

IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH KOLKATA

**SHRI SANJAY GARG, JUDICIAL MEMBER
SHRI SANJAY AWASTHI, ACCOUNTANT MEMBER**

**I.T.A. No. 1538/Kol/2024
Assessment Year: 2009-10**

**M/s Bhikshu Polymers Pvt. Ltd.
(Earlier known as M/s Jeevan Commotrade
Pvt. Ltd.)**

1st Floor, 4 Fairlie Place, Kolkata - 700001

[PAN: AACCCJ0069K]

.....**Appellant**

vs.

**Income Tax Officer,
Ward-6(2), Kolkata**

Aayakar Bhavan, P-7,
Chowringhee Square,
Kolkata - 700069

..... **Respondent**

Appearances by:

Assessee represented by : Sunil Surana, AR
Department represented by : A. Kundu, CIT-DR

Date of concluding the hearing : 26.09.2024
Date of pronouncing the order : 23.12.2024

ORDER

PER SANJAY AWASTHI, ACCOUNTANT MEMBER:

1. The present appeal is filed by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi [hereinafter referred to as “the Ld. CIT(A)”] passed u/s 250 of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) for Assessment Year 2009-10, dated 16.02.2024, which has been passed against the assessment order u/s 143(3)/263 of the Act, dated 16.03.2015.

1.1 In this case, vide order dated 16.03.2015 passed under Section 143(3)/263 of the Act, an addition of ₹ 13,57,80,000/- was made under Section 68 of the Act on account of share capital/premium claimed by the

assessee. The Ld. AO passed this order in response to directions given under Section 263 of the Act by the CIT-2, Kolkata. The directions in the said order under Section 263 of the Act were specifically to examine the genuineness and source of share capital by examining not only the Directors but the Ld. AO was also directed to examine other attendant circumstances to enable verification of the transactions. Since, there is a considerable recording of facts by the Ld. AO it is important to highlight and summarise the same as that would be required for adjudication. The facts may be summarised as under:

- (i) The company was incorporated on 01.05.2008 and during Financial Year (F.Y.) 2008-09 issued its shares to different Private Limited Companies, after charging high premiums, ranging from ₹ 90/ to ₹ 900/- (*Page 2 of Ld. AO's order*).
- (ii) No significant assets were noticed in the assessee company by the Ld. AO (*para 3, page 3 of Ld. AO's order*).
- (iii) The receiving of share application money and consequent investing in other Private Limited Companies has allegedly been done through a chain of transactions. The assessee company filed MOAs, Articles of AOA's, relevant forms filed before ROC, PAN etc. of the share capital subscribers. The Ld. Assessing Officer noticed that every single credit in the bank account was correspondingly followed by matching debit entries on either the same date or near about such dates (*para 4, page 3 of AO's order*).
- (iv) The assessee company did not have a strong financial track record or asset base indicating a poor balance sheet and there were, apparently, no signs of a bright future in terms of business prospects (*para 5, page 3 of Assessing Officer's order*).

- (v) The Ld. AO has recorded that the Earning Per Share (EPS) was nearly zero till the year ended 31.03.2012. This fact has been highlighted to demonstrate that a high premium was unjustified (*Para 9, page 6 of AO's order*).
- (vi) The appellant/assessee was given several opportunities to produce certain documents/information and was also asked to produce books of accounts, bills and vouchers but the appellant failed to do so. In fact, it is recorded that because of this issue summons were issued to the Principal Officer of the Companies for establishing the genuineness, identity and creditworthiness aspects of the transactions. It is recorded that most of the summons/notices sent to the Directors/Principal Officers of the assessee company and shareholders were either returned by the postal authorities or remained uncompiled with (*Paras 10 and 11 at page 6-7 of AO order*).
- (vii) A show cause notice was sent (dated 20.02.2015) through which detailed queries were presented for supply of information by the assessee. It is recorded by the Ld. Assessing Officer that some documents were filed which apparently were not sufficient to comply with the terms of the said show cause notice. In fact, the AO has recorded that the summons issued were not complied with (*Para 13, page 9 of AO's order and para 15, page 11 of AO's order*).
- (viii) The Ld AO has summarised the findings regarding the financial status of the investor companies by recording that they are investment companies, in their initial years of operation; income tax returns show either a nominal income or loss invariably; no noticeable business activity; and such companies received share capital with substantial premium, which was invested in the assessee company and similar other companies (*Ld. AO's order in para 14 at page 10*).

1.2 On the basis of findings given in the Ld. AO's order the impugned addition of ₹ 13,57,80,000/- was challenged before the Ld. CIT(A), who vide his order dated 16.02.2024 affirmed the action of Ld. Assessing Officer through detailed findings. However, the most critical fact finding is contained in para 5.2.2 as under:

*“5.2.2 It is seen that during the year the appellant company has raised share capital to the tune of Rs. 13,57,80,000/-. This in the backdrop that the company was incorporated in FY 2008-09 and in the same year it has issued shares against such high premium. The AO has also unearthed the complex web of shareholder funds again invested in different Pvt. Limited companies through various layering. The examination of the books of account of the appellant company, does not instil any confidence that the appellant company had the right numbers either in its Balance sheet or P&L account to justify the capacity to fetch such a huge share premium. **There are almost close to nil assets in the company, with no track record, and EPS nearly zero. As mentioned above, efforts to summon and inquire the Directors of the assessee company and the investor companies met with deafening silence. Interesting to add that there is cross holding of directorship between the investor and investee companies rampantly.** (Emphasis added). All these facts give credence to unreliability of entire transaction of shares. The appellant has failed to prove that share transactions are genuine. Transactions cannot be treated as genuine in presence of overwhelming evidences put forward by Revenue. Reliance is placed on judgment in case of Nipun Builders and Developers Pvt. Ltd. where it was held that it is duty of Tribunal to scratch surface and probe documentary evidence in depth, in light of conduct of appellant and other surrounding circumstances in order to see whether assessee is liable to provisions of section 68 or not.”*

It is seen that the Ld. CIT(A) has also relied on a large number of authorities in support of the contentions that the provisions of section 68 of the Act were clearly attracted to the facts of the present case.

2. Aggrieved with this action of Ld. CIT(A), the appellant has filed as many as 7 grounds of appeal which are unfortunately lengthy and argumentative. However, for the sake of perspective the grounds are extracted as under:

“1. For that the order passed u/s 263 r.w.s 143(3) is itself bad in law since the 263 proceedings were itself bad in law as when no addition was made on the reasons recorded no other addition would be sustained in the original order as per judgement of various High Courts and Coordinate Bench of the Kolkata Tribunal.

2. For that the Ld. CIT(A) erred in confirming the addition made u/s 68 by the Ld. AO when there was no finding that independent enquires were made by the Ld. AO as per direction of the Ld. CIT in the order passed u/s 263 and further it was on record that in the original assessment notices were issued to the shareholder

who duly replied and confirmed the share capital contributed by them by filing all requisite documents including bank statements, balance sheets, source of the amount paid, acknowledgement of filing of the return and other documents.

3. For that the Ld. CIT(A) erred in confirming the addition when the identity of the shareholders was not disputed in the order u/s 263, evidences were filed in original assessment proceedings in response to notice u/s 142(1) and the Id. AO in the order u/s 263 was directed to make independent enquiry not on test check basis but in respect of each and every shareholder when enquiry in respect of each and every shareholder was made earlier which was on record and nothing adverse have been found or recorded with reference to the earlier enquiry in respect of all the shareholders.

4. For that the Ld. CIT(A) erred in confirming the order of the Ld. AO when nothing adverse was found as can be seen from the assessment order in respect of the directions of the Ld. CIT in the order u/s 263.

5. For that the Ld. CIT(A) erred in confirming the order of the Ld. AO when the Ld. AO himself did not issue any notice u/s 133(6) or 131 to the shareholder companies nor to the directors of share older companies ignoring specific direction of the Ld. CIT when he should have made independent enquiries when the assessee filed all the details and evidences and no adverse view has been taken in respect of the documents and evidences filed in support of the share capital raised.

6. For that the Ld. CIT(A) erred in confirming the order of the AO on the ground that directors of assessee company did not appear when the appearance of the directors of the assessee company cannot be a criteria u/s 68 for proving the capital raised.

7. For that on the facts and in the circumstances of the case the addition u/s 68 made by the AO and confirmed by Ld. CIT(A) was not justified ignoring the evidences filed.”

Through the grounds, the appellant has not only challenged the proceedings under Section 263 of the Act but has also assailed the action of Ld. Assessing Officer in allegedly not adhering to the letter of the directions given by the Ld. CIT-2, Kolkata in the order under Section 263 of the Act. The appellant has also assailed the action of Ld. AO/CIT(A) with respect to the impugned addition under Section 68 of the Act. However, this adjudication will be confined to the merits or otherwise of the action of authorities below with respect to the impugned addition.

2.1 Before us, the Ld. Authorised Representative took pains to point out that all the share subscribers were existing corporate entities which were active in the ROC master data. It was also averred that all the transaction were done through banking channels and the same had been meticulously

documented before the Ld. AO. The Ld. Authorised Representative also stated that merely because the Directors or Principal Officers of the assessee and shareholders companies could not present themselves for interrogation etc. does not mean that the companies are non-genuine and hence doubtful. It was also argued that investment decisions are based on the commercial understanding and logic followed by corporate entities and the Assessing Officer could not claim to stand in the shoes of such businessmen and question commercial decisions. For this proposition, he relied on the case of *S.A. Builders Pvt. Ltd. reported in 288 ITR 1 (SC)*. He further argued that the assessee could not have done any better than submitting the kind of documents that he actually did for proving the genuineness of the impugned transactions.

The Ld. AR took us through the contents of a paper book running into 472 pages which essentially contained the details of the share capital subscribers. The order sheet from the assessment records have also been appended with this paper book. The Ld. Authorised Representative assailed the action of the authorities below and reiterated his contention that the assessee had done everything possible to escape the rigours of action under Section 68 of the Act establishing the bonafides of the transactions and had presented all manner of documents to justify the transactions and the identity etc. of such subscribers. The Ld. Authorised Representative also relied on the case of *Aastha Vincom Pvt. Limited Vs. DCIT, Central Circle-XIX, Kolkata, ITA No. 123/Kol/2015, A.Y. 2008-09, dated 26.08.2022*, and also on the case of *Magestic Vyapaar Pvt. Ltd. Vs. ITO, Ward-11(1), Kolkata, ITA No. 902/Kol/2024, A.Y. 2014-15, dated 22.08.2024* for canvassing the point that the Hon'ble Calcutta High Court in the case of *Balgopal Merchants (P) Ltd. Vs. Principal Commissioner of Income-tax reported in 468 ITR 136 (Calcutta)* was distinguishable. Reliance has also been placed in the case of *M/s Daniel Commodities Pvt. Ltd. Vs. ITO, Ward -6(1), Kolkata, ITA No. 645/Kol/2020 and CO No.*

4/Kol/2023, A.Y. 2009-10, dated 07.05.2024 to canvass the point that on facts section 68 of the Act was not exigible in the present case. Finally, reliance has been placed on the case of *M/s Hirak Vyapaar Pvt. Ltd. Vs. Principal Commissioner of Income Tax-1, Kolkata, ITAT/242/2023, IA No. GA/1/2023* passed by the Hon'ble' Calcutta High Court, dated 03.05.2024.

2.2. The Ld. Departmental Representative, on the other hand took us through the financial statements of the assessee company and stated that it was highly doubtful that a company having a total turnover of ₹ 12,873/- as on 31.03.2009 could become so attractive to presumably prudent businessmen that they would pay a substantial premium over the face value of each equity share to the extent that such quantum of premia were not commanded by even much better known and publicly held companies. The Ld. Departmental Representative also relied on the following case laws:

- (i) BST Infratech Ltd. reported in 468 ITR 111 (Cal)
- (ii) Balgopal Merchants reported in 468 ITR 136 (Cal)

The Ld. Departmental Representative, while relying on these cases said that it has been specifically recorded in the Balgopal Merchant case (supra) that the summons issued to Directors of the assessee company not being responded to, could be viewed adversely against the assessee, among other aspects. The Ld DR also relied on the findings of Ld. AO and read out various portions from the said order. He reiterated that the weak financials of the assessee company could not justify the premium charged on shares. He mentioned that there were good factual similarities between the cases of BST Infratech [reported in 468 ITR 111 (Cal)] and the case of Balgopal Merchants (P) ltd [reported in 468 ITR 136 (Cal)], vis-à-vis the present matter.

3. We have heard the rival contentions and considered the documents filed by Ld AR, as also the orders of authorities below. The points for consideration are whether the impugned transactions were justifiable on the strength of documents filed by the assessee or there was inadequacy in that regard. To begin with, we need to examine the contention of authorities below that the assessee had very weak financials to justify the premia charged on the shares issued to various subscribers. The Profit and Loss statement needs to be extracted for perspective:

Profit & Loss Account for the year ended 31st March, 2009

Particulars *31/03/2009*
Rs.

Income

Commodity Profit *12,873*

Expenditure

Audit Fees *2,758*

Bank Charges *574*

Company Secretarial Fees *1000*

Filing Fees *600*

Professional Fees *750*

General Expenses *1,939*

Printing & Stationary *1,869*

Preliminary Expenses *1,660*

Total *11,150*

Profit (+)/Loss(-) before tax *1,723*

Less Provision for Taxation *531*

Profit (+)/Loss(-) after tax
carried to Balance Sheet *1,192*

3.1. It is seen that the profit and loss account filed by the assessee paints a rather grim picture about the qualitative aspect of commercial activity which does not seem to justify the kind of premiums charged by the appellant. Thus, total revenues of Rs 12,873, with profit of Rs 1,723, for the year ending on 31.3.2009 is visible (pages 7-12 of the paper book), which cannot be said to indicate a healthy bottom-line or even a robust business model. Also, the total assets of this Company reveal the following position:

(a) Total Assets- Rs 1,35,781.19.

(b) Net Fixed Assets- Rs. Nil.

(c) Investments- Rs. 1,32,960.

(d) Net Current Assets- Rs 2,745.55

(e) Misc. Expenditure- Rs. 75.64

Considering this fact, it would have been all the more prudent to examine the genuineness etc. of the 17 concerns which chose to repose considerable faith in the commercial future of the assessee to trust them with huge sums of money. It would be seen from the summary of Ld. AO's findings [paragraph 1.1 supra; points (i) to (vii) supra] that this exercise was duly undertaken and the adverse conclusions flowed therefrom. It was under somewhat similar circumstances when the Hon'ble Jurisdictional High Court upheld the doubtful nature of share premium monies being given to companies having weak commercial credentials, in the case of *PCIT vs. BST Infratech Ltd. reported in [2024] 161 taxmann.com 668 (Calcutta)*. Hon'ble Calcutta High Court had occasion to observe that in the said case investors had no reason to invest huge amounts in business of that assessee and the entire transaction was done to circumvent the provisions of the Act. It has been held that the action of the assessing officer in treating such share application money u/s 68 of the Act as undisclosed cash credit was justified. The relevant portion from this order deserves to be extracted as under:

“36. In *Swati Bajaj*, the court held that based on the foundational facts the department has adopted the concept of "working backward" leading to the assessee. The department would be well justified in considering the surrounding circumstances, the normal human conduct of a prudent investor, the probabilities that may spill over and then arrive at a decision.

37. Thus the CIT(A) was right in adopting a logical process of reasoning considering the totality of the facts and circumstances surrounding the allegations made against the assessee taking note of the minimum and proximate facts and circumstances surrounding the events on which charges are founded so as to reach a reasonable conclusion and rightly applied the test that a reasonable/prudent man would apply to arrive at a conclusion. On facts we are convinced to hold that the assessee has not established the capacity of the investors to advance moneys for purchase of above shares at a high premium. The credit worthiness of those investors companies is questionable and the explanation offered by the assessee, at any stretch of imagination cannot be construed to be a satisfactory explanation of the nature of the source. The assessee has miserably failed to establish genuineness of the transaction by cogent and credible evidence and that the investments made in its share capital were genuine. As noted above merely proving the identity of the investors does not discharge the onus on the assessee if the capacity or the credit worthiness has not been established.

38. In the light of the above discussion, we hold that the assessee has failed to discharge legal obligation to prove the genuineness of the transaction and the credit worthiness of the investor which has shown to be so by a "round tripping" of funds. For all the above reasons, the revenue succeeds.

39. In the result the appeal is allowed, the order passed by the learned Tribunal is set aside and the order passed by the CIT(A) dated 28.11.2019 is restored and the substantial questions of law are answered in favour of the revenue.”

3.2. Considerable strength is also drawn from the case of *PCIT vs. NRA Iron & Steel (P.) Ltd.* reported in [2019] 412 ITR 161 (SC) in which share application money was approved for action u/s 68 of the Act even where the share applicants had filed confirmations and attempted to show that the transactions had taken place through normal banking channels, etc. In this case, the Hon'ble Apex Court has dealt with the issue from a legal perspective and some of the passages deserve to be extracted for reference:

“This Court in the land mark case of *Kale Khan Mohammad Hanif v. CIT* [1963] 50 ITR 1 (SC) and, *Roshan Di Hatti v. CIT* [1977] 107 ITR 938 (SC) laid down that the onus of proving the source of a sum of money found to have been

received by an assessee, is on the assessee. Once the assessee has submitted the documents relating to identity, genuineness of the transaction, and creditworthiness, then the Assessing Officer must conduct an inquiry, and call for more details before invoking section 68. If the assessee is not able to provide a satisfactory explanation of the nature and source, of the investments made, it is open to the revenue to hold that it is the income of the assessee, and there would be no further burden on the revenue to show that the income is from any particular source. [Para 8.2]

With respect to the issue of genuineness of transaction, it is for the assessee to prove by cogent and credible evidence, that the investments made in share capital are genuine borrowings, since the facts are exclusively within the assessee's knowledge. Merely, proving the identity of the investors does not discharge the onus of the assessee, if the capacity or credit-worthiness has not been established. [Para 8.3]

The Assessing Officer ought to conduct an independent enquiry to verify the genuineness of the credit entries. In the instant case, the Assessing Officer made an independent and detailed enquiry, including survey of the so-called investor companies from Mumbai, Kolkata and Guwahati to verify the credit-worthiness of the parties, the source of funds invested, and the genuineness of the transactions. The field reports revealed that the shareholders were either non-existent, or lacked creditworthiness. [Para 9]

The principles which emerge where sums of money are credited as Share Capital/Premium are:

- i. The assessee is under a legal obligation to prove the genuineness of the transaction, the identity of the creditors, and creditworthiness of the investors who should have the financial capacity to make the investment in question, to the satisfaction of the Assessing Officer, so as to discharge the primary onus.
- ii. The Assessing Officer is duty bound to investigate the creditworthiness of the creditor/ subscriber, verify the identity of the subscribers, and ascertain whether the transaction is genuine, or these are bogus entries of name-lenders.
- iii. If the inquiries and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack credit-worthiness, then the genuineness of the transaction would not be established. In such a case, the assessee would not have discharged the primary onus contemplated by section 68. [Para 11]

In the instant case, the Assessing Officer had conducted detailed enquiry which revealed that:

- i. There was no material on record to prove, or even remotely suggest, that the share application money was received from independent legal entities. The survey revealed that some of the investor companies were non-existent, and had no office at the address mentioned by the assessee. The genuineness of the transaction was found to be completely doubtful.

ii. The enquiries revealed that the investor companies had filed returns for a negligible taxable income, which would show that the investors did not have the financial capacity to invest funds ranging between Rs. 90 lakhs to Rs. 95 lakhs in the assessment year 2009-10, for purchase of shares at such a high premium.

iii. There was no explanation whatsoever offered as to why the investor companies had applied for shares of the assessee company at a high premium of Rs. 190 per share, even though the face value of the share was Rs. 10 per share.

iv. Furthermore, none of the so-called investor companies established the source of funds from which the high share premium was invested.

v. The mere mention of the income tax file number of an investor was not sufficient to discharge the onus under section 68. [Para 12]

The practice of conversion of un-accounted money through the cloak of Share Capital/Premium must be subjected to careful scrutiny. This would be particularly so in the case of private placement of shares, where a higher onus is required to be placed on the assessee since the information is within the personal knowledge of the assessee. The assessee is under a legal obligation to prove the receipt of share capital/premium to the satisfaction of the Assessing Officer, failure of which, would justify addition of the said amount to the income of the assessee. [Para 14]

On the facts of the present case, clearly the assessee company - respondent failed to discharge the onus required under section 68, the Assessing Officer was justified in adding back the amounts to the assessee's income. [Para 15]"

3.3. It is seen that in another case on somewhat similar facts, the Hon'ble Calcutta High Court in the case of *Balgopal Merchants (P.) Ltd. vs. PCIT* reported in [2024] 162 taxmann.com 465 (Calcutta) has held that action u/s 68 of the Act was justified. This case law has some similarity of facts with the present matter as the question of non-appearance of Directors for examination and very weak financials, as in the present case, were factors leading to the dismissal of assessee's appeal. The head note of this case law may be extracted for reference:

Section 68 of the Income-tax Act, 1961 - Cash credit (Share application money) - Assessment year 2012-13 - Assessee-company was engaged in business of trading and dealing in land - Assessing Officer noted that business of assessee was only investment and during previous year, assessee had received huge share application money along with premium - Assessing "Officer issued summons under section 131 to directors of assessee-company calling upon them to produce proof of identity/PAN card, list of companies where assessee was a director or shareholder, etc. - However,

there was no compliance of summons - Assessing Officer, thus, completed assessment under section 143(3) by adding amount of share application money received along with premium amount under section 68 on ground that it was only a facade for conversion of unaccounted money - It was noted that assessee was a newly incorporated company and it was in first year of its operation that to a broken year - There was no noticeable business activity or book value/earnings per share which could justify very high share premium - Assessee had itself claimed that there was no noticeable business activity during year - Whether thus, assessee having failed to establish basic ingredients required to be established under section 68 i.e., identity, creditworthiness and genuineness of transaction of share capital received, addition made under section 68 was valid - Held, yes [Paras 25, 30 and 31”

3.4. A close reading of the case laws cited (supra) reveals that mere filing of confirmations and the income tax details etc. are not enough to justify payment of monies as share premium when the financial aspects of the recipient company would not merit such investments under any kind of prudent commercial consideration, at least on the basis of financials presented before us in the detailed paper book filed by the appellant. In the present case, it is recorded in paras 10 and 11 at page 6-7 of Ld. AO's order that summons were issued to the Principal Officer of the Companies for establishing the genuineness, identity and creditworthiness aspects of the transactions, however, most of the summons/notices sent to the Directors/Principal Officers of the assessee company and shareholders were either returned by the postal authorities or remained uncomplished with. It is evident that even those share applicants who did file certain documents, were not sufficient in the eyes of law to discharge the burden cast on the assessee regarding proving the genuineness, etc of the transactions. The profit and loss account statement extracted (supra) would normally paint a grim picture to any prudent investor, however, in this case it seems to have encouraged 17 entities to transfer huge sums of money by way of share premia, ranging from Rs. 90 to Rs. 900 per equity share.

3.5. At this stage we also need to consider the case of *S. A. Builders* (supra) relied upon by the Ld. AR to canvass the point that the AO cannot

sit in judgement over commercial decisions taken by any assessee. It needs to be mentioned that the case under reference was on entirely different aspects as the Lordships of the Hon'ble Supreme Court were dealing with matters of expenditure u/s 36(1)(iii) and 37(1) of the Act. In fact, interestingly it has been recorded that:

“in the instant case, neither the High Court nor the Tribunal and other authorities had examined whether the amount advanced to the sister concern was by way of commercial expediency. [Para 28]...The High Court and other authorities should have examined the purpose for which the assessee advanced the money to its sister concern, and what the sister concern did with the money, in order to decide whether it was for commercial expediency, but that had not been done. [Para 30]”

Thus, even in this case law there is a direction to examine the issue on the touchstone of commercial expediency. Also, the argument pertaining to the businessman or an investor, being the best judge of where he wants to deploy funds, if taken to be a binding dictum, unfettered by any authority raising doubts on its justification, then one can speculate that the Legislature would have taken away all powers of enquiry from an Assessing Officer and an expenditure claimed would, perforce, always have to be allowed. This would render sections like 37(1) and 36, etc otiose. Reverting back to the matter at hand, it is seen that the doubts about the bonafides of the impugned transactions triggered the investigation by the Ld. AO, the intentions behind which cannot be simply dismissed by contending that such commercial decisions are beyond the purview of enquiry, as the businessman would be the best judge in such matters.

3.6. It is also required to advert to the cases relied upon by the Ld. AR, in his favour. Thus, in the case of *M/s Daniel Commodities Pvt Ltd* (supra), it is seen that the Coordinate Bench has substantially dealt with the issue of reopening u/s 147 of the Act and also the issue of Share Capital. For the latter the Coordinate Bench has quoted with favour from the CIT(A)'s finding and after extracting extensively from the said order, have decided

the issue in favour of the assessee by holding that all relevant documents were supplied by the assessee to the AO and, importantly, not only were all notices u/s 133(6) of the Act were complied with, but summons issued by the AO to the Directors were also complied with. The statements of the Directors were recorded by the Ld. AO. These facts have been recorded with favour in paragraph 14 of this order of ITAT. It is clearly evident that the present case differs substantially with the M/s Daniel Commodities case (supra), on facts, when we confine ourselves to finding on section 68 of the Act. Furthermore, regarding the case of Aastha Vincom Pvt Ltd (supra), it is seen that in the said order the Coordinate Bench was seized of second round proceedings, initiated after an order u/s 263 of the Act, in which case apparently on same set of facts the first round AO had accepted the claim of assessee about the genuineness of share premium. Also, this order was passed on 26.8.2022, which pre-dates the Hon'ble Jurisdictional High Court's orders in the cases of BST Infratech (supra) and Balgopal Merchants (supra) and thus the Hon'ble Members of the Coordinate Bench did not have the benefit of being guided by these binding Court orders. Again, in the case of Magestic Vyapaar Ltd (supra) the Coordinate Bench has distinguished the Balgopal Merchants case (supra) in para 8 of their order by clearly recording that in the case before the Hon'ble High Court the summons issued to the Directors were not complied with, whereas in the case before the Coordinate Bench the Directors had duly complied with the summons. It deserves to be noted that in the present case also there was inadequate compliance to summons, etc and thus, not only is the case of Magestic Vyapaar distinguishable but it would tend to support any view against this Appellant. Lastly, the case of Hirak Vyapaar Ltd of the Hon'ble Calcutta High Court is required to be discussed. In this case the Hon'ble High Court has observed, with favour, that there was an elaborate fact finding recorded in the impugned ITAT's order through which the compliance to notices issued by the Ld AO and the positive examination of the fiscal

health of that Respondent (assessee) was noted and recorded. On this basis it has been held that there was no question of law arising in the said appeal. In the present case, as would be discussed later in this order, there is similarity of facts to the cases relied upon by the Ld. DR and not the case of HIRAK VYAPAR (supra).

3.7. It is seen that the appellant has a very nominal income, during the year under consideration, as discussed elsewhere in this order. It is clear that such sub-par financials cannot justify high premiums per share, as recorded by the Ld. AO, and affirmed by the Ld. CIT(A), to any prudent investor. Accordingly, the insistence by the Ld. AO for ensuring the presence of the Directors of the appellant company for verification was justified. Merely the filing of financial statements, income tax details and bank statements will not be enough to prove the genuineness of the transaction in a closely held company, which is certainly distinct from a widely held company in which the general public is invited to invest and, needless to say, the public invests on a fair appraisal of the financials and future prospects of the company. In this case, the Ld. AO was right in insisting on more verification than whatever the appellant was willing to submit before him. In this regard a recent case of the Hon'ble Calcutta High Court deserves to be discussed as well. In *PCIT vs. One Point Commercial (P.) Ltd.* reported in [2024] 161 taxmann.com 737 (Calcutta) on similar facts the Hon'ble Jurisdictional High Court has given an order which will help in deciding this case conclusively. Certain portions deserve to be extracted from the said order as under:

“4. The Assessing Officer while completing the assessment under Section 143(3) of the Act by order dated 24th March, 2015 held that the assessee has failed to prove any one of the three ingredients which are required to be proved under Section 68 of the Act. Several decisions were referred to and the Assessing Officer concludes that there was no documents produced by the assessee to substantiate their claim. This order was affirmed by the Commissioner of Income Tax (Appeals)-9 [CIT(A)] by order dated 21st January, 2019 holding that merely furnishing documents in a routine way does not explain the source of creditworthiness of the party. Further, it has been held that the basis on which premium has been charged for the shares has not been

*explained; no efforts have been made with the help of financial statements to justify the quantum of share premium charged. The CIT(A) placed reliance on the decision of Kolkata Bench of the Tribunal in the case of ITO v. Blessings Commercial (P.) Ltd. [2018] 91 taxmann.com 176 in ITA 271/Kol/2014, dated 28th June, 2017 and other judgments and ultimately the appeal was dismissed. On an appeal preferred by the assessee before the Tribunal, the concurrent findings recorded by the Assessing Officer and the CIT(A) have been set aside and the appeal has been allowed. The impugned order passed by the Tribunal runs to 14 pages and in **paragraph 11** (emphasis added) of the impugned order, the learned Tribunal has recorded that from the bare perusal of the paper book and the documents placed, it is revealed that all the share applicants are income tax assesseees, they are filing their income tax returns, share application form and allotment letter is available on record which were filed in response to the notice under section 133(6), share application money was made by account payee cheques, details of the bank accounts belonging to the share applicants and their bank statements have been furnished and all the share applicants are having substantial creditworthiness represented by their capital and reserves. Though such is the findings recorded by the Tribunal, it is not supported by facts. The Assessing Officer has held that the assessee was a Private Limited company which cannot issue shares in the same manner in which Public Limited company does and in so far as creditworthiness of the share subscribers is concerned, there must be positive evidence to show the nature and source of resources of the share subscribers and if the assessee was serious enough to establish his case, it ought to have complied with the notices/letters issued by the Assessing Officer and **ought to have produced the directors of the subscribing companies before the Assessing Officer so that they could explain the sources from which the share subscription was made** (emphasis added). It is stated that there is no compliance either from the end of the assessee company or from the end of the alleged subscriber company. This finding recorded by the Assessing Officer as affirmed by the CIT(A), if required to be set aside by the learned Tribunal, reasons have to be assigned. Therefore, we find that the conclusion arrived at by the learned Tribunal in paragraph 11 is insufficient to support its ultimate conclusion in allowing the assessee's appeal. Therefore, we are of the view that the matter has to be remanded back to the Tribunal for fresh consideration."*

3.8. It is clear that merely filing income tax details, share application form and allotment letter, bank details and details about the creditworthiness of the share applicants is not enough to prove a transaction from the point of view of Section 68 of the Act. In this case also, the appellant is seen to have filed documents, by and large, as mentioned in para 11 of the ITAT's order in M/s One Point Commercial (*supra*), but following the extracted portions from the Hon'ble Jurisdictional High Court's cases in BST Infratech (*supra*) and the Hon'ble Calcutta High Court's order in the case of One Point Commercial Pvt Ltd, as extracted (*supra*), it is held the onus cast on the appellant for escaping

from the rigours of provisions of Section 68 of the Act have not been discharged. Considering the case laws cited (supra) the financial health of the assessee and the inadequate discharge of onus, we hold this case to be a fit case for application of Section 68 of the Act and thereby confirm the impugned addition.

4. So far as the contention of the Ld. AR that since the order passed u/s 147 of the Act was bad in law for want of sanction of the competent authority u/s 151 of the Act for issuing notice u/s 148 of the Act and therefore, the consequent revision order passed by the Ld. PCIT u/s 263 of the Act was also bad in law and further that consequently the order passed by the AO u/s 143(3) read with section 263 of the Act in compliance of the revision order of the Ld. PCIT was also bad in law is concerned, we note that in this case the original return of the assessee was processed u/s 143(1) of the Act. As per the relevant provision of section 151 of the Act as applicable for relevant assessment year 2009-10, the sanction of the competent authority i.e. Joint Commissioner of Income Tax was required if the original order would have been passed u/s 143(3) of the Act and not u/s 143(1) of the Act, therefore, there is no merit and the aforesaid contention raised by the Ld. AR. So far, the other contentions of the Ld. AR relating to validity of the earlier order passed u/s 147 of the Act and thereby raising the contention about the validity of the subsequent orders is concerned, we note that the said contentions raised by the Ld. Counsel do not hit at the very jurisdiction of the Assessing Officer to pass order u/s 147 of Act and therefore, the above contentions have no merit at this stage. Also, the contentions in Grounds of Appeal 2 & 3 have been addressed in the body of this order in as much as the fact finding done by the Ld. AO has been extensively dealt with.

5. In the result, the appeal of the assessee is dismissed.

Order pronounced in the court on 23.12.2024

Sd/-

[Sanjay Garg]
Judicial Member

Dated: 23.12.2024.

AK, PS

Copy of the order forwarded to:

1. M/s Bhikshu Polymers Pvt. Ltd.
(Earlier known as M/s Jeevan Commotrade Pvt. Ltd.)
2. Income Tax Officer, Ward-6(2), Kolkata
3. CIT(A)-
4. CIT-
5. CIT(DR)

//True copy//

Sd/-

[Sanjay Awasthi]
Accountant Member

By order

Assistant Registrar, Kolkata Benches