

**IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH KOLKATA
BEFORE SHRI SONJOY SARMA, JUDICIAL MEMBER
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.954/Kol/2023
Assessment Year: 2012-13**

Sharda Ferro Works Pvt. Ltd. 4 th Floor, Respect Home, Halderpara, Podrah Andul Road, Howrah-711109, West Bengal. (PAN: AAKCS0706L)	Vs.	Deputy Commissioner of Income Tax, Circle-1, Asansol
(Appellant)		(Respondent)

Present for:

Appellant by : Shri Sunil Surana, Advocate
Respondent by : Shri P. P. Barman, Addl. CIT

Date of Hearing : 01.02.2024
Date of Pronouncement : 14.03.2024

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of Ld.CIT(A), Asansol dated 23.09.2020 in appeal no. CIT(A), Asansol/10436/2015-16 passed against the assessment order by ACIT, Circle-1, Asansol u/s.143(3) of the Income-tax Act, 1961 (hereinafter referred to as the "Act"), dated 31.03.2015 for AY 2012-13.

2. Grounds of appeal raised by the assessee are reproduced as under:

"1. For that the Ld. CIT(A) erred in confirming the order of the Ld in adding back Rs.2,05,50,000/- as unexplained cash credit under see 68 when the when the appellant filed the PAN of share applicants and are registered with ROC having CIN, bank statement and source declaration of the share applicants and notice u/s. 133(6) were duly served on them to which all of them complied with and thus the onus lay on the appellant was duly discharged but the AO did not proceed further to make any enquiry and added back the amount without bringing any evidence to prove otherwise.

2. For that the Ld. CIT(A) was not justified confirming order of the Ld AO treating the sum of Rs.2,05,50,000/-as unexplained cash credit on the ground that the assessee failed to discharge its onus and relying on the judgements which has to relevancy to the facts of the case.”

3. There is a delay of 1023 days in filing the present appeal for which petition for condonation of delay along with affidavit is placed on record. Impugned order of Ld. CIT(A) is dated 23.09.2020. Ld. Counsel referred to point no. 11 in Form No. 36 which deals with “whether there is any delay in filing of appeal?” In response to this, assessee has submitted “there is no delay since the order was passed by the Ld. CIT(A)-Asansol having physical jurisdiction on 23.09.2020 which was the last date before change to Faceless regime, the office stopped working and the order was not served on the assessee. It was only on the reminder for payment of tax that the assessee requested the AO to keep the demand in abeyance since first appeal was pending and thereafter the Ld. AO send the copy of order on 16.08.2023.”

3.1. To substantiate this submission, ld. Counsel referred to a letter dated 24.09.2020 issued from the office of Commissioner of Income Tax, Appeal, Asansol addressed to the Chief Commissioner of Income tax-1, Kolkata, Pr. CIT, Asansol, Additional/Joint Commissioner of Income Tax, Range-2/3, Asansol and the AO i.e. ACIT, Circle-1, Asansol. In the said letter, appellate orders for certain assesseees were sent to the concerned AOs for necessary action which included the appellate order of the assessee also. According to Ld. Counsel, this first appellate order was received from the concerned AO on 16.08.2023 only. On receipt of the order, immediate action was taken to file the present appeal thus, the delay is not attributable towards lapse on the part of the assessee. It is more because of the shift of the first appellate procedure into Faceless regime which caused such a delay.

3.2. We have considered the submissions made by the Ld. Counsel in this respect and the evidence placed on record. We do take note of the fact that Faceless regime is a new technological phenomenon going through teething phase. Hence, it requires lenient and pragmatic approach to handle certain lapses which are unintended. Thus, taking the circumstances holistically, we condone the delay of 1023 days in filing the present appeal.

4. Assessee has submitted an application dated 09.01.2024 raising an additional ground on a legal issue which goes to the root of the matter. The said additional ground is numbered as 4 – *“For that the order passed by the AO was without jurisdiction and therefore the entire assessment is liable to be quashed.”*

4.1. The said additional ground being legal in nature is admitted by placing reliance on the decision of Hon’ble Supreme Court in the case of National Thermal Power Corporation 229 ITR 383. The moot point raised by the assessee in the present appeal is in respect of addition made by the Ld. AO towards share capital including share premium raised during the year, treated as unexplained cash credit u/s. 68, amounting to Rs.2,05,50,000/-.

5. Brief facts of the case are that assessee is in the business of manufacturing and trading of iron ores. Return was filed reporting a total income of Rs.5,64,720/-.

5.1. During the year, assessee had raised fresh share capital including premium amounting to Rs.2,05,50,000/- for which explanation and details were called for. Before the Ld. AO, it is noted that assessee had duly filed all the relevant details along with supporting documents to prove

identity, creditworthiness and genuineness of the transaction. Notices u/s. 133(6) were issued to the share subscribing companies which were also duly complied by them by filing complete details in the investment made towards share capital of the assessee. Ld. AO raised the issue of high premium at which the shares were issued by the assessee against which assessee submitted that it is a very old establishment with goodwill and brand value. It was also submitted that issue of shares at premium is always a commercial decision and it depends upon the outlook of the investors. Assessee also claimed that it had given details of names and addresses of the shareholders, their PAN, bank details and confirmation letters.

5.2. Ld. AO after taking into consideration the submissions made by the assessee arrived at a conclusion that amounts received by the assessee are not genuine but an arranged affair, camouflaged as share application money/share capital. He resorted to various judicial precedents to arrive at such an adverse view. In this respect he noted that assessee had failed to produce the subscribers inspite of specific opportunity allowed to it and also observed that share subscribing companies had filed their returns of income showing nominal losses. They did not have any money of their own and are mere name lenders. According to him, each one of them received money from somebody and that somebody received from a third person. He thus, concluded the assessment by making the addition towards the share capital including premium raised by the assessee during the year u/s. 68 of the Act. Aggrieved, assessee went in appeal before the Ld. CIT(A) who also confirmed the same

after referring to several judicial precedents. Aggrieved assessee is in appeal before the Tribunal.

6. Before us, Ld. Counsel for the assessee has placed on record a paper book containing 147 pages in support of corroborating the transaction of share capital including share premium raised during the year. Ld. Counsel for the assessee has made a detailed and elaborate submission on the issue. He took the Bench through the merits of the case to demonstrate the onus discharged by the assessee in terms of section 68 of the Act. He categorically pointed out that Ld. AO himself has noted in the assessment proceeding that assessee has furnished sheaves of paper documents in response to the summon/notices issue. Ld. Counsel also pointed out that Ld. AO has analysed the bank statement of the share subscribing companies which evidently demonstrates that all the relevant documentary evidences were before the Ld. AO though adverse view was taken. Ld. Counsel also submitted that summons were issued u/s. 131 on the directors of the assessee which even though were not complied in terms of personal attendance but were responded to by making all the necessary details and documents which have been acknowledged by the Ld. AO.

6.1. Ld. Counsel also submitted that mere non-appearance of directors is no basis for invoking provisions of section 68 of the act for which he placed reliance on the decision of Hon'ble Supreme Court in the case of *CIT v. Orissa Corporation (P) Ltd. (1986) 159 ITR 78 (SC)* wherein it was held as under:

"In this case the assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the revenue that the said creditors were the income-tax assesseees. Their index number was in the file of the revenue. The revenue, apart from issuing notices under section 131 at the instance of the assessee,

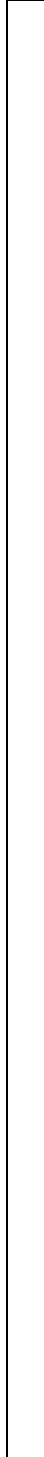
did not pursue the matter further. The revenue did not examine the source of income of the said alleged creditors to find out whether they were credit-worthy or were such who could advance the alleged loans. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the assessee could not do any further. In the premises, if the Tribunal came to the conclusion that the assessee had discharged the burden that lay on him, 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 could arise.

The High Court was, therefore, right in refusing to refer the questions sought for. Decision of the High Court affirmed.”

6.2. It was also submitted that audited Balance Sheet of each of the share applicant companies reflected the amount of investment made by them in the assessee as against their respective net worth. He thus, contended that Ld. AO has made the addition with a predetermined mind set. Further, according to him, they are all registered companies under the Companies Act, 1956.

6.3. According to him, Ld. AO has not made any attempt to enquire into the details and documents placed on record in the assessment proceeding. He submitted that Ld. AO has casually remarked that merely submitting the papers and documents on the table of the assessing authority does not in any way mean compliance. The burden of proof cannot be shifted on the revenue by cart loads of documents. On this observation of the Ld. AO, he strongly submitted that no attempt has been made by the Ld. AO to enquire into the veracity of the documents and details furnished by the assessee. Thus, the burden was on the Ld. AO as no adverse material has been brought on record to substantiate the addition made in the hands of the assessee.

6.4. Ld. Counsel for the assessee submitted that to establish the identity and creditworthiness of the shareholders and genuineness of the transactions, assessee has submitted all the relevant details and documents in the course of assessment as well as appellate proceedings, details of which are tabulated and is extracted below from the index of the paper book for ease of reference:



<u>Sl.No.</u>	<u>Particulars</u>	<u>Page No.</u>	<u>Filed/ Available before</u>
1.	Copy of ITR Acknowledgement, Computation of Income and Audit Report (as on 31.03.2012) of Sharda Ferro Works Pvt Ltd for Asst Yr 2012-13	1-21	AO & CIT(A)
2.	List of shareholders as on 31.03.2012	22	Do
3.	Documents relating to Anirudh Motor & General Finance Pvt Ltd (Subscriber) <ul style="list-style-type: none"> • Copy of notice u/s 133(6) and reply thereof • Copy of ITR Acknowledgement (Asst. Yr. 2012-13) • Copy of Auditor's Report & Audited Financial Statements as on 31st March 2012 • Copy of Bank Statement highlighting the transaction • Confirmation of source of investment in shares of Sharda Ferro Works Pvt. Ltd. by Anirudh Motor & General Finance Pvt Ltd. • Copy of MCA Master Data 	23-25 26 27-39 40 41 42-43	Do
4.	Documents relating to Kantha Distributors Pvt Ltd (Subscriber) <ul style="list-style-type: none"> • Copy of notice u/s 133(6) and reply thereof • Copy of ITR Acknowledgement (Asst. Yr. 2012-13) • Copy of Auditor's Report & Audited Financial Statements as on 31st March 2012 • Copy of Bank Statement highlighting the transaction • Confirmation of source of investment in shares of Sharda Ferro Works Pvt. Ltd. by Kantha Distributors Pvt. Ltd. • Copy of MCA Master Data 	44-48 49 50-60 61-63 64 65	Do

5.	<p>Documents relating to Dheera Dealcom Pvt Ltd (Subscriber)</p> <ul style="list-style-type: none"> • Copy of reply to notice u/s 133(6) 66 • Copy of ITR Acknowledgement (Asst. Yr. 2012-13) 67 • Copy of Auditor's Report & Audited Financial Statements as on 31st March 2012 68-78 • Copy of Bank Statement highlighting the transaction 79-80 • Confirmation of source of investment in shares of Sharda Ferro Works Pvt. Ltd. by Dheera Dealcom Pvt. Ltd. 81 • Copy of MCA Master Data 82 		Do
6.	<p>Documents relating to Turf Advertising & Marketing Company Pvt Ltd (Subscriber)</p> <ul style="list-style-type: none"> • Copy of notice u/s 133(6) and reply thereof 83-85 • Copy of ITR Acknowledgement (Asst. Yr. 2012-13) 86 • Copy of Auditor's Report & Audited Financial Statements as on 31st March 2012 87-100 • Copy of Bank Statement highlighting the transaction 101-102 • Confirmation of source of investment in shares of Sharda Ferro Works Pvt. Ltd. by Turf Advertising & Marketing Company Pvt. Ltd. 103 • Copy of MCA Master Data 104-105 		Do
7.	<p>Documents relating to Nakodar Finance Pvt Ltd (Subscriber)</p> <ul style="list-style-type: none"> • Copy of notice u/s 133(6) and reply thereof 106-108 • Copy of ITR Acknowledgement (Asst. Yr. 2012-13) 109 • Copy of Auditor's Report & Audited Financial Statements as on 31st March 2012 110-123 • Copy of Bank Statement highlighting the transaction 124 • Confirmation of source of investment in shares of Sharda Ferro Works Pvt. Ltd. by Nakodar Finance Pvt. Ltd. 125 • Copy of MCA Master Data 126-127 		Do

8.	Documents relating to V N V Consultants Pvt Ltd (Subscriber)		Do
	<ul style="list-style-type: none"> • Copy of notice u/s 133(6) and reply thereof • Copy of ITR Acknowledgement (Asst. Yr. 2012-13) • Copy of Auditor's Report & Audited Financial Statements as on 31st March 2012 • Confirmation of source of investment in shares of Sharda Ferro Works Pvt. Ltd. by V N V Consultants Pvt. Ltd. • Copy of Bank Statement highlighting the transaction • Copy of MCA Master Data 	128-130 131 132-141 142 143 144-145	
9.	Additional ground of appeal along with the letter	146-147	

6.5. Ld. Counsel reiterated that the share subscribers are body corporate, registered with ROC and are assessed to income tax. He further stated that these subscribers had confirmed the transactions, filed relevant papers and documents and also explained the source of funds in their hands for making investment in the assessee. He thus, emphasized that assessee had discharged its primary onus casted upon it u/s. 68 of the Act. According to him, the onus thus shifted to the Ld. AO to disprove the material placed before him. Without doing so, the addition made by the Ld. AO is based on conjectures and surmises and, therefore, cannot be sustained.

6.6. Ld. Counsel submitted that instead of pointing out any defect or discrepancy in the evidence and the details furnished by the assessee, Ld. AO proceeded to take adverse inference only on the ground that the directors of the assessee did not appear personally before him. In this respect he placed reliance on the decision of Hon'ble Jurisdictional High Court of Calcutta in the case of *Crystal Networks Pvt. Ltd. v. CIT in ITA 158 of 2002 dated 29.07.2010*.

6.7. Ld. Counsel also emphasized on the fact that in the submissions including ITRs, audit reports, share application details etc. as listed above, the Ld. AO has not found fault in any of the details submitted and simply proceeded to make addition in respect of the amount of share capital and premium. The documents furnished are to be prima facie considered as correct unless evidence is brought on record to falsify the claim made therein.

6.8. On the three basic ingredients for any cash credit viz., identity, creditworthiness of the subscribers and the genuineness of the transactions, Ld. Counsel submitted that all of these are fulfilled.

7. Per contra, ld. Sr. DR placed reliance on the order of the authorities below and submitted that assessee's own income has been infused in the guise of share capital through the allottee companies by layering the transactions to make appear a non-genuine transaction as a genuine one

8. We have heard the rival contentions and gone through the material placed on record. We note that Ld. AO without even going through and discussing the details submitted by the subscriber companies, insisted for personal appearance of the directors of the assessee to prove the identity, creditworthiness of the subscribers and the genuineness of the transactions. To our mind, Ld. AO could have taken an adverse view only if he could point out the discrepancies or insufficiency in the evidence and details furnished in his office and also as to what further investigation was needed by him by way of recording of statement of the directors of the assessee. We draw our force from the decision of the Hon'ble Bombay High court in the case of *PCIT v. Paradise Inland Shipping Pvt. Ltd.* [2017] 84 taxmann.com 58 (Pan)

wherein it was held that once the assessee has produced documentary evidence to establish the existence of the subscriber companies, the burden would shift on the revenue to establish their case. We also draw our force from the decision of Hon'ble Jurisdictional High Court of Calcutta in the case of *Crystal Network Pvt. Ltd. v. CIT (supra)* which held as under:

"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 CIT(Appeals) 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 produce of the assessee or not. When it was found by the CIT (Appeal) on fact having examined the documents that the advance given by the creditors have been established the Tribunal should not have ignored this fact finding."

8.1. Ld. AO has not bothered to discuss or point out any defect or deficiency in the documents of the share subscribing companies, furnished by the assessee. These evidences furnished have been neither controverted by the Ld. AO during the assessment proceedings nor anything substantive brought on record to justify the addition made by him. Ld. AO has added the amount of share capital and share premium on the ground that assessee has not produced its directors. Thus, going by the records placed by the assessee of all the share subscribing companies, it can be safely held that the assessee has discharged its initial burden and the burden shifted on the Ld. AO to enquire

further into the matter which he failed to do so. It is also noted from their audited financial statement that all the investing companies have sufficient own funds available with them to make investment in the assessee.

9. Before concluding, to give our finding, we place reliance on the following judicial precedents to buttress our observations and conclusions :

i) The decision of Hon'ble Jurisdictional High Court of Calcutta in the case of *CIT v. Dataware Pvt. Ltd. in ITAT No. 263 of 2011 dated 21.09.2011* wherein Hon'ble jurisdictional High Court held that

"After getting the PAN number and getting the information that the creditor is assessed under the Act, the Assessing officer should enquire from the Assessing Officer of the creditor as to the genuineness" of the transaction and whether such transaction has been accepted by the Assessing officer of the creditor but instead of adopting such course, the Assessing officer himself could not enter into the return of the creditor and brand the same as unworthy of credence."

ii) Decision of Hon'ble jurisdiction High Court of Calcutta in the case of *CIT Vs. Sagun Commercial P. Ltd. (ITA No. 54 of 2001 dated 17.02.2011)* wherein it was held as under:

"After hearing the learned advocate for the appellant and after going through the materials on record, we are at one with the Tribunal below as well as the Commissioner of Income-tax (Appeals) that the approach of the Assessing Officer cannot be supported. Merely because those applicants were not placed before the Assessing Officer, such fact could not justify disbelief of the explanation offered by the assessee when details of Permanent Account Nos. payment details of shareholding and other bank transactions relating to those payments were placed before the Assessing Officer. It appears that the Tribunal below has recorded specifically that the Assessing Officer totally failed to consider those documentary evidence produced by the assessee in arriving at such conclusion.

We, therefore, find no reason to interfere with the decision passed by the Commissioner of Income-tax (Appeals) and the Tribunal below and answer the

questions formulated by the Division Bench in the affirmative and against the Revenue. The appeal is, thus, dismissed."

iii) Decision of Hon'ble Bombay High Court in the case of *CIT v. Creative World Telefilms P. Ltd. (2011) 333 ITR 100 (Bom)* wherein it was held as under:

"In the case in hand, it was not disputed that the assessee had given the details of name and address of the shareholder, their PAN/GIR number and had also given the cheque number, name of the bank. It was expected on the part of the Assessing Officer to make proper investigation and reach the shareholders. The Assessing Officer did nothing except issuing summons which were ultimately returned back with an endorsement "not traceable". The Assessing Officer ought to have found out their details through PAN cards, bank account details or from their bankers so as to reach the shareholders since all the relevant material details and particulars were given by the assessee to the Assessing Officer. In the above circumstances, the view taken by the Tribunal could not be faulted. No substantial question of law was involved in the appeal."

iv) Decision of Hon'ble Madras High Court in the case of *Pranav foundations Ltd. (2015) 229 Taxman 58 (Mad)* is also referred wherein it was held as under:

"In view of the fact that all the four parties, who are subscribers of the shares, are limited companies and enquiries were made and received from the four companies and all the companies accepted their investment. Thus, the assessee has categorically established the nature and source of the said sum and discharged the onus that lies on it in terms of section 68. When the nature and source of the amount so invested is known, it cannot be said to undisclosed income. Therefore, the addition of such subscriptions as unexplained credit under section 68 is unwarranted."

10. Considering the facts and circumstances of the case and the material placed on record, we find that assessee has discharged its onus to prove the identity and creditworthiness of the share subscribing companies and the genuineness of the transactions towards sum of Rs.2,05,00,000/- received during the impugned year. Accordingly, considering these facts and in the light of the

judicial precedence referred above, we set aside the order of the ld. CIT(A) and delete the addition made towards share capital and share premium u/s. 68 of the Act. Accordingly, grounds taken by the assessee in this respect are allowed.

11. Since on the merits of the case, we have deleted the addition made by the Ld. AO in terms of our observations and findings recorded above, the legal issue raised by the assessee through additional ground in this appeal on the jurisdiction of AO to make the impugned assessment is rendered as a mere academic exercise. Accordingly, we desist ourselves from indulging into such an exercise. Accordingly, grounds taken by the assessee in this respect are not adjudicated upon.

12. In the result, appeal of the assessee is allowed.

Order is pronounced in the open court on 14th March, 2024.

Sd/-

(Sonjoy Sarma)
Judicial Member

Sd/-

(Girish Agrawal)
Accountant Member

Dated: 14th March, 2024

JD, Sr. P.S.

Copy to:

1. The Appellant:
 2. The Respondent.
 3. CIT(A), Asansol
 4. CIT
 5. DR, ITAT, Kolkata Bench, Kolkata
- //True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata