

**आयकर अपीलिय अधिकरण, कोलकाता पीठ “सी”, कोलकाता**

**IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH: KOLKATA**

श्री राजेश कुमार, लेखा सदस्य एवं श्री संजय शर्मा न्यायिक सदस्यके समक्ष

[Before Shri Rajesh Kumar, Accountant Member & Shri Sonjoy Sarma, Judicial Member]

**I.T.A. No. 649/Kol/2020**  
**Assessment Year : 2012-13**

ITO, Ward-6(1), Kolkata	Vs.	M/s Coxis Finance & Investment Pvt. Ltd.  (PAN: AABCC 4057 B)
Appellant / (अपीलार्थी)		Respondent / (प्रत्यर्थी)

Date of Hearing / सुनवाई की तिथि	19.10.2022
Date of Pronouncement/ आदेश उद्घोषणा की तिथि	10.11.2022
For the Appellant/ निर्धारिती की ओर से	Shri Akkal Dudhwewala, A.R
For the Respondent/ राजस्व की ओर से	Smt. Ranu Biswas, Addl. CIT

**ORDER / आदेश**

**Per Rajesh Kumar, AM:**

This is the appeal preferred by the revenue against the order of the Ld. Commissioner of Income Tax (Appeals)-7, Kolkata (hereinafter referred to as the Ld. CIT(A)”) dated 14.09.2020 for the AY 2012-13.

2. The only issued raised by the revenue in the various grounds of appeal is against the deletion of addition of Rs. 2,71,00,000/- as made by the AO on account of share capital and share premium being unexplained cash credit u/s 68 of the Act.

3. Facts in brief are that the assessee filed the return of income on 17.09.2012 declaring total income of Rs. 10,552/-. The case of the assessee was selected for scrutiny and statutory notices were duly issued and served on the assessee. During the course of assessment proceedings, the AO noted that the assessee has issued 1,35,500 equity shares at face value of Rs. 10/- each at a premium of Rs. 190/- thereby a sum of Rs. 2,71,00,000/- was from four corporate entities. Accordingly the assessee was asked to furnish the details/evidences to prove identity and creditworthiness of the investors and genuineness of the transactions. The AO also issued summons u/s 131 of the Act to the assessee as well as the investors. The Director of the assessee company appeared before the AO and statement was accordingly recorded however the another directors of the assessee company did not comply with the summons. Finally the AO after taking into account the reply/submissions of the assessee treated the amount raised during the year from allotment of shares of Rs. 2,71,00,000/- as unexplained cash credit and added the same to the income of the assessee in the assessment framed u/s 144 of the Act.

4. In the appellate proceedings, the Ld. CIT(A) allowed the appeal of the assessee. The Ld. CIT(A) noted that though the summons were issued u/s 131 to the four investors however they did not appear personally but furnished all the details proving the identity and creditworthiness of the investors and genuineness of the transactions. The Ld. CIT(A) also noted that summons were issued to the director of the assessee company Shri Manoj Jain who appeared before the AO and his statement was recorded u/s 131 of the Act. The AO made addition on the ground that the directors of the investor companies did not appear before the him in response to summons issued u/s 131 of the Act and accordingly held that the assessee has failed to discharge its onus of proving genuineness of the transactions and also identity and creditworthiness of the share holders. The Ld. CIT(A) also noted that though the summons u/s 131 of the Act were issued to all the four share holders however instead of personally appearing before the AO , they furnished the details/information sought by the AO comprising of copies of ITRs, PANs, Audited balance sheets, bank

statements etc. before the AO. The Ld. CIT(A) recorded a finding a fact that upon examination of these documents furnished by the shareholders it is found that the subscribing company have substantial own funds in the form of share capital and share premium and only a fraction of funds were invested in the assessee company. The Ld. CIT(A) also noted that there was no cash deposited in their bank accounts prior to issuing cheques to the assessee. Besides the Ld. CIT(A) noted that the shareholders have explained the source of funds also and thus came to conclusion that all these facts taken together proved identity and creditworthiness of the shareholders and genuineness of the transactions. The Ld. CIT(A) also observed that all these four companies were assessed to tax independently under their respective PAN and even their cases were assessed u/s 143(3)/143(1) of the Act and information as provided by them were in agreement with ones as furnished by the assessee. Finally the Ld. CIT(A) after following various judicial pronouncements namely CIT vs. Orchid Industries Pvt. Ltd., (397 ITR 136)(Bom-HC) , PCIT vs. Paradise Inland Shipping Pvt. Ltd. (84 taxmann.com 58) (Bom-HC) and various other decisions allowed the appeal of the assessee on this issue. While allowing this appeal of the assessee the ld CIT(A) distinguished the decision of Hon'ble Supreme Court in the case of NRA Iron & Steel Pvt. Ltd. (412 ITR 161) (SC) by holding that in the said decision the AO has made extensive enquiries and some of investors were found to be non-existent. The operative part of ld CIT(A) order is extracted as under:

*“4.19. From the documents available it appeared that the share subscription amounts were received from bodies corporate who were all independently assessed to tax. The income tax assessment orders of the share subscribing companies for the AY 2012-13 proved that the IT Department had accepted the genuine existence of the respective companies and with reference to information disclosed by each of them in their respective balance sheet, the total income was assessed. If the existence of the respective share subscribers was accepted by the AOs of the IT Department for the purposes of framing assessment for AY 2012-13, then I see no reason why the AO of the appellant company could dispute their ability to invest in shares of the other companies. Moreover, I find that each shareholder had disclosed in its audited accounts sufficiently large investible funds and only fraction of such investible funds were received by the appellant in the form of share capital. On these facts it could not toe alleged that respective companies were benamidars of the assesses. In the impugned order the AO has also referred to the alleged modus operand! adopted by the paper companies where the monies, are routed from one company to another in the form of subscription to share capital. I however find that the AO himself did not carry out any enquiry or investigation to prove his hypothesis that the unaccounted cash was rotated through four to five layers, save & except*

*in the assessment carder, the AO himself, did not, bring on record even a single specific instance to establish that anyone out of four share subscribers, had rotated unaccounted funds belonging to the assessee through four-five layers. Save & except surmising on the alleged money laundering activity,, the AO himself did precious little to prove his hypothesis that the assessee was engaged in money laundering. Apart from being an arm- chair critic the AO-himself did not undertake any worthwhile enquiry or investigation which in any manner proved that the entries in the bank statements were not real but make belief. While framing the assessment, the AO acts both as an Investigator as well as adjudicator of the facts as well as law. In his role of an investigator, toe AO is expected to conduct first hand enquiries about toe hypothesis on which he proceeds while framing the assessment. In the circumstances if the AO wanted to record conclusion about money laundering through four-five, layers, the AO was, ejected to prove at least two or three specific instances where he found that toe unaccounted cash was introduced and thereafter through four to five layers, the money was brought bade into toe assessee's books in the form of share capital. I however find that no such exercise was carried out by the AO except making; unsubstantiated allegations that the money laundering activity involved transferring of monies in four to five layers. In view of the AO's failure toconduct any enquiry on his own, I am of the opinion that the AO was not Justified inmaking the addition by simply making reference to general modus operandi adopted by some persons.*

*4.20 I find that the AO had made addition u/s 68 without proper application of mind and incorrect appreciation of the relevant provisions of the Act In the above judicial decisions, it has been held that before an addition u/s 68 is made, it is necessary for the AO to bring on record irrefutable material or evidence which would prove that there was no valid issuance of the shares and for that reason the assessee had failed to prove identity & creditworthiness of the shareholders and also failed to substantiate genuineness, if these touchstones are applied to the appellant's case then I find that the income-tax assessment orders passed by the Departmental Officers For AY 2012-13 showed that the identity of each of the share subscribers was accepted in their respective assessment proceedings. In the balance sheets of the respective,, share subscribers, the investments in assessee's share were recorded and each subscriber in its balance sheet had disclosed sufficiently, large investible funds. The assessee had also filed copies of the bank statements of the respective share subscribing which established that the share subscription amounts were received through banking channels The sources of making payment were also furnished and the entries In bank statements indicated that there was no deposit of cash prior: to clearance of the cheques in assessee's favour.- All these facts and documents considered Cumulatively establish that the assessee had discharged the onus of proving creditworthiness of the share subscribers and the genuineness of the transactions. I therefore hold that the AO was not Justified in making the impugned addition of Rs.2,7100,000/- u/s 68 of the Act for which the same is hereby directed to be deleted. These grounds are -allowed.*

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

5. After hearing the rival submissions and perusing the material on record including impugned order of Ld. CIT(A), we find that in this case the assessee has raised Rs. Rs.2,71,00,000/- by issuing 1,35,500 equity shares of face value of Rs. 10/- each at a premium of Rs. 190/-. We note that before the AO the assessee has duly filed all the evidences comprising ITRs, PANs, Balance Sheets, confirmations of the

investors along with their bank statements. We also note that the AO issued summons to the assessee as well as the four corporate investors however one of the directors of the assessee company appeared before the AO and his statement was recorded while other four investors did not comply with the summons. We note that all the four investors filed the details as sought by the AO proving their identity and creditworthiness and genuineness of the transactions. We note that the AO had made the addition merely on the ground that the allottee did not comply with the summons issued u/s 131 of the Act and thus the genuineness of the investments could not be verified. On the other hand, we note that all the evidences were filed by the assessee before the AO as well as before the Ld. CIT(A). In our opinion, mere non-compliance to the summons cannot be the basis for making addition. We have perused the order of Ld. CIT(A) carefully and find that very detailed finding has been given from Para 4.2 to 4.19 page 19 to 34 of the appellate order on each and every investor and ITRs', bank statements, balance sheets were analyzed and the conclusion was drawn that they have sufficient balances to invest in the assessee company and only a fraction of the total available fund were invested in the equity shares of the assessee company. Under these facts, we do not find any infirmity in the order of Ld. CIT(A) which do not warrant our interference in the appellate order. On the issue of high premium, we note that issuing of shares at a premium is a business decision taken by the board of directors and the AO cannot dictate the assessee as to at what rate the shares are to be issued. Besides there are no provisions under the Act to assess the said issue of shares at a high premium as the amendment was brought out in the Section 56(2)(viib) by Finance Act, 2012 w.e.f 01.04.2013 and accordingly is effective from AY 2013-14. So far as non-compliance of summons u/s 131 is concerned the same cannot be the ground for making addition. 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 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 353 ITR 171 (Cal ) 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 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. (ITA No. 282/Kol/2012) 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.”

Similar ratio has been laid down by the Hon’ble Mumbai High Court in the case of CIT Vs Orchid Industries (P) Ltd 397 ITR 136 by holding that provisions of section 68 of the Act can not 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 .

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 all the four 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.

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

Order is pronounced in the open court on 10<sup>th</sup> November, 2022

Sd/-  
(Sonjoy Sarma /संजय शर्मा)  
Judicial Member/न्यायिक सदस्य

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

Dated: 10<sup>th</sup> November, 2022

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- ITO, Ward-6(1), Kolkata
2. Respondent – M/s Coxis Finance & Investment Pvt. Ltd., 6B, Bentick Street, Ashoka House, 1<sup>st</sup> Floor, Kolkata-700001.
3. Ld. 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