

आयकर अपीलीय अधिकरण
कोलकाता 'बी' पीठ, कोलकाता में
**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'B' BENCH, KOLKATA**

श्री राजेश कुमार, लेखा सदस्य
एवं

श्री संजय शर्मा, न्यायिक सदस्य
के समक्ष

Before

**SRI RAJESH KUMAR, ACCOUNTANT MEMBER
&
SONJOY SARMA, JUDICIAL MEMBER**

**I.T.A. No.: 290/KOL/2023
Assessment Year: 2012-13**

***Nano Infra Promoters Pvt. Ltd.....Appellant
[PAN: AADCN 5229 Q]***

Vs.

ITO, Ward-7(1), Kolkata.....Respondent

Appearances by:

Assessee represented by – Sh. Miraj D. Shah, A/R.

Department represented by – Sh. P.P. Barman, Addl. CIT, Sr. D/R.

Date of concluding the hearing : December 6th, 2023

Date of pronouncing the order : February 29th, 2024

ORDER

Per Rajesh Kumar, Accountant Member:

This appeal preferred by the assessee is against the order passed by Learned Commissioner of Income Tax (Appeals) [in short Id. 'CIT(A)']-NFAC, Delhi dated 20.02.2023 for the Assessment Year (in short 'AY') 2012-13.

2. The only issue raised by the assessee is the confirmation of addition of Rs. 1.21 Crore by ld. CIT(A) as made by the Assessing Officer (in short ld. 'AO') on account of share capital/share premium being unexplained cash credit u/s 68 of the Act.

3. The facts in brief are that the AO during the course of assessment proceedings observed that the assessee has issued equity shares of face value of Rs. 10/- each at an average premium of Rs. 345.88 whereas the income declared by the company during the year was NIL. Accordingly, notices u/s 142(1) of the Act issued along with questionnaire calling upon the assessee to file the details *qua* the subscribers/investors and prove the identity and creditworthiness of the subscribers and the transactions which was replied by the Counsel of the assessee Sh. K.L. Agarwal on 21.09.2015 by filing submissions and thereafter the case was adjourned to 29.01.2015. The AO also issued summons u/s 131 of the Act to the director of the assessee company in order to secure their presence. However, no compliance made to the said summons. Finally, the AO added the entire share capital and share premium to the tune of Rs. 1.21 Crore to the income of the assessee vide order dated 13.02.2015. as unexplained cash credit on the ground that there was no compliance to the summons issued u/s 131 of the Act and therefore, identity, creditworthiness of the subscribers and genuineness of the transactions could not be examined.

4. In the appellate proceedings ld. CIT(A) dismissed the appeal of the assessee on account of non-appearance after briefly discussing the issues on merit and giving the same reasoning that

the assessee could not prove the three ingredients as envisaged by the provisions of Section u/s 68 of the Act.

5. After hearing the rival contentions and perusing the material on record, we find that the assessee has filed all the details/evidences before the AO *qua* the subscribers namely ITRs, balance sheets, addresses and bank accounts before the AO. However, the AO without doing any further investigation treated the share capital/share premium as unexplained cash credit on the ground that summons issued u/s 131 of the Act were not complied with. In our opinion, once the assessee has filed the evidences as required by the AO in order to prove the share capital/share premium then the assessee has discharged his onus of filing the documents initially and the burden shifts to the Revenue. In other words, the AO has to carry out further verification/examination of these evidences and then come to a conclusion as to how the share capital/share premium is not proved and not merely on the ground that the assessee has not complied with the summons issued u/s 131 of the Act. The amounts received by the assessee cannot be added to the income of the assessee for just non-compliance of summons. The case of the assessee finds support from the decision of Coordinate Bench in the case of *Yash Movers Pvt. Ltd. vs. ITO* in *ITA No. 601/KOL/2023* order dated 22.08.2023 the operative part of which is extracted below:

“5. After hearing the rival contentions and perusing the material on record, we note that the assessee during the year has raised Rs. 18,00,000/- from three parties as stated hereinabove. The assessee has filed the necessary evidences comprising names, addresses,

PANs, bank statements, ITRs, balance sheet, profit and loss accounts, share allotment letter, share application with bank statement besides filing the bank statements of the assessee thereby evidencing the receipt of amounts of from these investors. We note that the assessee is a trading in shares and textiles and all the subscribers were also trader in textiles. We also note that it's customary in the business of textiles to business dealings in cash and so deposit into the banks accounts out of sales proceeds is in the normal course of business. Therefore mere fact that the cash has been deposited in the bank accounts of the subscribers immediately one or two days before issuance of cheques in favour of the assessee will not perse prove that these transactions were non-genuine. We have also examined the evidences filed before us in respect of share subscriber companies. We note that these companies are in fact having business in textiles and their turnover justified the cash deposits. Therefore the reasoning given by authorities below without looking into the nature of business of the assessee and the subscribers qua the cash deposit in the account of the subscribers before the date of the payment to the assessee is not sustainable. Besides the mere fact that the assessee has failed to produce the principals / directors of the subscribing company due to which investment could not be verified cannot be a ground for making addition in the hands of the assessee. The Ld. CIT(A) has upheld the order of AO simply reiterating the finding of the AO that principals/directors of the subscribers were not produced and source was not explained. However both the authorities have failed to point out any defects in the documents/evidences furnished by the assessee and simply relied on the theory principal officers/ directors of the assessee company were not produced. In our opinion, the addition is based upon conjecture and surmises and not on the records which were available before the authorities below. Moreover the addition cannot be made on the basis of that principal officer/ director of the company were not produced. The case of the assessee finds support from the decision of Co-ordinate Bench in the case of ITO vs. Naina Distributors Pvt. Ltd. in ITA NO. 651/Kol/2020 for AY 2012-13 dated 04.01.2023. The operative part is reproduced as under:

5. After hearing the rival contentions and perusing the material on record, we observe that the assessee has raised a share capital of Rs. 4,67,50,000/- by issuing equity share of face value of Rs. 10/- at a premium of Rs. 490/- per share. We observe that during the assessment proceedings, the assessee has furnished all the details

in support of share capital and share premium raised by the assessee beside the details of the investors vide written submissions dated 9.6.2014 filed in reply to notice dated 5.5.2014 issued u/s 142 of the Act. We note that the assessee has filed names, addresses PANs of the investors, copies of share allotment advice, copies of share application forms, bank statements, statement giving complete details of share application money received during the year, copy of Form 2 evidencing Return of Allotment and Copy of Form 5 for increase in Authorized capital. We also note that the AO has issued notice u/s 133(6) to all the investors on 11.06.2014 for carrying out independent verification of these transactions which were duly responded by these investors by filing all the requisite details comprising shares subscribed, ledger accounts, bank statements, explanation for source of funds, ITRs and audited financial statements and also assessment order framed u/s 143(3) in all the cases. The copy of these which are also placed before us at page 15 to 340 in the PB. We also note that the AO has issued summon u/s 131 to the directors of the assessee company to produce managing directors of the share subscribing companies which were not complied with and this is the sole reason for making the addition in the hands of the assessee. The AO has not pointed out any defect or deficiency in the evidences filed by the assessee as well as by the investors. The Ld. CIT(A) has allowed the appeal of the assessee after taking into account all the above facts and has given a detailed findings of fact that AO has not pointed out any defect in the evidences by the assessee as well as by the share subscribers and mainly harped on the nonproduction of managing directors of the share subscriber companies to make the addition. The Ld. CIT(A) has noted that the assessee has discharged its onus by filing all the details and evidences which were the part of the record and therefore the addition made by the AO was wrong and ordered to be deleted. In view of these facts, we do not find any infirmity in the order of Ld. CIT(A) as the assessee has discharged its onus by filing all the details in the assessment proceedings. Moreover, the assessment framed u/s 143(3)/147/144 of the Act in all the cases of investors were also furnished before both the authorities below and copies of assessment order were also enclosed in the PB as stated hereinabove. Considering these facts, we do not find any infirmity in the order of Ld. CIT(A) which is otherwise a very reasoned and speaking order passed after discussing various factual details about each and every subscribers in para 4.6 such their source of investments, creditworthiness, etc. In our opinion, non-production of directors of the investors cannot be a ground for making addition in

the hands of assessee u/s 68 of the Act when the other evidences relating to the raising share capital and also qua the share subscribers are available on record as furnished by the assessee and also the cross-verification done by the AO on the basis of notices issued u/s 133(6) as discussed above. The case of the assessee is 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 summons 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.”

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.”

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. The AO simply harped on the non production of managing directors of the share subscribing companies to make the addition which is not correct. The Id CIT(A) has passed a very reasoned and speaking order discussing all facts and satisfaction of all the ingredients of section 68 of the Act while allowing the relief as stated above. 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.

5.1. Similarly the Hon'ble Calcutta High Court in the case of PCIT vs. Naina Distributors Pvt. Ltd. has decided the issue in favour of the assessee by holding that mere non-production of director cannot be the ground for making any addition in the hands of assessee u/s 68 of the Act. The operative part is reproduced as under:

“After carefully considering the findings recorded by the Commissioner of Income Tax, (Appeals) 7 Kolkata (CITA) in his order dated 21.09.2020 and the findings recorded by the learned Tribunal we find that the entire matter is fully factual. The learned Tribunal has independently examined as to the genuinity of the transaction in the matter of raising share capital and the Tribunal noted that even during the assessment proceedings, the assessee has furnished all details in respect of the share capital and share premium raised by the assessee besides the details of the investors by their submission dated 9.6.2014 in reply to the notice issued by the Assessing Officer

under Section 142 of the Act dated 5.5.2014. The Tribunal also noted that the assessee had produced all documents, disclosed the names and addresses and PAN Numbers of the investors, copies of the share allotment advice, copies of the share application form, bank statement, statement giving details of share application, money receipt during the year, copy of Form No. 2 evidencing return of allotment and copy of Form No. 5 for increase in various capital. Further the assessing officer has issued notice to the investors under Section 133(6) on 11.06.2014 for carrying out independent verification of the transaction and those investors duly responded to those notice and filed the requisite details such as the number of shares subscribed, ledger account, bank statement, explanation for source of funds, income tax returns and audited financial statements and also assessment order framed under Section 143(3) of the Act in all the cases. The Tribunal further noted that in spite of such being the factual position, the only reason for making the addition in the hands of the assessee the director of the assessee company did not respond to the summons issued by the assessing officer under Section 131 of the Act. The correctness of this was also considered by the learned Tribunal and it was held that non appearance of the director cannot be made a ground for addition in the hands of the assessee under Section 68 of the Act when other evidence relating to the raising of share capital qua the share subscriber were available on record as furnished by the assessee and also cross verified by the assessing officer pursuant to the enquiry conducted in response to the notices issued under Section 133(6) of the Act. The learned Tribunal also referred to the decision of this Court in the case of Crystal Networks Pvt. Ltd. Vs. CIT. reported in 353 ITR 171 (CAL).

Thus we find that there is no question of law much less substantial question of law arising for consideration in this appeal.

Accordingly, the appeal fails and is dismissed.”

We therefore respectfully following the ratio laid down in the above decisions, set aside the order of the Ld. CIT(A) and direct the AO to delete the addition. The ground nos. 1 to 4 are allowed.”

6. Since the facts of the instant case are materially same *vis-à-vis* the facts of the case as decided by the Coordinate Bench, we therefore, are inclined to set aside the order of ld. CIT(A) and direct the AO to delete the addition.

7. In the result, the appeal filed by the assessee is allowed for statistical purposes.

Kolkata, the 29th February, 2024.

Sd/-

[Sonjoy Sarma]
Judicial Member

Sd/-

[Rajesh Kumar]
Accountant Member

Dated: 29.02.2024

Bidhan (P.S.)

Copy of the order forwarded to:

- 1. Nano Infra Promoters Pvt. Ltd., 52, Shyam Bazar Street, Ground Floor, Kolkata-700 004.**
- 2. ITO, Ward-7(1), Kolkata.**
- CIT(A)-NFAC, Delhi.
- CIT-
- CIT(DR), Kolkata Benches, Kolkata.

// True copy //

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata