 2011-12 and at Sl. No. 34 the loan from SFTPL appears which showed that assessee had taken Rs. 50,00,000/- as unsecured loan on which interest of Rs.4,19,178/- was provided and a TDS of Rs.41,918/- was also deducted and deposited in the government treasury. The Ld. AR, therefore, submitted that all the information relating to this loan was available before the AO in the original assessment proceeding which culminated u/s. 143(3) of the Act and duly examined and verified by the AO. The Ld. AR, therefore, submitted that the reopening of assessment which was invalidly done and conclusion of the AO is nothing but a mere change of opinion on the basis of same facts which is not permissible under the Act. In defense of his argument, the Ld. AR relied on the decision of Hon'ble Apex Court in the case of CIT Vs. Kelvinator India Ltd. (2010) 320 ITR 561 (SC).

7.1. Ld. AR also referred to page no. 37 of the paper book which is a letter addressed to the Dy. Commissioner of Income Tax dated 18.04.2019 raising objection to the reopening of assessment and issuance of notice u/s. 148 of the Act which runs into four pages upto page no. 37 to 41 of the paper book-1 and on page no. 41 para 1 the Ld. AR has pointed out that the assessee has specifically requested the AO to provide the cross examination of the person whose statement is alleged to be used against the assessee company by the department. The Ld. AR submitted that in spite of specific request being made by the assessee, it has not been provided the cross examination by the AO thereby causing grave miscarriage of justice and violation of principle of natural justice as has been held by the Hon'ble Supreme Court in the case of Andaman Timber Industries Vs. CCE, (2015) 127

DTR 241 (SC). The Ld. AR also pointed out that the reasons were recorded in a very mechanical and perfunctory manner.

7.2. The Ld. AR referred to para 2 wherein the AO has noted that assessee has availed accommodation entry in the guise of unsecured loan to the tune of Rs.85.50 lakh from SFTPL but as a matter of fact there was no such amount taken as unsecured loan and the actual amount of unsecured loan taken by the assessee from the said company was only Rs. 50 lakh as has been verified by the AO in the original assessment proceeding. Thereafter, the Ld. AR also referred to para 5 and 6 of the assessment order of the said reasons and highlighted that the AO has stated that there was failure on the part of the assessee to disclose truly and fully the information qua the said loan whereas as a matter of fact, the assessee has fully and truly disclosed all the particulars regarding such loan in the original assessment proceeding. The Ld. AR referred to the various documents filed along with the reply addressed to the Dy. Commissioner of Income Tax dated 18.04.2019.

7.3. The Ld. AR further submitted that the reopening of assessment made by the AO by stating in para 5 of the reasons recorded that though the assessee has filed annual report , profit and loss account , balance sheet wherein various information were disclosed however there was a failure on the part of the assessee to disclose information truly and fully. The ld AR argued that said noting of the AO has been arbitrary , whimsical and based on conjectures and surmises on the ground that all the information/details qua the said loan were fully disclosed after AO asked the assessee to furnished the details which were furnished vide letter dated 21.01.2015. The ld AR vehemently contended that there was no failure of any kind whatsoever on the part of the assessee to disclose these information in the original assessment proceedings and in order to reopen the assessment beyond the period of four years has to be subject to the satisfaction of the conditions as laid down in the first proviso to section 147 of the Act. The ld. AR stated that the said proviso provides that where an assessment has been framed u/s. 143(3) of the Act , then action shall be taken after expiry of four years from the end of relevant assessment year if the income has escaped assessment because of failure of the assessee to disclose truly all material facts necessary for the assessment of income for the said assessment year. The Ld. AR contended that it is not the case in the instant assessment year as the assessee has fully

disclosed all the material facts and information qua the above loan during the original assessment proceedings and, therefore, the reopening of assessment is also bad in law and may be quashed. In defense of his argument, the Ld. AR relied on the decision of Hon'ble Apex Court in the case of *ACIT Vs. CEAT Ltd.* reported in *[2022] 449 ITR 171 (SC).*

8. The Ld. AR also stated that the recording of reasons by the AO shows a purely mechanical approach which lacks due application of mind to the information received. The ld. AR stated that in para 2, the AO has noted a figure of Rs. 85.50 lakh whereas as a matter of fact only Rs. 50 lakh was borrowed by the assessee from the said company SFTPL. The ld. AR stated that the reasons recorded on the basis of correct fact is also not available and the reopening matter is to be quashed.

9. The undisputed facts are that the assessment in the instant assessment year was framed u/s 143(3) of the Act and the issue of unsecured loan was specifically asked by the AO and replied to by the assessee with all evidences as filed vide written submission dated 21.01.2015. Therefore the assessee has furnished all the evidences qua the said loan before the AO in original assessment proceedings and thus the assessee has disclosed all the information qua the loan. I considering the factual matrix of the case , in our considered opinion, the re-opening has not been made in terms of the first proviso to Section 147 of the Act and therefore, cannot be sustained. The case of the assessee is squarely covered by the decision of Hon'ble Apex Court in the case of *CEAT Ltd. (supra)* wherein the Hon'ble Apex Court has held as under:

> *"1. The petitioner is impugning the notice dated March 27, 2019 issued under section 148 of the Income-tax Act, 1961 (the Act) for assessment year 2012-13 and the order dated October 31, 2019 rejecting the petitioner's objections. Since the notice issued is after expiry of four years from the end of the relevant assessment year and assessment under section 143(3) of the Act was completed, the proviso to section 147 of the Act shall apply. The respondent has to first show that there was failure on the part of the petitioner to fulfil and there are non-disclosure of material facts required for assessment.*

2. We have considered the reasons annexed at exhibit F to the petition. In our view, the respondent has miserably failed to disclose any facts, material or otherwise which has not been disclosed. In our view, first of all the reasons indicated change of opinion which is impermissible in law and secondly, the entire basis for reopening is due to mistake of the Assessing Officer that resulted in under-assessment.

3. The hon'ble apex court in Indian and Eastern Newspaper Society v. CIT [1979] 119 ITR -996 (SC) has held that an error discovered on a reconsideration of the same material (and no more) does not give power to the Assessing Officer to reopen the assessment. Paragraph 14 of the said judgment read as under (page 1004 of 119 ITR):

'Now, in the case before us, the Income-tax Officer had, when he made the original assessment, considered the provisions of sections 9 and 10. Any different view taken by him afterwards on the application of those provisions would amount to a change of opinion on material already considered by him. The Revenue contends that it is open to him to do so, and on that basis to reopen the assessment under section 147(b). Reliance is placed on Kalyanji Mavji and Co. v. CIT [1976] 102 ITR 287 (SC), where a Bench of two learned judges of this court observed that a case where income had escaped assessment due to the "oversight, inadvertence or mistake" of the Income-tax Officer must fall within section 34(1)(b) of the Indian Income-tax Act, 1922. It appears to us, with respect, that the proposition is stated too widely and travels farther than the statute warrants in so far as it can be said to lay down that if, on reappraising the material considered by him during the original assessment, the Income-tax Officer discovers that he has committed an error in consequence of which income has escaped assessment, it is open to him to reopen the assessment. In our opinion, an error discovered on a reconsideration of the same material (and no more) does not give him that power. That was the view taken by this court in Maharaj Kumar Kamal Singh v. CIT [1959] 35 ITR 1 (SC), CIT v. A. Raman and Co. [1968] 67 ITR 11 (SC) and Bankipur Club Ltd. v. CIT [1971] 82 ITR 831 (SC) and we do not believe that the law has since taken a different course. Any observations in Kalyanji Mavji and Co. v. CIT [1976] 102 ITR 287 (SC)

suggesting the contrary do not, we say with respect, lay down the correct law.'

4. This view has been followed by a Full Bench of the Karnataka High Court in Dell India (P.) Ltd. v. Joint CIT (LTU) [2021] 432 ITR 212 (Karn).

5. The petition therefore is allowed in terms of prayer clause (A) which reads as under:

(A) that this hon'ble court may be pleased to issue a writ of cer tiorari or any other writ, order or direction under article 226 of the Constitution of India calling for the records of the case leading to the issue of the impugned notice and passing of the impugned order and after going through the same, and examining the question of legality thereof, quash, cancel and set aside the impugned notice (exhibit C) dated March 27, 2019 and the impugned order (exhibit H) dated October 31, 2019.

6. The petition disposed of."

Balbir Singh, Additional Solicitor General, (Rupesh Kumar, Naman Tandon, Rupinder Singhmar and Raj Bahadur Yadav, Advocates, with him) for the petitioners.

Vanita Bhargava, Ajay Bhargava, Shantanu Chaturvedi, Ms. Prerna Singh and M/S. Khaitan and Co., Advocates, for the respondent.

JUDGMENT

Page No: 173

1. We have heard Mr. Balbir Singh, learned Additional Solicitor General appearing on behalf of the petitioners.

2. It is not in dispute that the assessment was sought to be reopened beyond four years. Therefore, all the conditions under section 148 of the Income-tax Act, 1961 for reopening the assessment beyond four years are required to be satisfied. Having gone through the reasons recorded for reopening, we are of the opinion that the conditions precedent for reopening of the assessment beyond four years are not satisfied. The reassessment was on change of opinion. There are no allegations of suppression of material fact. Under the circumstances, no error has been committed by the High Court in setting aside the reopening notice under section 148 of the Income-tax Act. We are in complete agreement with the

view taken by the High Court. The special leave petition stands dismissed."

9.1 Since the facts of the instant case are materially same as that of the decision taken by the Hon'ble Apex Court in the above decision, accordingly, we are inclined to quash the re-opening of assessment.

9.2. We further also note that the assessee has specifically requested the AO to allow the cross examination vide letter addressed to the Dy. Commissioner of Income Tax dated 18.04.2019 of the person whose statement is alleged to be used against the assessee company by the department but in spite of this the assessee has not been provided the cross examination by the AO thereby causing grave miscarriage of justice and violation of principle of natural justice. Even on this count eh assessment is invalid and cannot be sustained. The case of the assessee is squarely covered by decision of the Hon'ble Supreme Court in the case of Andaman Timber Industries Vs. CCE, (2015) 127 DTR 241 (SC). We also note that the reasons recorded in a very mechanical and perfunctory manner and the re-opening on the said reasons cannot be sustained. We find that there was no application of mind by the AO to the information received which were vague itself and therefore the AO has simply relied on the information received from the Investigation Wing and has not applied his mind. The case of the assessee finds support from the decision of Hon'ble Delhi High Court in the case of CIT vs. SFIL Stock Broking Ltd. in [2010] 325 ITR 285 (Del) wherein it was held that the AO has to apply his mind to the information and independently arrived at a belief that income had escaped assessment otherwise the reopening of assessment cannot be sustained. In our considered view the reasons have to be read as recorded and there cannot be any substitution or addition or deletion to the reasons as has been held by the Hon'ble Bombay High Court in the case of Hindustan Lever Ltd. vs R.B. Wadkar (No. 1) in 2004 137 TAXMAN 479 (Bom). Consequently the ground no. 2 raised by the assessee is allowed.

10. On merit, the Ld. AR submitted that the addition made by the AO and as sustained by the Ld CIT(A) is totally wrong and against the various judicial pronouncements of various judicial forums. The Ld. AR stated that the loan taken by the assessee was refunded in F.Y. 2014-15. The ld. AR also stated that interest was provided, TDS was deducted and deposited as per the provisions of the Income Tax Act. The Ld. AR contended that in that scenario no addition can be made and the loan taken cannot be treated as non-genuine. In defense of his argument, he relied on series of decisions namely –

i) CIT s. Ayachi Chandrashekhar Narsangji (2014) 42 taxman.com 251 (Guj)

ii) CIT Vs. Mitul Krishna Kapor (ITA No. 33/2009 dated 09.06.2016 (Cal)

iii) DCIT Vs. J. P. Fincorp Services Pvt. Ltd., ITA No. 2517/Ahd/2016 (Ahd)

iv) Balaji Solutions Ltd. Vs. ACIT, ITA No. 572/Kol/2022 dated 20.02.2023

v) Rajhans Construction P. ltd. Vs. ACIT (IT Appeal No. 1450 of 2016 (2022) 140 taxmann.com 370

vi) ITO Vs. Smt Pratima Ashar, ITA No. 105/Mum/2018 (2019) 107 taxmann.com 135 (Mum. Trib)

11. We have perused the orders of the lower authorities and have carefully gone through the facts of the case. We have also perused the decision cited supra. From the perusal of the said decisions that the various judicial forums have held that one loans were taken and repaid through banking channel the same cannot be added u/s. 68 of the Act. Besides, we note that assessee has filed all the evidence proving identity, creditworthiness of the loan and genuineness of the transaction which has not been considered by the authorities below and on this count also even on merit the case of the assessee is succeeded. Consequently, we quash the reopening of assessment made u/s. 147 of the Act by setting aside the order of the Ld. CIT(A).

ITA No. 1424//Kol/2023 A.Y.2013-14

12. The ground no. 1 & 2 are general in nature and do not require any adjudication.

13. The first issue raised in ground no. 3 is against the order of ld CIT(A) confirming the addition of Rs. 1,25,00,000/- and of Rs. 12,05,344/- as made by the AO u/s 68 of the Act on account of unsecured loans and Interest thereon.

14. The facts in brief are that the assesse filed the return of income on28.09.2013 declaring total income of Rs. 55,65,670/-. The case of the assessee was selected for scrutiny and statutory notices were duly issued and served upon the assessee. During the assessment proceedings the AO issued notice u/s 142(1) of the Act along with questionnaire calling upon the assessee to furnish information / details in respect of the unsecured loans raised by the assessee which was complied with by the assessee comprising name, addresses, PAN, details of amounts taken interest provided thereon TDS deducted and deposited in to Govt. treasury along with the audited account of the lenders, loan confirmations, MCA Master Data and ITRs in respect of all lenders. The AO issued notices u/s 133(6) of the Act and the lenders furnished all the information / evidences as called for. The assessee even submitted the source of money and the net worth of the lenders proving the creditworthiness of the lenders. The AO instead of doing any verification/ enquiry into this evidences merely relied on the report of DDIT(Inv) that the summon issued u/s 131 to these parties were non-existent. And finally added the said unsecured loans along with interest to the income of the assessee besides making other additions in the assessment framed u/ s143(3) of the Act dated 31.03.2016.

15. 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 despite assessing filing all the evidences/details as filed before the AO.

16. The Ld. A.R vehemently submitted before us that the first appellate authority has grossly ignored and overlooked all the facts on record as well as evidences filed by the assessee before him. The Ld. A.R submitted that details of lenders comprising their names, addresses, PANs, and total amount of unsecured received by the assessee , interest provided and TDS deducted thereon and deposited in the Govt. Treasury. The ld AR also produced the CIN Nos, their net worth and amount paid to the assessee company which sufficiently proved the creditworthiness of these transactions. The Ld. A.R stated that the assessee has filed all the evidences/details/information such as audited accounts, shareholders bank statements, memorandum of article of associations, source of source and ledger copies etc. But both the authorities below have failed to carry out any further

enquiry/investigation into these evidences. 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 lenders however, the summons issued by DDIT(inv) u/s 131 of the Act were not complied with. The Ld. A.R contended that since both 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. The Ld. A.R stated that all these facts are placed before the authorities below however 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 as well as Ld. CIT(A) and both the authorities below have 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.

17. The Ld. D.R while controverting the arguments of the Ld. A.R submitted that the lenders did not comply with the summons issued u/s 131 of the Act and also that these companies were non-existent. 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 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.

18. 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 raised unsecured loans from 7 parties during the year. The interest was paid on the said loans after deduction of TDS which was duly deposited into the Govt. treasury. The assessee has complied with the directions of the AO in the matter of furnishing evidences comprising name, addresses, PAN, details of amounts taken interest provided thereon TDS deducted and deposited in to Govt. treasury along with the audited account of the lenders, loan confirmations, MCA Master Data and ITRs in respect of all lenders. The AO issued notices u/s 133(6) of the Act and the lenders furnished all the information / evidences as called for. The assessee even submitted the source of money and the net worth of the lenders proving the creditworthiness of the lenders. etc which were duly filed before the AO. We note that the similar details/evidences were also furnished before the Ld. CIT(A) but the Ld. CIT(A) has passed very cryptic order without giving any clear finding. 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 of the Act by DDIT (Inv) were not complied with by the assessee. 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 as well as before CIT(A) and thereafter the burden shifted to the authorities below which have not been discharged. 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 assessees. 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. I f 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."

18.1 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."

18.2. 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."

18.3. 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 .

18.4 Even the unsecured loans taken by the were repaid in the subsequent years. We also note that the interest has been paid on these loans after deduction of TDS at source which was also deposited with the Govt treasury. On this appoint we have decided the merits in para 9 and 10 above by relying on various decisions in ITA No. 1423/Kol/2023 (supra).

18.5. Considering the facts and circumstances of the assessee in the light of the above decision ,we inclined to set aside the order of ld CIT(A) and direct the AO to delete the addition. The ground no. 3 is allowed.

19. The issue raised in ground no 4 is against the confirmation of addition of Rs. 33,98,717/- as made by the AO u/s 14A r.w. rule 8D(2).

20. The facts in brief are that the assessee has made investments in shares/securities and during the year earned exempt income of Rs. 1,930/-. The assessee has suo- motto disallowed Rs. 552/- under rule 8D(2)(i) and Rs. 2,68,104/- under rule 8D(2)(iii).The AO during the assessment proceedings invoked Rule 8D(2)(ii) and calculated the disallowance at Rs. 33,98,717/- and added the same to the income of the assessee. The ld CIT(A) simply affirmed the order of AO on this issue without giving any reasons.

21. Having considered the facts on records, we note that the exempt income earned by the assessee is only Rs. 1,930/- which has been noted by the AO in the assessment order. The AO has also noted that assessee has sue motto made disallowances Rs. 552/- under rule 8D(2)(i) and Rs. 2,68,104/- under rule 8D(2)(iii). We also note that the share capital and reserves and surplus of the assessee were Rs. 5,88,21,617/- whereas the investments in equity were Rs. 5,41,92,455/-. Considering the above facts the assessment as well as the appellate order passed by the ld. CIT(A) are not sustainable for two reasons. One the assessee has already disallowed expenses which are far more than the exempt income while disallowance cannot exceed the exempt income. Two the assessee own funds available were

sufficient to cover the investment in shares and therefore on this score no disallowance is called for. Accordingly we set aside the order of ld CIT(A) on this issue and direct the AO to delete the addition. The ground no. 4 is allowed.

22. In ITA No. 1426/Kol/2023 the issue raised in ground no. 1 ,2,3,4 are similar to ones as decided by us in ground no. 1,2,3 and 4 ITA No.1424/Kol/2023, therefore, our findings in these grounds would apply mutatis mutandis to ground no. 1,2,3 and 4 of this appeal as well. The issue raised in ground no. 5 in respect of PF is not pressed and accordingly dismissed as not pressed. Accordingly, the appeal of the assessee is partly allowed. .

23. In respect of ITA No. 1425/Kol/2023 the issue raised in this appeal by the assessee is against the confirmation of penalty u/s. 271 of the Act. Since we have allowed the appeal of the assessee in ITA No. 1424/Kol/2023 A.Y. 2013-14 , therefore, the penalty has no legs to stand . Accordingly the AO is directed to delete the penalty and the appeal of the assessee is allowed.

24. In the result, the appeals in ITA No. 1423,1424,1425/kol/2023 are allowed and in ITA No. 1426/Kol/2023 is partly allowed.

Order is pronounced in the open court on 22nd May, 2024

Sd/-	Sd/-
(Sonjoy Sarma)	(Rajesh Kumar)
Judicial Member	Accountant Member

Dated: 22nd May, 2024

JD, Sr. PS

Copy of the order forwarded to:

1. Appellant–
2. Respondent .
3. CIT(A), NFAC, Delhi
4. CIT,
5. DR, ITAT, Kolkata, True Copy

By Order

Assistant Registrar
ITAT, Kolkata Bench, Kolkata