

आयकर अपीलीय अधिकरण, कोलकाता पीठ 'सी', कोलकाता
IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH: KOLKATA
श्री संजय गर्ग न्यायिक सदस्य एवं श्री राजेश कुमार लेखा सदस्य के समक्ष
[Before Shri Sanjay Garg, Judicial Member & Shri Rajesh Kumar, Accountant Member]

I.T.A. No. 711/Kol/2019
Assessment Year : 2012-13

ITO, Ward-4(4), Kolkata	Vs.	M/s KDG Projects Pvt. Ltd. (PAN: AACCK 7179 F)
Appellant / (अपीलार्थी)		Respondent / (प्रत्यर्थी)

Date of Hearing / सुनवाई की तिथि	24.08.2022
Date of Pronouncement / आदेश उद्घोषणा की तिथि	02.11.2022
For the Appellant / निर्धारिती की ओर से	Shri Manish Tiwari, FCA
For the Respondent / राजस्व की ओर से	Smt. Ranu Biswas, Addl. CITDR

ORDER / आदेश

Per Rajesh Kumar, AM:

This is the appeal preferred by the revenue against the order of the Commissioner of Income Tax(Appeals)-7, Kolkata [hereinafter referred to as 'Ld. CIT(A)'] dated 09.01.2019 for the assessment year 2012-13.

2. The grounds raised by the revenue are as under:

1. Whether Ld. CIT(A) erred in law by holding that genuineness and creditworthiness of shareholders were proved but no remand report was sought for from AO by not appreciating the fact that the assessee could not explain the nature and source of application money received during the assessment proceedings?

2. *That the appellant craves leave to add, alter or modify any of the grounds before or at the time of hearing?*

3. The revenue has assailed the order of Ld. CIT(A) on the ground that the Ld. CIT(A) has wrongly deleted the addition by holding that the genuineness and creditworthiness of the investors are proved by ignoring the fact that the nature and source of application money received were not furnished and even proved before the AO nor any remand report was called for by Ld CIT(A).

4. Facts in brief are that the case of the assessee was selected for scrutiny under CASS and statutory notices were duly issued and served upon the assessee. Pertinent to state that the return of income was duly filed declaring total income of Rs. 19,88,060/-. The company was incorporated on 20.12.2005 and in FY 2011-12 issued equity shares to various private limited companies at a high premium. Accordingly the AO called upon the assessee to furnish various details/evidences/information which were duly furnished by the assessee pertaining to increase in share capital however summons issued u/s 131 of the Act remained non-complied with. The summons issued to the Directors of investing companies / share allottee companies also remained non-complied however investor companies had furnished all the details before the AO. Finally the AO added the entire share capital and share premium of Rs. 3,15,00,000/- to the income of the assessee on the ground that genuineness and creditworthiness were not proved.

5. In the appellate proceedings, the Ld. CIT(A) allowed the appeal of the assessee by holding that the assessee has proved genuineness of transactions and creditworthiness of the investors by observing and holding as under:

“4.2. I have considered the submissions and paper book filed by the A.R of the appellant in the backdrop of the assessment order. I have also considered the case laws relied upon by the AO as well as the A.R in support of their contentions. The short issue for my consideration is that whether the sum of ₹3,15,00,000/- received by the appellant as share capital including share premium invites the mischief of section 68 of the Act or not. I find from the audited accounts of the appellant that it is engaged in the business of trading in iron & steel since its incorporation in 2005. I find that in course of assessment proceedings the AO sought details of share capital raised by the appellant. The appellant furnished details of such share holders. The AO then issued summon u/s 131 of the Act to all the 9 shareholders. In compliance thereto

all the 9 shareholders filed their replies before the AO. However none of the shareholder appeared before the AO in compliance to summon issued u/s 131 of the Act. The addition was made by the AO as there was no personal compliance to summon u/s 131 of the Act by the shareholders as well as by the appellant company. According to the AO because of non compliance of directors of the subscriber companies in person the nature and source of share capital raised by the appellant were in doubt. I find that in response to notices issued by the AO, the appellant has furnished the details of share capital which included share application forms, Board resolution for making investment, Bank statement, copy of PAN Card, Income Tax return acknowledgement for the relevant assessment year, audited accounts. However, according to AO, although appellant was incorporated on 20.12.2005 it issued shares to different private limited companies against high premium. Accordingly, the AO wanted to understand as to how the investment decisions that too at a huge premium was taken and whether the share applicants had their own profit making apparatus to invest. Therefore, the AO issued summons u/s 131 of the Act which was duly served upon all the 9 shareholders. Admitted position in the assessment order is that directors of shareholder companies did not appear in person but merely filed replies containing the evidences of investments made. Copies of such replies have been filed by the AR of the appellant company. However the AO concluded that the identity and creditworthiness of the shareholders and genuineness of the transaction between shareholders and the appellant could not be verified and, therefore, he added the entire sum of Rs. 3,15,00,000/- as unexplained cash credit u/s 68 of the Act.

4.3. I find that the appellant has raised share capital of Rs. 3,00,00,000/- during the relevant assessment year from 9 shareholder companies by way of issue of 60000 equity shares of ₹10 each at a premium of ₹490/- per share. Remaining share capital of ₹15,00,000/- was raised from the directors of the appellant company. As a result total increase in share capital including share premium amounted to Rs. 3,15,00,000/-. Since the capital of Rs.15,00,000/- was raised from the directors of appellant company the same is being dealt with separately as follows:

<u>Sl.</u>	<u>Name & PAN</u>	<u>Address</u>	<u>Total Share capital (Rs)</u>
1	Nitu Gupta	DC-55, Mahavir Vikash, Salt Lake, Kol-700106	7,00,000
2	Rajib Gupta	DC-55, Mahavir Vikash, Salt Lake, Kol-700106	5,00,000
3	Sushila Gupta	DC-55, Mahavir Vikash, Salt Lake, Kol-700106	3,00,000
	Total		15,00,000

I find that the appellant has furnished details of these shareholders which included Income Tax Return for the relevant assessment year, computation of income, bank statement, share application form, details of sources of funds etc. The AO did not find any anomalies in these details. The AO did not make any adverse comment on such details nor did he conduct any enquiries from these shareholders. In fact the AO has not even pointed out that he has issued any notice for verification from these directors. The order is absolutely non speaking as far as addition of the sum of Rs.15,00,000/- received from the directors of the appellant company is concerned and a nonspeaking order cannot be sustained in any manner as per law. I find that the identities of these individuals are established by the PAN issued to them by the Department and the Bank accounts opened in their names. The creditworthiness is established from the fact that they have adequate capital balances with them and the genuineness is established from the fact that the entire transactions were through banking channel. Therefore in my considered view, the appellant has discharged its initial onus cast upon it vis-a-vis

section 68 of the Act and in view of the fact that the AO has failed to discharge his part of the onus in rebutting the claim of the appellant, the addition of Rs. 15,00,000/- stands to no merit and therefore is hereby directed to be deleted.. Remaining share capital of Rs. 3,00,00,000/- was raised from the following shareholders and are dealt with accordingly:

Sl.	Name & PAN	Address	No. of shares	Total Share capital (including premium)
2	Silverson Logistics Pvt. Ltd. [AAOCS6924L]	1, Hatgachia, Dhapa Road, Kolkata-700105	4000	20,00,000
3	Fantastic Hirise Pvt. Ltd. [AABCF3817G]	66, G.T. Road, Liluah, Howrah-711204	4000	20,00,000
4	Jhilmil Dealtrade Pvt. Ltd. [AACCJ3607R]	255, Canal Street, Shreebhumi, Kolkata-700048	4000	20,00,000
5	Creative Infra realtors Pvt. Ltd. [AAECC1081A]	255, Canal Street, Shreebhumi, Kolkata-700048	4000	20,00,000
6	Velocity Infradevelopers Pvt. Ltd. [AADCV5230D]	9/12, Lalbazar Street, Kolkata-700001	5000	25,00,000
7	Victor Infra Properties Pvt. Ltd. [AADCV5282B]	3, Mangoe Lane, Kolkata-700001	5000	25,00,000
8	Landscape Commodeal Pvt. Ltd. [AABCL7914J]	255, Canal Street, Shreebhumi, Kolkata-700048	4000	20,00,000
9	Everfast Infrastructure Pvt. Ltd. [AACCE6744Q]	40/4, Banerjee Para Road, Kolkata-700041	10000	50,00,000
				3,00,00,000/-

The AR drew my attention to pages 33 to 188 of the paper book from where I find that complete details of shareholders were furnished before the AO. On perusal of replies filed by all the 9 shareholders I find that the following evidences were filed before the AO as follows:

- (a) Income Tax Return of the shareholder
- (b) Audited accounts of the shareholder
- (c) Share application forms
- (d) Pan card
- (e) Bank statement
- (f) Explanation for source of fund for making investment.

At page 1 & 2 of the paper books there is an explanation filed by the appellant for justification of premium charged by it. Further from the details as aforesaid, it is apparent that all the shareholders are (i) income tax assesseees (ii) they were filing their return of income (iii) the share application form is also filed (iv) the transactions were through account payee cheque (v) copy of banks statement none of which has a cash deposit before issuing of cheque to the appellant company (vi) shareholders have substantial creditworthiness which is represented by their capital and reserves. I find that the identity of shareholders is proved by the fact that all the 9 shareholders are corporate bodies registered with Registrar of Companies, they have been allotted PAN by Department and they are filing their return of income, the summons issued u/s 131 of the Act were served upon all the 9 shareholders which were complied to by filing necessary evidences. As regards creditworthiness of these share applicant companies it is noted that these shareholder companies have huge funds available in the form of capital and reserves and the investment made by them is only a small part of their capital. These transactions are duly reflected in the balance sheets of the shareholders, so the creditworthiness in my view is also proved. I agree with the contentions of the AR who placed

reliance upon the decision of Hon'ble Jurisdictional High Court in CIT vs Dataware Ltd in ITAT No.263 of 2011 dated 21/09/11 & G.A.No 2856 of 2011 which is applicable in appellant's case. I find that even if there was any doubt regarding the creditworthiness of the share applicant, the AO should have made enquiries from the AO of such shareholders which has not been done, so no adverse view could be drawn in this regard. Regarding genuineness of the transactions, it is noted that the monies have been paid through account payee cheques out of sufficient bank balance available in their bank accounts. It is also evident from the replies sent by such shareholders that the sources of such investments have also been disclosed by the shareholders. Hence the source of source is also proved in the appellant's case. The shareholders have confirmed the transactions in response to summon u/s 131 of the Act which are duly corroborated with their respective bank statements and all the payments are by account payee cheque and no cash is found to have been deposited immediately before issuing the cheque to the appellant thus the genuineness is also proved. Accordingly all the three conditions to explain the nature and source of money u/s 68 of the Act is proved by the appellant. All the evidences were before the AO and the onus cast upon the appellant was shifted to the AO to disprove the materials before him. Even the justification for share premium charged was before the AO but the AO did not do anything apart from issuing summons to the shareholders. He treated the entire sum of ₹3,00,00,000/- as unexplained cash credit u/s 68 of the Act only on the pretext that the directors of the shareholder companies did not turn up before him. I find that the reliance placed by the AR upon the decision of Hon'ble Apex court in the case of Orissa Corporation Ltd. reported in 159 ITR 78 & Hon'ble Gujarat High Court in the case of DCIT vs. Rohini Builders reported in 256 ITR 360 are squarely applicable in the appellant's case wherein the apex court held as under:*

When the assessee furnishes names and addresses of the alleged creditor and the GIR numbers, the burden shifts to the department to establish the Revenue's case and in order to sustain the addition the Revenue has to pursue the enquiry and to establish the lack of creditworthiness and mere non-compliance of summons issued by the Assessing officer u/s 131, by the alleged creditors will not be sufficient to draw an adverse inference against the assessee”

Similar view was taken by Hon'ble Jurisdictional High Court in the case of Crystal Networks Pvt. Ltd. vs. CIT reported in 353 ITR 171. In view of the foregoing findings no addition of unexplained cash credit u/s 68 of the Act was warranted. In view of the foregoing the impugned addition of Rs. 3,15,00,000/- does not stand to any merit which is now hereby directed to be deleted.

6. *In the result, the appeal of the appellant is treated as allowed.”*

6. The Ld. D.R vehemently submitted before us that the order passed by the Ld. CIT(A) is wrong and against principles of natural justice as the Ld. CIT(A) has admitted the new evidences which were not before the AO and decided the issue of share capital and share premium on basis the said evidences without calling for any remand report on the said new evidences. The Ld. D.R., while taking us through the assessment order, brought to the notice of the Bench that the summons were issued to the directors of the investor companies which remained non-complied nevertheless the Ld. D.R admitted that the evidences as regards the share capital and share premium

were furnished before the AO. The Ld. D.R. therefore prayed before the bench that the case may kindly be restored to the file of the AO so that complete verification of all the new evidences which were placed before the Ld. CIT(A) could be done by the AO.

7. The Ld. A.R. on the other hand heavily relied on the order of the Ld. CIT(A) by submitting that it is not a case of shell company as the company is doing the business of dealing in iron and steel. The Ld. A.R. submitted that only objection of the AO was that the shares were issued at a very high premium without any justification. The Ld. A.R. submitted that it is not the case of the AO that these investor companies did not furnish the necessary evidences as called for but only objection was that the summon issued u/s 131 to the directors of the investor companies were not complied with. The Ld. A.R. submitted that the appellate order was passed after detailed analysis and examination of all the evidences and a factual findings of facts have been recorded by the Ld. CIT(A) to the effect that the genuineness of the transactions and creditworthiness of the parties were fully proved. The Ld. A.R thus heavily relied on the order of Ld. CIT(A) and case laws as referred in the appellate order and submitted that the appellate order may be affirmed by dismissing the appeal of the assessee.

8. Having heard the rival submissions and perusing the material on record, we note that Ld. CIT(A) has carried out a detailed examination/ enquiry of the evidences by the assessee before him and it is only after detailed analysis into various aspects such as genuineness of the transactions and creditworthiness of the investors, the addition was ordered to be deleted . Moreover, we note that the AO had made the addition merely on the ground that the shares were issued at a very high premium without any justification. In our opinion the to issue share at a high premium is a business decision by board of directors of the company which cannot be questioned in the instant year at least as there is no provision in the Income Tax Act so far as this assessment year is concerned as the section 56(1)(viib) has been brought by Finance Act,2012 w.e.f. 1.4.2013 and therefore effective from assessment year 2013-14. We have perused the order of Ld. CIT(A) and finds that Ld CIT(A) has passed a very

reasoned and speaking order after following the various decisions as cited (supra) after taking in account the evidences of 9 investor companies comprising ITRs acknowledgments, audited accounts, share application forms, PAN cards, bank statements, audited accounts, source of funds for making investments etc which are placed in the paper book from page no. 49 to 2013. We note that the assessee has received the amounts through account payee cheques and source of investments were fully explained and proved. We further note that the AO has made the addition that no compliance was made to the summons issued to the assessee as well as the investors. In our considered view non compliance to summons issued u/s 131 of the Act or non appearance of the directors of the subscribing companies before the AO can not be basis for making addition as the assessee has filed all the necessary documents before the authorities below proving the identities, creditworthiness of the investors and genuineness of the transactions. 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 commented on these evidences filed by the assessee. Under these facts and circumstances and considering underlying facts in the light of ratio laid down in the decisions as discussed above, we are inclined to uphold the order of Ld. CIT(A) by dismissing the appeal of the revenue.

9. In the result, the appeal of the revenue is dismissed.

Order is pronounced in the open court on 2nd November, 2022

Sd/-

(Sanjay Garg /संजय गर्ग)
Judicial Member /न्यायिक सदस्य

Sd/-

(Rajesh Kumar /राजेश कुमार)
Accountant Member / लेखा सदस्य

Dated: 2nd November, 2022

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- ITO, Ward-4(4), Kolkata
2. Respondent – M/s KDG Projects Pvt. Ltd., 23A, N.S. Road, 6th Floor, Room No. 17, Kolkata-700001.
3. The CIT(A)- 7, Kolkata (sent through e-mail)
4. Pr. CIT- Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata