

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, KOLKATA

**BEFORE SHRI RAJESH KUMAR, AM
AND
SHRI PRADIP KUMAR CHOUBEY, JM**

**ITA No.1481/KOL/2024
(Assessment Year: 2012-13)**

**Income Tax officer,
7th floor, NADT Building, Aaykar
Bhavan Poorva, 110 Shantipally,
Kolkata-700107**

Vs.

**Amodini Vyapar Pvt. Ltd.
Kalpanalaya, Avirampur, PO-
Budge Budge,
Kolkata-700137, West Bengal**

(Appellant)

(Respondent)

PAN No. AACCA2332G

Assessee by : Shri Sunil Surana, AR
Revenue by : Shri Pradip Kumar Biswas, DR

Date of hearing: 26.11.2024
Date of pronouncement : 31.12.2024

ORDER

Per Rajesh Kumar, AM:

This is an appeal preferred by the Revenue against the order of the National Faceless Appeal Centre, Delhi (hereinafter referred to as the "Ld. CIT(A)") dated 05.07.2023 for the AY 2012-13.

02. The only issue raised by the Revenue is against the deletion of addition of ₹3,55,65,468/- as made by the Id. AO u/s 68 of the Act towards unexplained cash credit being share capital/ share premium.
03. The facts in brief are that the assessee filed the return of income showing total income at ₹18,400/-. Thereafter the case of the assessee was selected for scrutiny under CASS and statutory notices were duly issued and served upon the assessee. The assessee filed before the Id. AO the computation of income, audited financial

statements for the year on 22.10.2013 on the basis of which the Id. AO observed that the assessee has received huge share capital/ share premium during the year of ₹3,54,76,000/- vis a vis the net profit of the company being very meagre to the tune of ₹1,20,461/- in F.Y. 2010-11 and ₹1,01,321/- for F.Y. 2011-12. The assessee also furnished the details of allottees, their IT returns, etc. and informed the Id. AO that shares were issued at a premium of ₹490/- with face value of ₹10 each. The Id. AO also issued summons u/s 131 of the Act to the shareholders for independent verification of the transactions of share subscription, however, nobody turned up and finally, the amount of capital share/ share premium was treated as bogus and unexplained and added to the income of the assessee in the assessment framed vide order dated 17.03.2015 passed u/s 144 of the Act.

04. The assessee preferred the appeal before the Id. CIT (A), who allowed the appeal of the assessee. The Id. CIT (A) after taking into consideration the contentions/ submissions of the assessee deleted the addition by observing and holding as under:-

"5. Decision:

The appellant in its ground of appeal has assailed the AO in making the assessment under section 144 without allowing the assessee any reasonable opportunity of being heard and in adding Rs. 3,54,76000/- as unexplained cash credit u/s 68 of the Act. Further the assessee assailed the AO in making disallowance of Rs. 88,648/- under section 14A read with Rule 8D when neither expense was incurred for earning any exempt income nor any satisfaction was recorded having regard to the accounts of the assessee before making such disallowance. The AO relied on the decision of the ITAT in case of Bisakha Sales Pvt. Ltd. vs CIT-II, Kolkata in ITA No. 1493/KOI/2013 and proceeded to add the share premium u/s 68 of the Act.

5.1 The appellant in its submission submitted that the assessment proceedings were started at the fag-end of the assessment year when the proceedings were getting barred by limitation. The appellant submitted that it had complied with all the requisite information required by the AO for completion of the

assessment proceedings. The appellant submitted that it had filed the confirmation letters along with the PAN, the financial statements and acknowledgement of filing of the return of the subscribers, along with the bank statement highlighting the source of investment by the shareholder thereby discharging the onus cast on it to prove the source, identity, creditworthiness and genuineness of the transactions. The AO in total disregard of the submission did not accept its submission and added the share premium u/s 68 of the Act relying on the order of Hon'ble ITAT in the case of M/s Bisakha Sales Pvt. Ltd., without appreciating the facts of that case and the facts of the appellants case and also when there is a plethora of cases supporting the contention of the appellant.

5.2 The submission of the appellant is examined. The AO in the assessment order u/s 144 of the Act noted that in response to the notice u/s 142(1) of the Act the AR of the appellant filed reply giving details of the allottees and the copies of their return. The AO further noted that summons u/s 131 (1) of the Act were issued for personal hearing to all the shareholders but none of them attended. The AO then asked the appellant to produce the books of accounts within a specific time and date which was also not complied with. The AO also noted that "some replies" were received in section. The AO further stated that unless the shareholder does not appeal before him to give evidence on oath u/s 131(1) of the Act r.w CPC, 1908 the transaction cannot be treated to be genuine.

5.3 The submission, the assessment order is perused. The AO has stated that there was submission by the appellant, which establishes that there was compliance and that it was not a case of non-compliance as stated out by the AO in framing the order u/s 144 of the Act. Further the AO issued summons u/s 131(1) of the Act for personal attendance which was not adhered to by the shareholders. It was also stated by the AO that some replies were received in section. The AO is not specific which compliance and by which shareholder was made, however the AO proceeded to add the share premium u/s 68 in the order framed u/s 144 of the Act. The appellant in its detailed submission filed the copies of the ROI, copy of confirmations, forms of application for equity shares etc., their balance sheet etc. The appellant further relied on a number of judicial decisions to support its grounds of appeal. The issue of disallowance by the AO on non-compliance of notice u/s 131(1) of the Act has been considered by the ITAT-Delhi in *United Foods (P.) Ltd. v. ACIT in ITA /9681/2019*. The relevant part of the order is reproduced below:

"8. We have carefully considered the rival submissions and perused the assessment order and the first appellate order. The material referred to relied upon were also perused. The disallowance of Rs. 3,02,39,330/- on account of job work expenses is in controversy.

8.1 As stated, the assessee company was, at the relevant time, engaged in the business of manufacturing, processing and trading of rice and other food grains. In the proceeding assessment years, the assessee was engaged only in trading activity of commodity i.e. rice. The processing activity begun during the year under review as reported in



the tax audit report. The quantum jumps in the turnover on account of processing activity, as reflected in financial statement, also evidences the integration of processing activity. The fixed assets/machineries were acquired during the year, as shown in the fixed asset schedule to achieve the requirement of processing/manufacturing activity. The assessee claims to have incurred job work expenses of Rs. 3.02 crore which amounts to 1.28 % of the turnover. The payment towards job work charges were paid mainly to four job work contractors situated in Gandhidham, Gujarat. The Assessing Officer and CIT(A) has rejected the job work expenses claimed by the assessee on the ground that notice issued under section 133(6) and thereafter summons issued under section 131 to the contractors have remained uncomplained with, by such contractors. In this regard, it is the case of the assessee that the payments to job work providers have been subjected to TDS provisions and the job work income is correspondingly reflected in the respective return of income filed by the contractors which is placed on record. Besides, the necessity of incurring expenses is also demonstrated circumstantially; viz. (i) acquisition of fixed assets and increase in Gross block by a nearly triple (ii) process activity translating in corresponding increase in turnover. Furthermore, the income tax return filed by the contractors establishes the identity of job work service providers with their addresses and therefore the onus on the assessee towards identification and genuineness of transaction is manifestly discharged by the overwhelming documentary evidences. A mere physical presence or otherwise of such service providers will not alter the factual matrix in the absence of any suspicious circumstance brought on record. The Assessee also contends that the authority issuing summons should judge the relevancy of documents or books of accounts before issuing summons for production of documents. There is no averment in this regard in the orders of the lower authorities on such co-relation and application of mind

8.2 It is further case of the assessee that the summons issued to the parties situated in Gujarat for personal attendance in Delhi is an obvious case of overreaching the exercise of power vested under section 131 of the Act read with provisions of CPC. In the instant case, where the contractors are situated at a remote area situated in excess of distance of 500 kms, witnesses could not be ordered to attend in person before the Assessing Officer having regard to the order XVI Rule 19 of Civil Procedure Code 1908. The assessee contends that the Assessing Officer has the same powers as are vested in a Court in Civil Procedure Code 1908 while trying a suit, for exercise of power vested under section 131(1) of the Act. This being so, the right course of action available to the Assessing Officer was to issue 'commission' under S. 131(1)(d) of the Act at the nearest place of the situation of the contractors for personal attendance, enquiry and local investigations. The power to issue commission is identical with section 75 of the Code of Civil procedure 1908. It is further case of the assessee that the Assessing Officer having committed serious fault in exercise of omnibus power and



cannot be given second round of proceedings to correct his own lackadaisical approach. Since the tangible evidence by way of ITR of the contractor reflecting corresponding income is already placed on record coupled with the fact that reimbursements have been made through banking channel after deduction of tax at source, there is no warrant to disbelieve the version of the assessee. No fallacy in the documents presented before revenue authorities has been brought on record either.

8.2.1 This apart, the assessee also points out that the business operations of the assessee is closed in the subsequent years and the money lent by the banks to the assessee were declared as non-performing assets (NPA) in September 2016 by the Punjab National Bank. Hence, all the assets were securitized on behalf of the bank under SARFAESI Act 2002 and thereafter mostly auctioned to realize the dues. The company is not doing business anymore and is rendered without any staff, financial records and other support and backup. Hence, a fresh round of inquiry on demonstrable facts will not serve any useful purpose. The assessee asserts that on the face of speaking documents, it is difficult to visualize a different position emerging from such belated enquiry, if permitted, after lapse of considerable time and the closure of the business of the assessee. A reference was made to the judgment of the Hon'ble Supreme Court in *Union of India v. CITI Bank N.A.* [2022] 141 taxmann.com 409/174 SCL 165 among others.

8.3 The reasons broadly condensed in the preceding paragraphs justifies the plea of the assessee. The assessee has successfully demonstrated the incurring of job work expenses on the basis of clinching evidences, both direct and circumstantial. No adverse materials to controvert these tell-tale evidences are on record at present.

8.4 Shorn off the non-compliance of summons served under section 131 of the Act, the assessee has filed formidable evidences to identify the contractors as well as the factum of incurring job work expenses as demonstrated by the income tax returns of the service providers. TDS has been deducted on such expenses and reflected in the return of income of the contractors. The increase in turnover, addition of new line of business, i.e., processing of rice and substantial increase in the fixed asset are vital indicators of plausibility of the explanation offered by the assessee in this regard. In this factual matrix, in the absence of any culpable evidence in possession of revenue, the job work expenses deserve to be allowed, on a standalone basis, as incurred in the ordinary course of business.

8.5 Now we turn to address the grievance of revenue on non-compliance of summons. Admittedly, the summons under section 131 were duly served on the contractors but had remained un-responded. In this backdrop, the observations of Hon'ble Madras High Court in *S. Hastimal v. CIT* [1963] 49 ITR 273 are worth noting wherein an impetus was given on the difficulty on the part of any assessee to explain a



transaction after a decade. Similar view has been recently expressed by the Hon'ble Supreme Court in CITI Bank case (supra).

8.6 This apart, we are alive to the concern of the assessee that owing to closure of business and in the absence of any support service available at the end of the assessee, it is not positioned to defend its stand on outcome of such inquiries after such a long gap and will cause onerous burden on the assessee if such inquiries are continued even after a decade.

8.7 Having regard to these ground realities read with overwhelming tangible documents suggesting the state of affairs to true, we are not inclined to engage the department in futile exercise by second round of proceedings and rake up a stale cause. Needless to say, the assessee is not required to demonstrate the bona fides to the hilt and no infallible proof is required to be furnished to the satisfaction of the Revenue in every case. In the totality of circumstances so weighed cumulatively, the plea of the Assessee deserves to be accepted in the peculiar facts of the case.

9. The action of the CIT(A) is thus set aside and the addition/disallowance on account job-work charges are reversed and cancelled.

10. In the result, the appeal of the Assessee is allowed."

5.4 The addition in the instant case had been made by the AO on non-compliance of notice u/s 131(1) of the Act by the shareholder, even when the relevant details had been filed by the appellant in the course of the assessment proceedings and also at the appellate stage. The AO had not controverted the submission made by the appellant therefore following the Hon'ble ITAT-Delhi the addition made by the AO for non-compliance by the shareholders is unsustainable. The addition made is accordingly deleted. The ground of appeal is allowed.

5.5 The other ground of appeal relating to disallowance u/s 14A of the Act amounting to Rs. 88468/-. The appellant in its submission submitted that there was no exempt income earned claimed by the appellant. The submission is considered, the assessment order is perused. The AO has mechanically proceeded to calculate expenditure u/s 14A of the Act. without recording reasons and pointing out the exempt income claimed by the appellant. The judicial decisions are clear that where there is no exempt income earned, there cannot be disallowance u/s 14A of the Act. Accordingly, the addition made is deleted. The ground of appeal is allowed."

05. The Ld. D.R contended that the share application money/share capital/share premium was received by the assessee from various subscribers who were not having any creditworthiness. The Ld. D.R



submitted that replying to the notices u/s 131 of the Act did not mean that the ingredients as envisaged in section 68 of the Act were duly satisfied. Besides the Id DR stated that the enquiries and investigation could not be carried out by the AO when the subscribers did not appear personally in compliance to summons issued u/s 131 of the Act. Therefore the Ld. D.R ,therefore, submitted that the addition was rightly made by the AO. The DR argued that the Ld. CIT(A) has just deleted the addition on the ground that the assessee furnished all the evidences and AO failed to carry out further enquiry based on these evidences while the important aspect of non compliance to summons to the summons issued u/s 131 of the Act. The Id DR therefore prayed that the order of Id CIT(A) may be reversed and that of AO be restored.

06. Ld. Counsel for the assessee vehemently submitted before the bench that the order passed by the Ld. CIT(A) is cogent , reasoned and passed after taking into account the facts record and various decisions given by different judicial forum. The Ld. AR ,while referring to the evidences filed by the assessee as well as by the subscribers, submitted that the assessee as well as the subscribers have filed all the evidences proving the identity and creditworthiness of the subscribers as well as genuineness of the transactions. The Ld. AR referred to the replies filed in response to summons u/s. 131 of the Act and submitted that the AO has not pointed out any defect or deficiency in these evidences, which abundantly proved the three conditions of section 68 of the Act. The Ld. AR stated that where the assessee has filed all the evidences qua the subscribers consisting of names and addresses, PANs, audited accounts, bank statements etc. and AO has not carried out any further verification, then the addition cannot make the addition merely on the ground that there was no

compliance to summon issued u/s. 131 of the Act. The Ld. AR stated that even the information sought by the AO in the summons issued u/s. 131 of the Act were duly complied. The Ld AR thus heavily defended the appellate order by relying on the following decisions:

- (i) *CIT Vs. Orissa Corporation Pvt. Ltd. (1986) 159 ITR 78 (SC);*
- (ii) *CIT Vs. Orchid Industries Ltd. 397 ITR 136 (Bom);*
- (iii) *Crystal Networks Pvt. Ltd. Vs. CIT 353 ITR 171 (Kol);*
- (iv) *ITO Vs. M/s. Cygnus Developers India Pvt. Ltd.(ITA No. 282/Kol/2012)*
and
- (v) *Joy Consolidated Pvt. Ltd. Vs. ITO (ITA No. 547/Kol/2020).*

07. After hearing the rival contentions and perusing the material on record, we find that the assessee has furnished before the AO as well as the Ld. CIT(A) all the evidences qua raising the share capital/ share premium during the year comprising the proofs of PAN cards, list of directors with share holders with DIN, copies of ITRs, copies of bank statements with full narration as to credit and debit entries, source of funds in the hands of investors etc. We note that assessee during the year has issued equity shares of face value of Rs.10/- each at a premium of ₹490/- to various subscribers from whom the assessee has received Rs. 3,54,76,000/-. We find that though the assessee company/investors did not comply with summon u/s 131 by producing the director / principal officer/ individual of the share subscribing companies however, we note that they have filed all the details before the AO. We note that the AO has not done any verification on the evidences furnished by the assessee as well as by the share subscribers independently and has not pointed any defect of any kind whatsoever. We note that the AO has only harped on the fact that the directors did not turn up on the date and time giving for personal deposition. Besides the AO has harped on the fact that these



shares were allotted at very high premium by ignoring the facts that there was no bar on issue of shares of high premium in the AY 2012-13 and the same was applicable from AY 2013-14 because Clause (viib) to Clause 2 section 56 inserted by Finance Act, 2012 w.e.f 01.04.2013. Similarly the provisions in Finance Act, 2012 that the assessee company issuing share premium have to prove source of source has been inserted with effect from 1.4.2013 and is not applicable in the case of assessee for AY 2013-14 onwards. The case of the assessee finds support from the decision of the Hon'ble Bombay High Court in the case of CIT vs. Gangadeep Infrastructure Pvt. Ltd. in 80 taxmann.com 272 (Bom). Therefore, the appellate order passed by the Ld. CIT(A) directing the AO to delete the addition is based on the correct appreciation of facts on record and the ratio laid by the Hon'ble Courts in the various decisions as discussed hereinbelow. In our opinion, the addition cannot be made merely on the ground that the summon issued u/s 131 to the directors of the assessee company were not complied with whereas on the other hand the assessee has filed all the evidences called for by the AO qua the subscribers. We also noted that even the notice issued u/s 131 of the Act was partly complied with as all the details called for by the AO were duly furnished nonetheless no personal appearance was made for deposition. The case of the assessee finds support from the following decisions .The Hon'ble Supreme Court in the case of CIT Vs Orissa Corporation Ltd. (supra) has held as under:

"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. 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."

08. 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 unserved 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."

09. The case of is also covered by the decision of the coordinate bench by 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."

010. 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 .

011. In the instant case before us also, the assessee has furnished all the evidences proving identity and creditworthiness of the investors and genuineness of the transactions but AO has not commented on these evidences filed by the assessee. Besides the investors have also furnished complete details/evidences before the AO which proved the identity, creditworthiness of investors and genuineness of the transactions. 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 uphold the order of Ld. CIT(A) by dismissing the appeal of the revenue.

012. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 31.12.2024.

Sd/-
(PRADIP KUMAR CHOUBEY)
(JUDICIAL MEMBER)

Sd/-
(RAJESH KUMAR)
(ACCOUNTANT MEMBER)

Kolkata, Dated: 31.12.2024

Sudip Sarkar, Sr.PS



Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT
4. DR, ITAT,
5. Guard file.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Kolkata