FORM NO.(J2)

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

Present:
Hon'ble Justice Girish Chandra Gupta
And
Hon'ble Justice Asha Arora

GA NO.509 OF 2016
WITH
ITAT NO.113 OF 2016

RAJMANDIR ESTATES PRIVATE LIMITED.
Versus
PRINCIPAL COMMISSIONER OF INCOME TAX, KOLKATA – III, KOLAKTA.

Advocate for the Appellant: Mr. N. K. Poddar, Sr. Adv.
Mr. Vineet Tibrewal, Adv.

Advocate for the Respondent: Mr. A. K. Ghosal, Sr. Adv.
Mr. P. Dudhoria, Adv.

Date of Hearing: 15.03.2016, 16.03.2016, 17.03.2016, 18.03.2016, 21.03.2016, 22.03.2016, 24.03.2016, 29.03.2016, 31.03.2016, 01.04.2016, 04.04.2016, 05.04.2016.

Judgement delivered on:13th May 2016.

GIRISH CHANDRA GUPTA, J. The appeal is directed against a judgement and order dated 3rd November, 2015 passed by the learned Income Tax Appellate Tribunal, Kolkata, 'D' – Bench in ITA No.882/KOL/2013 pertaining to the assessment year 2009-10 upholding an order dated 22nd March, 2013 passed under Section 263 of the Income Tax Act, 1961. The assessee has come up in appeal. Briefly stated the facts and circumstances of the case are as follows:-

The share capital of the assessee as at 31st March, 2008 was Rs.55,15,000/-. During the relevant previous year share capital of the assessee rose to a sum of Rs.1,34,42,370/-. The reserve and surplus which as at 31st March, 2008 was a sum of Rs.77,398.31 paise rose to a sum of Rs.39,92,61,247.60 paise. The increase in the share capital and the reserve and

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surplus is consequent to the issuance of 7,92,737 shares of Rs.10/- each at a premium of Rs.390/-. The authorised share capital of the assessee during the relevant assessment year was Rs.1,36,00,000/-. The assessee originally filed a return showing a gross total income of Rs.24,658/-. The assessee thereafter wrote to the assessing officer that due to inadvertence it had not disclosed receipt of a sum of Rs.61,000/- on account of consultancy fees. The mistake, it was pointed out, was due to the fact that the sum of Rs.61,000/- had been spent in making donation to a club. In the circumstances a notice dated 15th February, 2011 under Section 148 was issued. A notice dated 23rd February, 2011 under Section 142(1) of the Income Tax Act was also issued, seeking amongst other the details of share application money received by the assessee, including the names of the applicants, their address, date of receipt and the total amount received. It was submitted by Mr. Poddar that consequent to the notice dated 23rd February, 2011 the assessee disclosed full particulars as regards the applicants of shares including the money received from them.

The aforesaid increase in the share capital is stated to have been subscribed by 39 corporate applicants. 15 out of them were issued notices under Section 133(6) of the Income Tax Act. Those 15 applicants were directed amongst others to disclose the source of money contributed to the share capital of the assessee.

Mr. Poddar contended that though the notices under Section 133(6) were issued to only 15 out of 39 applicants of share, the source of money in respect of each of the applicants of shares including their confirmation and bank statements were disclosed by the assessee.

From the information made available by the assessee, it appears that 19 out of 39 applicants secured funds, for the purpose of contributing to the share capital of the assessee, on account of share application money. In other words, those 19 applicants collected funds on account of share application money in their respective companies and that money was contributed to the share capital

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of the assessee. 15 out of the 39 applicants, it appears, procured the fund by selling shares. The balance applicants of shares in the share capital of the assessee company did not however disclose the nature of receipt though source of fund was disclosed. What has not been specified is, as to on what account was the money received. The forms of share application purporting to have been signed by the applicant companies have also been disclosed from which it appears that the date of allotment, number of allotment, number of shares allotted, share ledger folio, allotment register folio, application number, have all been kept blank. These particulars, Mr. Poddar, submitted should have been filled up by the assessee, but that has not been done. Another significant fact admitted by the assessee in reply to the notice to show cause under Section 263 is that the "shares were offered to, and subscribed by the closely held companies owned by the Promoters/Directors or their close relatives and friends".

Assessment under Section 143(3) read with Section 147 of the Income Tax Act was completed on 30th March, 2011. A notice dated 22nd February, 2013 was issued under Section 263 of the Income Tax Act alleging that the assessment under Section 143(3) / 147 was completed without application of mind and without requisite enquiry into the increase of the share capital including the premium received by the assessee. The assessee replied stating, inter alia, as follows:-

"On a bare perusal of the impugned Showcause Notice, it would appear that the allegations of the Revenue may be summarized as under:

(i) That the Assessing Officer did not make requisite enquiry on the issue as to "what prompted the subscribers" to subscribe Shares at a high premium, issued by a closely held company.

(ii) That there is no evidence on record which can show that the issue of subscription of Shares had been examined objectively and, therefore, it appeared to the Revenue that the assessment order was passed without application of mind.

Before proceeding to reply to the aforesaid allegations, which, in our humble view, are wholly unfounded, it would be appropriate to recall the undisputed facts borne out by record, as under:

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In the previous year relevant to the assessment year 2009-10 the assessee- company had issued 7,92,737 Equity Shares of the Face Value of Rs.10/- each at a premium of Rs.390/-. Such shares were offered to, and subscribed by the closely held companies owned by the Promoters/Directors or their close relatives and friends. From the List of Allottees of such Shares (copy given herewith), it would be kindly found that all the Shares were offered to, and subscribed by the corporate entities and therefore, there was no question of any outsider making investment in Shares of the assessee-company. It bears importance to state here that the investor companies of Shares were interested to subscribe Shares of the assessee-company as, according to them, the assessee-company had great prospect in future."

The CIT in his order dated 22nd March, 2013 passed under Section 263 opined that this was or could be a case of money laundering which went undetected due to lack of requisite enquiry and non-application of mind. He entertained the belief "that unaccounted money is laundered as clean share capital by creating a façade of paper work, routing the money through several bank accounts and getting it the seal of statutory approval by getting the case reopened u/s.147 suo motu". The order dated 30th March, 2011 passed under Section 143(3)/ 147 was thus erroneous and prejudicial to the interest of the revenue. He, therefore, set aside the same and issued directions for a thorough enquiry. To be precise the following directions were issued.

"A.O. is directed to carry out through and detailed enquiries in the case. He should carry out inquiries about the various layers through which the share capital has been rotated. The A.O. is also directed to summon the present & past Directors of the assessee company and the subscriber companies and examine them. The A.O. should also examine as to when this company was sold. At that point of time the fictitious assets such as shares in other companies or loans given to other companies is converted back into cash by credit in the assessee company's bank account. The source of this money also needs to be examined. Further, information should be sent to the A.Os of the subscriber companies and to the other companies through which the capital has been rotated regarding the findings of the A.O. Subsequent to the inquiries & verification of all relevant aspects of the case, the A.O. should pass a speaking order after providing adequate opportunity to the assessee."

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The Tribunal has upheld the order. The assessee has come up in appeal.

Mr. Poddar, learned senior advocate appearing for the appellant- assessee advanced the following submissions:-

(1)Before an order under Section 263 can be passed, the Commissioner is obliged to satisfy twin conditions:

(i)that the order passed by the assessing officer is erroneous and;

(ii) that the order is prejudicial to the interest of the revenue.

Unless both these conditions are satisfied, the CIT has no jurisdiction to tinker with the order of the assessing officer.

(2) Receipt of share capital during the relevant assessment year was not a taxable event. He drew our attention to Section 56(2)(viib) which was introduced with effect from 1st April, 2013 which reads as follows:-

"56. Income from other sources.—
(1)…
(2) In particular and without prejudice to the generality of the provisions of sub-section (1), the following incomes shall be chargeable to income tax under the head "Income from other sources", namely:—
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(vii-b) where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares:

Provided that this clause shall not apply where the consideration for issue of shares is received—

(i) by a venture capital undertaking from a venture capital company or a venture capital fund; or

(ii) by a company from a class or classes of persons as may be notified by the Central Government in this behalf.

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Explanation.—For the purposes of this clause,—

(a) the fair market value of the shares shall be the value—

(i) as may be determined in accordance with such method as may be prescribed; or

(ii) as may be substantiated by the company to the satisfaction of the Assessing Officer, based on the value, on the date of issue of shares, of its assets, including intangible assets being goodwill, know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, whichever is higher;

(b) "venture capital company", "venture capital fund" and "venture capital undertaking" shall have the meanings respectively assigned to them in clause (a), clause (b) and clause (c) of 17[Explanation] to clause (23-FB) of Section 10;]"

He contended that the eyebrows were raised because the assessee issued shares of Rs.10/- each at a premium of Rs.390/-. Even assuming that the shares were over-priced, the same would not become taxable during the relevant assessment year. If it is not a taxable income there can be no consequent loss of revenue. Therefore the order passed by the assessing officer cannot be prejudicial to the interest of the revenue.

(3) The concept of arms length pricing in a domestic transaction was introduced for the first time with effect from 1st April, 2013 by introducing Sections 92A and 92BA of the Income Tax Act.

The object of Mr. Poddar in showing this provision is that though the subscribers, to the share capital of the assessee, are companies managed by the same group of persons or their relations, the same is of no consequence because during the relevant assessment year the concept of arms length pricing in the domestic transaction was not there.

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The enquiry directed by the Commissioner is therefore bound to be an exercise in futility unless the case of the assessee can be brought within Section 68 of the Income Tax Act.

He in support of his submissions relied upon the judgement in the case of CIT, West Bengal –Vs- Calcutta Discount Company Limited reported in (1973) 91 ITR 8 (SC) wherein the following views were expressed:-

"The question that, when an assessee transfers some of his stock-in-trade to another person at a price less than the market price, whether that assessee can be considered to have made any profit merely because he has transferred some of his stock-in-trade not at the market price but at a lesser price, came up for consideration before the High Court of Madras in Sri Ramalinga Choodambikai Mills Ltd. v. CIT [(1955) 28 ITR 952 (Mad)] . The facts of that case as set out in the head-note are: a limited company sold certain goods showed in its stock-in-trade to its managing agency firm and to another firm in which one of its directors was interested. The sales in question were held to be bona fide sales. At the same time it was held that the goods were sold at a concessional rate. The Income Tax Officer sought to tax the assessee therein after computing the profits earned by that firm on the basis of the market price of the goods sold and not the actual price at which those goods were sold. The assessee challenged the said basis. The Tribunal upheld the contention of the assessee. It came to the conclusion that the assessee had, in reality, made no profits at all. The High Court agreed with the conclusion reached by the Tribunal. It opined that, in the absence of any evidence to show either that the sales were sham transactions or that the market prices were in fact paid by the purchasers, the mere fact that the goods were sold at a concessional rate to benefit the purchasers at the expense of the company would not entitle the Income Tax Department to assess the difference between the market price and the price paid by the purchasers, as profits of the company.

A somewhat similar question came up for consideration before this Court in CIT v. A. Raman & Co. [(1968) 1 SCR 10 (SC) : (1968) 67 ITR 11] It is unnecessary to set out the facts of that case and it is sufficient to refer to the relevant observations in the judgment. Shah, J., (as he than was), speaking for the Court, stated the law at p. 17 of the report, thus:

"The plea raised by the Income Tax Officer is that income which could have been earned by the assessees was not earned, and a part of that income was earned by the Hindu undivided families

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That according to the Income Tax Officer was brought about by 'a subterfuge or contrivance'. Counsel for the Commissioner contended that if by resorting to a 'device or contrivance', income which would normally have been earned by the assessee is divided between the assessee and another person, the Income Tax Officer would be entitled to bring the entire income to tax as if it had been earned by him. But the law does not oblige a trader to make the maximum profit that he can out of his trading transactions. Income which accrues to a trader is taxable in his hands: income which he could have, but has not earned, is not made taxable as income accrued to him. By adopting a device, if it is made to appear that income which belonged to the assessee had been earned by some other person, that income may be brought to tax in the hands of the assessee, and if the income has escaped tax in a previous assessment a case for commencing a proceeding for reassessment under Section 147(b) may be made out. Avoidance of tax liability by so arranging commercial affairs that charge of tax is distributed is not prohibited. A taxpayer may resort to a device to divert the income before it accrues or arises to him. Effectiveness of the device depends not upon considerations of morality, but on the operation of the Income Tax Act. Legislative injunction in taxing statutes may not, except on peril of penalty, be violated, but it may lawfully be circumvented."

It is a well accepted principle of law that an assessee can so arrange his affairs as to minimise his tax burden. Hence, if the assessee in this case has arranged its affairs in such a manner as to reduce its tax liability by starting a subsidiary company and transferring its shares to that subsidiary company and thus foregoing part of its own profits and at the same time enabling its subsidiary to earn some profits, such a course is not impermissible under law."

He submitted that Section 92BA has been enacted and given effect from 1st April, 2013 in order to avoid the applicability of the aforesaid judgement of the Apex Court in the case of CIT –Vs- Calcutta Discount Co. Ltd.

(4) He drew our attention to Schedule 10 of the Companies Act in order to show that the increase in the authorized share capital can be made subject to payment of fees prescribed therein. In order to avoid to pay the fees the assessee chose to price the shares at Rs.10/- each and to collect the sum of Rs.390/- per share by way of premium.

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(5) All the documents required by the assessing officer by the notice under Section 142(1) of the Income Tax Act were duly submitted and they have also been produced before us. There is nothing in the documents, according to him, to arouse any suspicion with regard to (i) identity, (ii) genuineness of the transaction and (iii) creditworthiness of the applicants of shares.

It cannot therefore be said that the assessing officer either did not apply his mind or omitted to make necessary enquiry. He added that the revenue did not disclose anything to contradict the documents disclosed by the assessee or to disprove them or even to dispute the correctness thereof.

(6) Commenting upon the order under Section 263 Mr. Poddar contended that the Commissioner has opined that:-

"a) bank statements of the subscribing companies is for a very limited period and not for the whole year".

Mr. Poddar contended that the bank statements for the entire relevant period were furnished. The Commissioner in his order under Section 263 opined that "analysis of this statement does not throw any light whatsoever on the source of funds of the subscriber companies." Mr. Poddar contended that the source of fund of each of the subscribing company including cheque numbers and the nature of receipt except in a few cases were duly furnished by the assessee to the assessing officer.

He submitted that those bank statements have also been produced before us for our convenience. He filed a booklet containing the source and nature of receipts of each of the subscribing company.

(b) The Commissioner opined that:-

"the replies were just placed on record and no independent inquiries were carried out regarding the fact whether the subscribing companies were available at the given address, whether they had the financial capability to invest such substantial amounts and whether they were genuine corporate entities."

Mr. Poddar contended that the particulars of Pan Card, acknowledgement of return, bank statements, application for shares, source of money, balance-

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sheet showing investment made by the subscribers with the assessee were all furnished before the Assessing Officer and they have also been produced before us.

The finding recorded by the Commissioner is also belied, according to him, by the fact that notices issued to 15 out of 39 subscribers by the Assessing Officer under Section 133(6) of the Income Tax Act were duly served and the noticees duly responded thereto which goes to show beyond any pale of doubt that the subscribing companies were very much available at the given address.

(c) The Commissioner opined that:-

"In the recent years, it has become a common practice to introduce unaccounted money by way of share capital in dummy companies. The present assessee company is part of the large number of such cases in Kolkata as well as other parts of the country. The share capital is introduced by rotating the money to dummy companies which have been created solely for this purpose. The Directors of such companies are more often than not low paid employees such as peons, darbans, drivers or other persons of humble means. The modus operandi for introduction of unaccounted money as share capital is that unaccounted cash is deposited in the bank accounts of different persons/companies. After this, the money is transferred by way of cheques to other companies and this is done 3 to 4 layers, the money reaches its intended destination and this company is then sold off to the group or person who will ultimately use the money. He in turn, returns the amount of share capital and premium in cash to the person from whom the company is purchased. Thus, when share capital is introduced at huge premium in new-formed companies with no business, it should raise the suspicion of the A. O. In fact, such high premium is not commanded even by blue chip quoted companies. Under these circumstances, the A.O. is duty bound to carry out through & detailed inquiries and go beyond the layers created by the so called "entry operators" so that it may be established that the share capital is bogus."

Mr. Poddar, contended that the Commissioner has drawn upon his imagination without any factual basis and without any evidence in support thereof. He contended that the finding is perverse to the core. He did not, however dispute that the share capital in this case was introduced by rotating

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the money. But he objected to the use of the expression "Dummy Companies" because each of the companies is registered with the Income Tax Authorities and other statutory authorities. He submitted that the rotation of money is, in any event, on capital account and has no revenue effect and is, therefore, irrelevant.

Mr. Poddar contended that the order of the Commissioner is perverse. The perversity of the finding could further be illustrated by the fact that in the case before us, there has been no transaction in cash. Therefore, the finding that the company returns the amount of share capital and premium in cash is altogether baseless.

(d) He drew our attention to the following finding of the Commissioner:-

"It also needs to be pointed out that this assessee's case is not an isolated example. There are hundreds of such cases in this charge and other charges where the modus operandi is identical. Once the money has been rotated though 3 to 4 companies, return of income is filed showing very nominal income. Subsequent to this, a letter is written to the A.O. that inadvertently the assessee company has left out some minor item of income or claimed some deduction wrongly and the A.O. is requested to issue notice u/s.148. Thereafter, in the proceedings u/s.148, inquiries are carried out in a routine and superficial matter. Confirmations & other documents regarding the share capital are filed which are placed on record. Thereafter, order u/s.147/143(3) is passed adding back the amount offered by the assessee supposedly left out by mistake. It is needless to say that no independent inquiries are carried out regarding the share capital. The company is then passed on to the final purchaser after charging a percentage of the capital in the company. This modus operandi has been confirmed in may search operations carried out by the Investigation Wing on entry operators & others over the past few years."

Mr. Poddar contended that there is nothing to show that the assessee requested for issuance of any notice under Section 148 of the Income Tax Act. The assessee merely pointed out a mistake discovered subsequent to filing of the return. This, the assessee did in compliance of Section 273A. Uncharitable

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remarks cannot be passed against the assessee simply because he complied with the law.

(e) The Commissioner relied upon the judgement in the case of Sumati Dayal –Vs- CIT reported in (1995) 214 ITR 801 (SC) which, according to him has no manner of application because in that case there was evidence which is altogether absent in the case before us.

He submitted that the judgement in the case of CIT –Vs- Nova Promoters and Finlease (P) Ltd. reported in 342 ITR 169 is not applicable to the facts of this case because in that case there were confessional statements which is not there in this case. He submitted that the judgements in the case of CIT –vs- Durga Prasad More, relied upon by the Commissioner, reported in (1982) 71 ITR 540 and the judgement in the case of CIT –Vs- Precision Finance Pvt. Ltd. reported in (1994) 208 ITR 465 are also distinguishable and have no applicability to the facts and circumstances of this case.

In the case of Precision Finance Pvt. Ltd. there was nothing to show that the transaction was genuine, whereas in the present case each and every link of the transaction has been proved to the hilt, according to him.

(f) He also drew our attention to the Black money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 only to show that the aforesaid act applies only to an undisclosed income earned abroad.

(g)The Prevention of Money Laundering Act, 2002 (hereinafter referred to as 'PMLA') defines the offence of money laundering under Section 3 thereof which reads as follows:-

*"3. **Offence of money-laundering.—** Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime and projecting it as untainted property shall be guilty of offence of money-laundering."*

The expression 'proceeds of crime' used in Section 3 has been defined in 2(u) which reads as follows:-

"'proceeds of crime' means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property [or where such property is taken or held outside the country, then the property equivalent in value held within the country]."

Only such property may become proceeds of crime which has been derived as a result of criminal activity relating to a scheduled offence. The scheduled offences have been classified in three parts A, B and C. Neither of the parts include any offence under the Income Tax Act.

He therefore, contended that the PMLA, even assuming that the Commissioner has referred to in his order under Section 263, can have no manner of application to the facts and circumstance of this case.

(h) He submitted, which we quote verbatim, that "supposing there is a chain; the last or the first person in the chain, admits to have applied unaccounted fund in the transaction or it is proved that unaccounted funds have, in fact been used by him, even then there is no material to show or link the unaccounted fund with the assessee. In that case the person who admits or is proved to have used unaccounted funds can be assessed under Section 68. The others cannot be assessed because for the same money repeated assessments cannot be made. For the purpose of taxing the assessee under Section 68 nexus between the assessee and the unaccounted money has to be established.

In the ultimate analysis the object of any investigation is to find out whether there has been any unaccounted transaction which can come within the provision of Section 68 of the Income Tax Act." Section 68, he contended, insists upon the satisfaction of the assessing officer. Unless the satisfaction of the assessing officer is perverse, the CIT has no jurisdiction to interfere.

(7) The next submission advanced by Mr. Poddar is that before the Commissioner exercises jurisdiction under Section 263 he is bound to conduct

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enquiry himself. He in support of his submission relied upon the views expressed in the case of ITO –Vs- DG Housing Projects Ltd., reported in (2012) 343 ITR 329 wherein the following views were expressed:-

"Thus, in cases of wrong opinion or finding on the merits, the Commissioner of Income-tax has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary enquiry, if required and necessary, before the order under section 263 is passed. In such cases, the order of the Assessing Officer will be erroneous because the order passed is not sustainable in law and the said finding must be recorded. The Commissioner of Income-tax cannot remand the matter to the Assessing Officer to decide whether the findings recorded are erroneous. In cases where there is inadequate enquiry but not lack of enquiry, again the Commissioner of Income-tax must give and record a finding that the order/inquiry made is erroneous. This can happen if an enquiry and verification is conducted by the Commissioner of Inome-tax and he is able to establish and show the error or mistake made by the Assessing Officer, making the order unsustainable in law. In some cases possibly though rarely, the Commissioner of Income-tax can-also show and establish that the facts on record or inferences drawn from facts on record per se justified and mandated further enquiry or investigation but the Assessing Officer had erroneously not undertaken the same. However, the said finding must be clear, unambiguous and not debatable. The matter cannot be remitted for a fresh decision to the Assessing Officer to conduct further enquiries without a finding that the order is erroneous. Finding that the order is erroneous is a condition or requirement which must be satisfied for exercise of jurisdiction under section 263 of the Act. In such matters, to remand the matter/issue to the Assessing Officer would imply and mean the Commissioner of Income-tax has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question."

The aforesaid views in the case of D. G. Housing Projects were also echoed in the case of Director of Income Tax –Vs- Jyoti Foundation reported in (2013) 357 ITR 388 (Del).

(8) He in support of his submission that any further investigation is not only not called for but is also not permissible relied upon the following judgements:-

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(a)CIT –Vs- Steller Investment Ltd. reported in (1991) 192 ITR 287 (Delhi). The Delhi High Court refused to admit reference when the revenue sought to challenge an order of the Tribunal setting aside an order under Section 263 holding as follows:-

"The petitioner seeks reference of the following question:

"Whether, on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was correct both on facts and in law in holding that the provisions of section 263 have not been validly invoked in this case by ignoring the material fact that the Assessing officer had failed to discharge his duties regarding the investigation with regard to the genuineness and creditworthiness of the shareholders, many of them being students and housewives?"

In the present case, the subscribed capital of the assessee had been increased. The Income-tax Officer assessed the company and accepted the increase in the subscribed capital. The Commissioner of Income-tax came to the conclusion that the Assessing Officer did not carry out a detailed investigation inasmuch as there had been a device of converting black money into white by issuing shares with the help of formation of an investment company. The Commissioner of Income-tax further held that the Assessing Officer did not make enquiries with regard to the genuineness of the subscribers of the share capital. He thereupon set aside the order of assessment.

The Tribunal reversed this decision for reasons which we need not go into.

It is evident that even if it be assumed that the subscribers to the increased share capital were not genuine, nevertheless, under no circumstances, can the amount of share capital be regarded as undisclosed income of the assessee. It may be that there are some bogus shareholders in whose names shares had been issued and the money may have been provided by some other persons. IF the assessment of the persons who are alleged to have really advanced the money is sought to be reopened, that would have made some sense but we fail to understand as to how this amount of increased share capital can be assessed in the hands of the company itself.

In our opinion, no question of law arises and the petition is, therefore, dismissed."

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The aforesaid views of the Delhi High Court were unsuccessfully challenged before the Supreme Court. The Supreme Court refused to entertain the special leave petition holding as follows:-

"We have read the question which the High Court answered against the Revenue. We are in agreement with the High Court. Plainly, the Tribunal came to a conclusion on facts and no interference is called for. The appeal is dismissed. No order as to costs."

(b) Before the special leave petition was dismissed by the Supreme Court in the case of Steller Investment Ltd., the question had once again cropped up before the Delhi High Court in the case of CIT –vs- Sophia Finance Ltd. reported in (1994) 205 ITR 98 (Full Bench) wherein the following views were expressed:-

"As we read section 68 it appears that whenever a sum is found credited in the books of account of the assessee then, irrespective of the colour or the nature of the sum received which is sought to be given by the assessee, the Income-tax Officer has the jurisdiction to enquire from the assessee the nature and source of the said amount. When an explanation in regard thereto is given by the assessee, then it is for the Income-tax Officer to be satisfied when the said explanation is correct or not. It is in this regard that enquiries are usually made in order to find out as to whether, firstly, the persons from whom money is alleged to have been received actually existed or not. Secondly, depending upon the facts of each case, the Income-tax Officer ***may even be justified in trying to ascertain the source of the depositor, assuming he is identified, in order to determine whether that depositor is a mere name-lender or not. be that as it may, it is clear that the Income-tax Officer has jurisdiction to make enquiries with regard to the nature and source of a sum credited in the books of account of an assessee and it would be immaterial as to whether the amount so credited is given the colour of a loan or a sum representing the sale proceeds or even receipt of share application money. The use of the words "any sum found credited in the books" in Section 68 indicates that the said section is very widely worded and an Income-tax Officer is not precluded from making an enquiry as to the true nature and source thereof even if the same is credited as receipt of share application money.***

If the amount credited is a capital receipt then it cannot be taxed but it is for the Income-tax Officer to be satisfied that the true nature of the receipt is that of capital. Merely because the company chooses to show the receipt of the money as capital,

*it does not preclude the Income-tax Officer from going into the question whether this is actually so. Section 68 would clearly empower him to do so. Where, therefore, the assessee represents that it has issued shares on the receipt of share application money then the amount so received would be credited in the books of account of the company. The Income-tax Officer would be entitled to enquire, and it would indeed be his duty to do so, whether the alleged shareholders do in fact exist or not. If the shareholders exist then, possibly, no further enquiry need be made. But if the Income-tax Officer finds that the alleged shareholders do not exist then, in effect, it would mean that there is no valid issuance of share capital. Shares cannot be issued in the name of non-existing persons. The use of the words "may be charged" (emphasis * added) in section 68 clearly indicates that the Income-tax Officer would then have the jurisdiction, if the facts so warrant, to treat such a credit to be the income of the assessee.*

It is neither necessary nor desirable to give examples to indicate under what circumstance section 68 of the Act can or cannot be invoked. What is clear, however, is that section 68 clearly permits an Income-tax Officer to make enquiries with regard to the nature and source of any or all the sums credited in the books of account of the company irrespective of the nomenclature or the source indicated by the assessee. In other words, the truthfulness of the assertion of the assessee regarding the nature and the source of the credit in its books of account can be gone into by the Income-tax Officer. In the case of Steller Investment Ltd. [1991] 192 ITR 287 (Delhi), the Income-tax Officer had accepted the increased subscribed share capital. Section 68 of the Act was not referred to and the observations in the said judgement cannot mean that the Income-tax Officer cannot or should not go into the question as to whether the alleged shareholders actually existed or not. If the shareholders are identified and it is established that they have invested money in the purchase of shares then the amount received by the company would be regard as a capital receipt and to that extent the observations in the case of Steller Investment Ltd. [1991] 192 ITR 287 (Delhi), are correct but if, on the other hand, the assessee offers no explanation at all or the explanation offered is not satisfactory then, the provisions of section 68 may be invoked. In the latter case section 68, being a substantive section, empowers the Income-tax Officer to treat such a sum as income of the assessee which is liable to be taxed in the previous year in which the entry is made in the books of account of the assessee."

Mr. Poddar contended that the existence of the share-holders in this case has duly been proved. Therefore, even the judgement in the case of Sophia Finance Ltd. does not militate against the assessee.

(c) The next judgement relied upon by Mr. Poddar is in the case of CIT –Vs- Lovely Exports Pvt. Ltd. reported in (2008) 299 ITR 268 (Delhi) wherein the following views were expressed:-

"Therefore, for a detailed discussion on Section 68 one should first turn to Gee Vee Enterprises v. Addl. CIT (1975) 99 ITR 375 (Delhi) and thence finally to the decision of the Full Bench of this Court in Sophia Finance (1994) 205 ITR 98.

In Gee Vee Enterprises –Vs- Addl. CIT (1975) 99 ITR 375 (Delhi), the Division Bench had in the context of a challenge to the maintainability of the writ petition on the grounds of the availability of an alternative remedy laid down situations which would justify the invocation of Article 226 of the Constitution. The Bench had also opined that (page 384): "the intention of the Income Tax Officer as erroneous not only because it contains some apparent error of reasoning or of law or of fact on the fact of it but also because it is a stereo-typed order which simply accepts what the assessee has stated in his return and fails to make inquiries which are called for in the circumstances of the case." It was further observed that the Assessing Officer is both an adjudicator as well as an investigator, and ***it is his duty to ascertain the truth of the facts stated in the return if such an exercise is "provoked", or becomes "prudent". The Bench held that Section 263 which deals with the revision of orders prejudicial to the Revenue by the Commissioner comes into operation wherever the Assessing Officer fails to make such an inquiry, because it renders the order of the Assessing Officer "erroneous". It seems to us that if this duty pervades the normal functioning of the Assessing Officer, it becomes acute and essential in the special circumstances surrounding Section 68 of the Income Tax Act.***

There cannot be two opinions on the aspect that the pernicious practice of conversion of unaccounted money through the masquerade or channel of investment in the share capital of a company must be firmly excoriated by the Revenue. Equally, where the preponderance of evidence indicates absence of culpability and complexity of the assessee it should not be harassed by the Revenue's insistence that it should prove the negative. *In the case of a public issue, the company concerned cannot be expected to know every detail pertaining to the identity as well as financial worth of each of its subscribers. The company must,*

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however, maintain and make available to the Assessing Officer for his perusal, all the information contained in the statutory share application documents. In the case of private placement the legal regime would not be the same. A delicate balance must be maintained while walking the tightrope of sections 68 and 69 of the Income-tax Act. The burden of proof can seldom be discharged to the hilt by the assessee; if the Assessing Officer harbours doubts of the legitimacy of any subscription he is empowerd, nay duty-bound, to carry out thorough investigations. But if the Assessing Officer fails to unearth any wrong or illegal dealings, he cannot obdurately adhere to his suspicions and treat the subscribed capital as the undisclosed income of the company.

"in this analysis, a distillation of the precedents yields the following propositions of law in the context of section 68 of the Income-tax Act. The assessee has to prima facie prove (1) the identity of the creditor/ subscriber; (2) the genuineness of the transaction, namely, whether it has been transmitted through banking or other indisputable channels; (3) the creditworthiness or financial strength of the creditor/subscriber; (4) if relevant details of the address or PAN identity of the creditor/subscriber are furnished to the Department along with copies of the shareholders register, share application forms, share transfer register, etc., it would constitute acceptable proof or acceptable explanation by the assessee. (5) The Department would not be justified in drawing an adverse inference only because the creditor/subscriber fails or neglects to respond to its notices; (6) the onus would not stand discharged if the creditor/subscriber denies or repudiates the transaction set up by the assessee nor should the Assessing Officer take such repudiation at face value and construe it, without more, against the assessee; and (7) the Assessing Officer is duty-bound to investigate the creditworthiness of the creditor/subscriber the genuineness of the transaction and the veracity of the repudiation."

"The Commissioner of Income-tax (Appeals) deleted the addition for the reason that the identity of the shareholders had been established on the strength of Steller Investment, which approach may not be entirely correct in the light of the discussion above. We have already concluded that this merely shifts the burden of proving the illegal or illegitimate nature of the transaction onto the Department. The investigations carried out by the Assessing Officer in Calcutta cannot be relied upon by the Assessing Officer, Bulandshahar, consequent on those proceedings being found to be without jurisdiction. While rejecting the assault of the Revenue on this aspect the Income-tax Appellate Tribunal has cogently noted that the share capital

issued to the original shareholders in the assessment year 1984-85, which had been cancelled by the Assessing Officer, Calcutta, was found to be valid by the jurisdictional Assessing Officer at Bulandshahar. But we hasten to clarify that the statement of law made by the Income-tax Appellate Tribunal to the effect that in case of share capital no additions could be made if it is established that the shareholders exist is not completely correct and has not been so enunciated by this Court in Sophia Finance [1994] 205 ITR 98 (Delhi) [FB].”

A special leave petition filed by the revenue challenging the order of the Delhi High Court in the case of Lovely Exports Pvt. Ltd. was dismissed in limine reported in CIT –Vs- Lovely Exports Pvt. Ltd. (2009) 319 ITR (St.) 5 (SC).

Mr. Poddar strongly relied upon the opinion expressed by the Apex Court in dismissing the special leave petition which reads as follows:-

“We find no merit in this special leave petition for the simple reason that if the share application money is received by the assessee-company from alleged bogus shareholders, whose names are given to the Assessing Officer, then the Department is free to proceed to reopen their individual assessments in accordance with law. Hence, we find no infirmity with the impugned judgement.” : CIT v. Lovely Exports P. Ltd. : S. L. P. (Civil) No.1153 of 2008.”

Mr. Poddar submitted that the views expressed by the Apex Court in the case of Steller Investment Ltd. were really endorsed by the aforesaid views expressed in the Lovely Exports Pvt. Ltd. The main plank of the argument advanced by Mr. Poddar is that if the share application money received by the assessee, is bogus, the department is free to proceed to reopen the individual assessment of the applicants of the shares. He contended that the views expressed by the Apex Court both in the case of Steller Investment Ltd. and Lovely Exports Pvt. Ltd. were binding and therefore, the assessing officer could not have taken a different view of the matter.

The Commissioner, according to him, drawing upon his imaginary grounds interfered with the order of the assessing officer and that was erroneously upheld by the learned Tribunal.

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(d) Mr. Poddar drew our attention to a judgement of the Tribunal in ITA No.479/KOL/2011 M/s. Lotus Capital Financial Services Ltd. –Vs- ITO wherein an order under Section 263 passed by the Commissioner of Income Tax was quashed on the ground that:-

"We are of the view that the assessee has filed complete details names, addresses, no. of share applied for and allotted, cheque nos., name of bank on which cheques were issued to shareholders and even this was verified through notices u/s. 133(6) of the Act and in response to these notices, the prospective shareholders also replied to the assessee, and the confirmations are on record even before us, the same clearly reveals that complete information was available before the Assessing Officer at the time of framing of assessment and he has given this finding in his order passed u/s. 143(3) of the Act. We, after going through provisions of section 263 of the Act, find that Commissioner can revise assessment order passed by Assessing Officer only if –

(i)it is erroneous, and

(ii) it is prejudicial to the interests of the revenue.

If the order sought to be revised is not prejudicial to the interests of the revenue, Commissioner has no jurisdiction to revise it. For instance, an order of assessment passed by an Assessing Officer without complying with the procedure laid down in the pre 1989 section 144B of the Act is erroneous, but cannot be said to be prejudicial to the interests the revenue. Similarly, failure of the Assessing Officer to deal with the claim of the assessee in the assessment order may be an error, but an erroneous order by itself is not enough to give jurisdiction to Commissioner to revise it under section 263 of the Act. It must further be shown that the order was prejudicial to the interests of the revenue and it is not each and every order passed by the Assessing Officer which can be revised under section 263 of the Act. A bare reading of section 263(1) makes it clear that the pre-requisite to exercise of jurisdiction by the Commissioner suo motu under it, is that the order of the AO is erroneous in so far as it is prejudicial to the interests of the Revenue. The Commissioner has to be satisfied with twin conditions, namely, (i) the order of the AO sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent -if the order of the AO is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue-recourse cannot be had to section 263(1). This view is

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taken by Hon'ble Apex Court in the case of Malabar Industrial Co. Ltd. v. CIT (2000) 243 ITR 83, 88 (SC). Accordingly, in the present case before us, the assessment framed by AO is neither erroneous nor prejudicial to the interest of revenue and this is clearly demonstrated by facts discussed by AO in his order and documents produced before us by assessee. Accordingly, we set aside the order of CIT passed u/s. 263 of the Act being not as per law."

(e)This Court in ITAT No.125 of 2012 CIT –Vs- M/s. Lotus Capital Financial Services Pvt. Ltd. refused to admit an appeal preferred by the revenue. The object of citing this judgement, Mr. Poddar contended, is that the facts and circumstances of the case before us are on all fours of the aforesaid judgment and, therefore, a similar view should be taken.

(f) In an unreported judgement of this Court in the case of CIT –Vs- M/s Dataware Pvt. Ltd. (ITAT No. 263 of 2011) addition made by the assessing officer was deleted by the CIT(A) on the ground that the identity of the creditor had been well-established, creditworthiness of the creditor was also proved and the CIT was convinced about the genuineness of the transaction. The order of the CIT(A) was confirmed by the Tribunal. This Court refused to admit an appeal preferred by the revenue.

The object of citing this judgment is that the identity of the applicants of shares has been fully established by the assessee. Payments were all made by cheques, bank statements have been submitted. The applicants of shares are also assessees to the income tax. They have furnished pan details. Therefore any further enquiry in the case was not called for.

(g) Another unreported judgement of this Court in the case of CIT –Vs- Roseberry Mercantile (P) Ltd. was cited by Mr. Poddar wherein the assessing officer was of the opinion that the nature and source of money utilized for the purpose of increasing the share capital was doubtful. He, therefore, added the sum under Section 68/69 of the Income Tax Act. In an appeal the CIT(A) following the case of Lovely Exports Pvt. Ltd. deleted the addition holding that

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the sum received from the investors could not be added under Section 68. This Court refused to admit an appeal preferred by the revenue.

(h) In another unreported judgement of this Court in the case of CIT –Vs- M/s. Sanchati Projects (P) Ltd. (ITAT No. 140 of 2011) cited by Mr. Poddar, a sum of Rs.82 lakhs were collected by the assessee by issuing shares to 8 persons. The assessing officer doubted the credibility of the share holders on the basis that they or some of them had the same address as the other applicants of the shares. Therefore, a sum of Rs.45 lakhs was added back. The CIT(A) deleted the addition on the basis that all the share applicants were assessed to tax and the transactions with the assessee were duly reflected in their respective audited balance-sheets. An appeal preferred by the revenue was dismissed by the Tribunal and this Court refused to admit an appeal of revenue.

(i) Mr. Poddar also drew our attention to a judgement in the case of CIT – Vs- Samir Bio-Tech Pvt. Ltd. reported in (2010) 325 ITR 294 (Delhi) wherein an appeal preferred by the revenue was dismissed because the identity of the subscribers of shares were not in doubt and the transaction had also taken place by account payee cheques. The assessing officer had taken an adverse view only because the subscriber initially did not respond to the summons but subsequently they did.

He also drew our attention for an identical proposition to CIT –Vs- Kamdhenu Steel & Alloys Ltd. reported in (2014) 361 ITR 220 (Delhi). A special leave petition preferred by the revenue was also dismissed.

Based on the aforesaid judgements Mr. Poddar contended that there can be no doubt that the assessing officer took a possible view in accepting the increase of the share capital as genuine. He added that if the views of the assessing officer are a possible view, the CIT does not have any jurisdiction to interfere.

(10) The next contention advanced by Mr. Poddar is that the assessee is not required to prove the source of source. He in support of his submission

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relied upon a judgement in the case of CIT –Vs- Dwarkadhish Capital Pvt. Ltd. reported in (2011) 330 ITR 298 (Delhi) Vol.5. In this case share capital was increased by a sum of Rs.71.75 lakhs. The assessing officer asked for explanations which were duly filed. The assessing officer was, however of the opinion that the assessee had failed to offer proper explanation with respect to 5 subscribers and, therefore a sum of Rs.35,50,000/- was added. The CIT deleted the additions and the Tribunal affirmed the order of CIT. In an appeal preferred by the revenue the Court opined as follows:-

"In any matter, the onus of proof is not a static one. Though in Section 68 proceedings, the initial burden of proof lies on the assessee yet once he proves the identity of the creditors/share applicants by either furnishing their PAN number or Income-tax assessment number and shows the genuineness of transaction by showing money in his books either by account payee cheque or by draft or by any other mode, then the onus of proof would shift to the Revenue. Just because the creditors/share applicants could not be found at the address given, it would not give the Revenue the right to invoke Section 68. One must not lose sight of the fact that it is the Revenue which has all the power and wherewithal to trace any person. Moreover, it is settled law that the assessee need not to prove the source."

Mr. Poddar contended that the view expressed in the case of Dwarkadhish (supra) that the assessee is not required to prove the source of source has been followed in a series of cases.

(a) He drew our attention to a judgement of the Delhi High Court in the case of CIT –Vs- Kinetic Capital Finance Ltd. reported in (2013) 354 ITR 296 (Del) wherein the following views were expressed:-

"The Tribunal, in our view, has correctly appreciated the position in law which is that when an unexplained credit is found in the books of account of an assessee the initial onus is placed on the assessee. The assessee is required to discharge this initial onus. Once that onus is discharged, it is for the Revenue to prove that the credit found in the books of account of the assessee is the undisclosed income of the assessee. In the circumstances obtaining in the present case, in our view, the assessee has discharged that initial onus. The assessee is not required thereafter to prove the genuineness of the transactions

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as between its creditors and that of the creditors' source of income, i.e., the sub-creditors (See Nemi Chand Kothari v. CIT [2003] 264 ITR 254 (Gauhati) and the judgement of this Court in Mod Creations Pvt. Ltd. v. ITO I. T.A. No. 1158 of 2007 decided on August 29, 2011) since reported in [2013] 354 ITR 282 (Delhi). The Tribunal is the final fact finding authority."

(b) He drew our attention to the similar view also expressed by the Allahabad High Court in the case Zafa Ahmad & Co. –Vs- CIT reported in (2013) 214 Taxman 440 (All). Similar view was also taken by the Allahabad High Court in the case of Anil Rice Mills –Vs- CIT reported in (2006) 282 ITR 236.

In the aforesaid judgement reference was also made to other cases as would appear from page 248 which is as follows:-

"It has been held by the various High Courts that the assessee cannot be asked to prove source of source or the origin of origin [vide S. Hastimal v. CIT [1963] 49 ITR 273 (Mad) ; Tolaram Daga v. CIT [1966] 59 ITR 632 (Assam) ; CIT v. Daulat Ram Rawatmull [1973] 87 ITR 349 (SC); Sarogi Credit Corporaion v. CIT [1976] 103 ITR 344 (Patna)]."

(11) The next judgement cited by Mr. Poddar is an unreported judgement of the Delhi High Court in the case of CIT –Vs- Five Vision Promoters Pvt. Ltd. (ITA 234 of 2015).

Mr. Poddar submitted that the facts and circumstances in the aforesaid cases are similar to the facts and circumstances of the case before us. The similarity lies in the fact that part of the share capital of the assessee was contributed by 16 companies which in their turn had been financed by M/s. Ganesh Builtech. In other words, Ganesh Builtech invested money in those 16 companies, those 16 companies invested money with the assessee and all of them belonged to the same group. The similarity however ends there.

The assessing officer based on the statement made by one Sri Vijay Jindal came to the conclusion that the shares originally issued by the assessee at Rs.81.19 crores were bought back by the individuals/ concerns belonging to the same group at a sum of Rs.10.38 crores. It is on this basis that the differential amount was added back to the income of the assessee. The CIT

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upheld the order of the assessing officer but the Tribunal deleted the addition. In an appeal preferred by the revenue, the High Court held that:-

"Also, the fact that the shares of the assessee were subsequently sold at a reduced price is indeed not germane to the question of the genuineness of the investment in the share capital of the Assessee. The question of avoidance of tax thereby may have to be examined in the hands of the person purchasing the shares."

(12) Mr. Poddar submitted that concluded matters cannot be reopened as was done in this case by the Commissioner of Income Tax. He in support of his submission relied on the following passage from the judgement in the case of CIT –Vs- Gabriel India Ltd. reported in (1993) 202 ITR 108:-

"The Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded. Such action will be against the well-accepted policy of law that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity. (See Parashuram Pottery Works Co. Ltd. v. ITO [1977] 106 ITR 1 (SC), at page 10)

As observed in Sirpur Paper Mills Ltd. v. ITO [1978] 114 ITR 404, 407 (AP) by Raghuveer J. (as his Lordship then was), the Department cannot be permitted to begin fresh litigation because of new views they entertain on facts or new versions which they present as to what should be the inference or proper inference either of the facts disclosed or the weight of the circumstances. If this permited, litigation would have no end," except when legal ingenuity is exhausted". "To do so….. to divide one argument into two and to multiply the litigation."

What had happened in that case was that an explanation was accepted by the assessing officer. The CIT was of the opinion that the explanation was not acceptable. The CIT was, however unable to point out any error in allowing the explanation. The order of the CIT was set aside by the Tribunal and the High Court had upheld that order. In doing so the aforesaid observations were made.

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(a) The next judgement cited by Mr. Poddar is in the case of Hari Iron Trading Co. –Vs- CIT reported in (2003) 263 ITR 437 for the following proposition:-

"In the absence of any suggestion by the Commissioner as to how the inquiry was not proper, we are unable to uphold the action taken by him under section 263 of the Act."

Taking inspiration from the aforesaid views expressed in the case Hari Iron Trading Company, Mr. Poddar contended that in the case before us, the CIT has directed the assessing officer to "carry out enquiries about various layers through which the share capital has been rotated". Mr. Poddar contended that the enquiry through the layers is irrelevant for the purpose of assessment of the assessee, in the light of the judgements in the case Lovely Exports (supra) and Steller Investment (supra).

(13) The next submission of Mr. Poddar is as regards scope of Section 263. He cited the judgement in the case of CIT –Vs- Leisure Wear Exports Pvt. Ltd. reported in (2012) 341 ITR 166 (Delhi). He drew our attention to paragraph 9 of the judgment and submitted that he adopts the same as a part of his argument which reads as follows:-

"The power of revision is not meant to be exercised for the purpose of directing the Assessing Officer to hold another investigation without describing as to how the order of the Assessing Officer is erroneous. From this it also follows that where the assessment order has been passed by the Assessing Officer after taking into account the assessee's submissions and documents furnished by him and no material whatsoever has been brought on record by the Commissioner which showed that there was any discrepancy or falsity in evidence furnished by the assessee, the order of the Assessing Officer cannot be set aside for making deep inquiry only on the presumption and assumption that something new may come out."

(14) Mr. Poddar drew our attention to the judgement in the case of Omar Salay Mohamed Sait –Vs- CIT reported in (1959) 37 ITR 151 (SC) wherein the Apex Court opined as follows:-

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"We are aware that the Income-tax Appellate Tribunal is a fact finding Tribunal and if it arrives at its own conclusions of fact after due consideration of the evidence before it this court will not interfere. It is necessary, however, that every fact for and against the assessee must have been considered with due care and the Tribunal must have given its finding in a manner which would clearly indicate what were the questions which arose for determination, what was the evidence pro and contra in regard to each one of them and what were the findings reached on the evidence on record before it. The conclusions reached by the Tribunal should not be coloured by any irrelevant considerations or matters of prejudice and if there are any circumstances which required to be explained by the assessee, the assessee should be given an opportunity of doing so. On no account whatever should it act on no evidence at al or on improper rejection of or surmises nor should it act on no evidence at all or on improper rejection of material and relevant evidence or partly on evidence and partly on suspicions, conjectures or surmises and if it does anything of the sort, its findings, even though on questions of fact, will be liable to be set aside by this court."

Mr. Poddar contended that the aforesaid views of the Supreme Court are equally applicable to the order passed by the CIT in the exercise of his revisional jurisdiction. Mr. Poddar drew our attention to another judgement of the Supreme Court in the case of Lalchand Bhagat Ambica Ram -Vs- CIT reported in (1959) 37 ITR 288 (SC) wherein the following observations were made:-

"Adverting to the various probabilities which weighed with the Income-tax Officer we may observe that the notoriety for smuggling food grains and other commodities to Bengal by country boats acquired by Sahibgunj and the notoriety achieved by Dhulian as a great receiving centre for such commodities were merely a background of suspicion and the appellant could not be tarred with the same brush as every arhatdar and grain merchant who might have been indulging in smuggling operations, without an iota of evidence in that behalf. The cancellation of the food grain license at Nawgachia and the prescience inasmuch as the appellant was acquitted of the offence with which it had been charged and its license also was restored. The mere possibility of the appellant earning considerable amounts in the year under consideration was pure conjecture on the part of the Income-tax Officer and the fact that the appellant indulged in speculation (in Kalai account) could not legitimately lead to the inference

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that the profit in a single transaction or in a chain of transactions could exceed the amounts, involved in the high denomination notes, this also was a pure conjecture or surmise on the part of the Income-tax Officer."

Mr. Poddar submitted that since money laundering activities are going on, the CIT thought that the assessee was also a money launderer. Taking inspiration from the aforesaid judgement, Mr. Poddar contended that his client was also tarred with the same brush without any iota of evidence in that behalf.

(15) The proviso to Section 68 has been added with effect from 1st April, 2013. Therefore, the proviso is prospective in nature and cannot apply to any transaction during any period prior to 1st April, 2013, whereas the Court, in this case is concerned with the assessment year 2009-10. In the absence of the aforesaid proviso the mere fact that 4 or 5 contributors did not disclose the nature of their receipt is of no significance because the matter has to be decided in the light of the judgements in the case of Lovely Exports and Steller (supra).

Mr. Poddar submitted that the proviso to Section 68 added with effect from 1st April, 2013 can have no retrospective operation. He in support of his submission relied upon the judgement in the case of Reliance Jute & Industries Ltd. –Vs- CIT reported in (1979) 120 ITR 921 wherein the following views were expressed:-

"It is a cardinal principle of the tax law that the law to be applied is that in force in the assessment year unless otherwise provided expressly or by necessary implication."

(a) He also relied upon an earlier judgement of the Supreme Court in the case of Karimtharuvi Tea Estate Ltd. –Vs- State of Kerala reported in (1966) 60 ITR 262 wherein the following views were expressed:-

"It is well-settled that the Income-tax Act as it stands amended on the first day of April of any financial year must apply to the assessment of that year. Any amendments in the Act which come into force after the first day of April of a financial year,

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would not apply to the assessment for that year, even if the assessment is actually made after the amendments come into force."

(b) Mr. Poddar submitted that the proviso to Section 68 is neither procedural nor explanatory as would appear from the objects for introduction of the same as would appear from the Parliamentary Notes which is as follows:-

"C. MEASURES TO PREVENT GENERATION AND CIRCULATION OF UNACCOUNTED MONEY

Cash credits under section 68 of the Act

Section 68 of the Act provides that if any sum is found credited in the books of an assessee and such assessee either

(i)does not offer any explanation about nature and source of money; or

(ii) the explanation offered by the assessee is found to be not satisfactory by the Assessing Officer, then, such amount can be taxed as income of the assessee.

The onus of satisfactorily explaining such credits remains on the person in whose books such sum is credited. If such person fails to offer an explanation or the explanation is not found to be satisfactory then the sum is added to the total income of the person. Certain judicial pronouncements have created doubts about the onus of proof and the requirements of this section, particularly, in cases where the sum which is credited as share capital, share premium etc.

Judicial pronouncements, while recognizing that the pernicious practice of conversion of unaccounted money through masquerade of investment in the share capital of a company needs to be prevented, have advised a balance to be maintained regarding onus of proof to be placed on the company. The Courts have drawn a distinction and emphasized that in case of private placement of shares the legal regime should be different from that which is followed in case of a company seeking share capital from the public at large.

In the case of closely held companies, investments are made by known persons. Therefore, a higher onus is required to be placed on such companies besides the general onus to establish identity and credit worthiness of creditor and genuineness of transaction. This additional onus, needs to be placed on such companies to also prove the source of money in the hands of shareholder or persons making payment towards issue of shares before such sum is accepted as genuine credit. If the company

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fails to discharge the additional onus, the sum shall be treated as income of the company and added to its income.

It is, therefore, proposed to amend section 68 of the Act to provide that the nature and source of any sum credited, as share capital, share premium etc., in the books of a closely held company shall be treated as explained only if the source of funds is also explained by the assessee company in the hands of the resident shareholder. However, even in the case of closely held companies, it is proposed that this additional onus of satisfactorily explaining the source in the hands of the shareholder, would not apply if the shareholder is a well regulated entity, i.e. a Venture Capital Fund, Venture Capital Company registered with the Securities Exchange Board of India (SEBI).

This amendment will take effect from 1st April, 2013 and will, accordingly, apply in relation to the assessment year 2013-14 and subsequent years."

(16) Mr. Poddar contended that Section 263 does not visualize a case of substitution of the views of the assessing officer by the views of the Commissioner. He in support of his contention relied upon the judgement in the case of CIT –Vs- Sunbeam Auto Ltd. reported in (2011) 332 ITR 167 (Del.)

(17) The next submission advanced by Mr. Poddar is that the assessing officer in his notice under Section 142(1) specified a large number of documents to be produced by the assessee which is a pointer to show that the assessing officer had duly applied his mind. He in support of his submission relied upon a judgement of this Court in the case of Grindlays Bank Ltd. –Vs- ITO reported in (1978) 115 ITR 799 which reads as follows:-

"We feel no hesitation in agreeing with the learned trial judge that before any notice under this provision could be issued calling upon an assessee to produce any document, the ITO must be satisfied that such a document would be needed for the purpose of making the assessment or in other words the document must have its bearing on the pending assessment, and, secondly, that he requires the document to be so produced for the purpose of making the assessment. To fulfil these requirements it is quite obvious that the ITO must apply his mind because without such application of mind he can never arrive at any bona fide satisfaction on the two points referred to hereinbefore. As pointed out by this court in a Bench decision in the case of Hindustan Motors Ltd. v. T. N.

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Kaul (Appeal No.280 of 1970) arriving at such a satisfaction is a part of the jurisdictional fact so that the ITO never acquires jurisdiction to issue a notice under s.142(1) for production of any document until he on application of his own mind arrives at a satisfaction that the document so directed to be produced would have its bearing on the assessment and that he requires the same to be produced for making the assessment. Where the ITO does not apply his mind to these requirements and does not arrive at any such satisfaction but issues the notice in mechanical exercise of his powers it would really be an act beyond his jurisdiction which can certainly be challenged before this court in the writ jurisdiction. Moreover, issue of a notice in mechanical exercise of powers under s.142(1) would be merely a purported exercise of powers and not a real one and it is always open to a person aggrieved by such a notice to challenge it before this court in its writ jurisdiction (See Union of India v. Tarachand Gupta & Bros., AIR 1971 Sc 1558, and also the decision of the Supreme Court in the case of Barium Chemicals v. A. J. Rana [1972] 42 Comp Cas 245). This being the position, we are unable to accept the contention of Mr. Pal that even if we accept the contention of the appellant we should hold that the infirmity alleged constitutes such irregularity or illegality as would not entitle this court to interfere in exercise of its writ jurisdiction."

(a) The aforesaid judgement was subsequently followed by a learned Single Judge of this Court in the case of Vijay Mallya –Vs- ACIT reported in (2003) 131 Taxman 477 (Cal).

It is, however, to be noticed that in both the cases the subject matter of challenge was that the notice under Section 142(1) had been issued without application of mind.

(b) The next judgement cited by Mr. Poddar is in the case of CIT –Vs- J. L. Morrison (India) Ltd. reported in (2014) 366 ITR 593 to which one of us (Girish Chandra Gupta, J.) was a party wherein the following views were expressed:-

"The fact, that all requisite papers were summoned and thereafter the matter was heard from time to time coupled with the fact that the view taken by him is not shown by the Revenue to be erroneous and was also considered both by the Tribunal as also by us to be a possible view, strengthens the presumption under clause (e) of Section 114 of the Evidence Act. A prima facie evidence, on the basis of the aforesaid presumption, is thus converted into a

conclusive proof of the fact that the order was passed by the Assessing Officer after due application of mind."

(18) Mr. Poddar reiterated that even if the share-holders are bogus, the share capital contributed by them shall not become taxable at the hands of the assessee, in view of the law laid down by the Apex Court in the case of Lovely Exports (supra) and Steller Investment (supra). Therefore, the assessing officer had no option but to accept the share capital. Mr. Poddar submitted that in any event this was a possible view. If this was a possible view the Commissioner could not have exercised the revisional jurisdiction. In support of his submission he relied upon the views expressed by the Apex Court in the case of Malabar Industrial Co. Ltd. –Vs- CIT reported in (2000) 243 ITR 83 at page 88 (SC). He added that if it is a possible view then the view cannot be said to be erroneous nor can it be said to be prejudicial to the revenue.

(a) Relying upon the judgement in the case of CIT –Vs- Max India Ltd. reported in (2007) 295 ITR 282 at page 284 (SC), Mr. Poddar contended that both on the date when the assessment order was passed and the order under Section 263 was passed the proviso to Section 68 had not been introduced. The law as it stood on the date of exercise of power shall govern the controversy.

(19) Lastly, it was submitted by Mr. Poddar that it would appear from the impugned judgment that by the order under challenge only two appeals were disposed of. But the learned Tribunal has relied upon the conclusions arrived at in the judgement of Subholaxmi.

Mr. Poddar contended that there is factual dissimilarity between the two cases. The challenge thrown to the order under Section 263 passed by the Commissioner could not have been rejected without considering the case of the appellant on merits. The order of the learned Tribunal is, therefore, perverse.

The order of the Tribunal, according to him is perverse, for the simple reason that the facts of this case were not examined. The order of the Tribunal should therefore be quashed.

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(20) Mr. Ghoshal learned senior advocate appearing for the revenue reiterated the contents of the order under Section 263 and submitted that the judgements cited by Mr. Podddar have no manner of application because the facts and circumstances of this case are altogether dissimilar to the facts and circumstances of the judgements cited by him. He contended that there has been total non-application of mind on the part of the assessing officer. He did not realize nor did he try to find out the real nature of the transaction. He also relied upon the following judgements:-

(a) The first judgement he relied upon is in the case of CIT –Vs- Maithan International reported in (2015) 375 ITR 123 (Cal). This was a case wherein this Court upheld an order under Section 263 and had also set aside the order passed by the learned Tribunal. The views expressed therein though in relation to a case of money lent and advanced are as follows:-

"It is not the law that the Assessing Officer occupying the position of an investigator and adjudicator can discharge his function by perfunctory or inadequate investigation. Such a course is bound to result in erroneous and prejudicial orders. Where the relevant enquiry was not undertaken, as in this case, the order is erroneous and prejudicial too and, therefore, revisable. Investigation should always be faithful and fruitful. Unless all fruitful areas of enquiry are pursued the enquiry cannot be said to have been faithfully conducted. In a different context the apex court observed "contra veritatem lex nunquam aliquid permittit: implies a duty on the court to accept and accord its approval only to a report which is the result of faithful and fruitful investigation"

(b) The next judgement cited by him is in the case of CIT –Vs- Navodaya Castles Pvt. Ltd. reported in (2014) 367 ITR 306 (Del). This was a case where receipts were on account of share application money. The assessee had submitted the share application forms, copies of bank statements of the subscribers of shares to show that the share application amount was debited to their account; confirmation by the applicant companies; certificates of incorporation together with copies of memorandum and articles of association;

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copies of pan card and income tax return etc. Based on the aforesaid documents no further enquiries were made and the return was processed under Section 143(1) of the Act. Subsequently the case was reopened under Section 147 and a sum of Rs.54 laks were added to the income of the assessee by the assessing officer.

The addition was deleted by the CIT. The Tribunal upheld that order. In an appeal preferred by the revenue the following question was formulated for consideration.

"Whether the Income-tax Appellate Tribunal fell into error in upholding the deletion of Rs.54 lakhs, which was directed to be added back by virtue of Section 68 of the Income-tax Act, 1961, on the ground that the assessee had discharged the onus of proving the identity and the creditworthiness of the share subscriber and the genuineness of the subscription?"

The matter was remanded back by the Division Bench to the Tribunal for rehearing relying upon judgement in the case of Commissioner of Income Tax – Vs- N. R. Portfolio (P.) Ltd. reported in (2013) 2014 Taxman 408 (Delhi) wherein a similar addition under Section 68 in respect of receipt on account of share application money was set aside by the CIT and upheld by the Tribunal. The High Court restored the order of addition allowing the appeal of the revenue. The High court also held as follows:-

"This court is conscious of a view taken in some of the previous decisions that the assessee cannot be faulted if the share applicants do not respond to summons, and that the state or revenue authorities have the wherewithal to compel anyone to attend legal proceedings. However, that is merely one aspect. An assessee's duty to establish that the amounts which the AO proposes to add back, under Section 68 are properly sourced, does not cease by merely furnishing the names, addresses and PAN particulars, or relying on entries in a Registrar of Companies website. One must remember that in all such cases, more often than not, the company is a private one, and share applicants are known to it, since they are issued on private placement, or even request basis. If the assessee has access to the share applicant's PAN particulars, or bank account statement, surely its relationship is closer than arm's length. Its request to such concerns to

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participate in income tax proceedings, would, viewed from a pragmatic perspective, be quite strong, because the next possible step for the tax administrators could well be re-opening of such investor's proceedings. That apart, the concept of "shifting onus" does not mean that once certain facts are provided, the assessee's duties are over. If on verification, or during proceedings, the AO cannot contact the share applicants, or that the information becomes unverifiable, or there are further doubts in the pursuit of such details, the onus shifts back to the assessee. At that stage, if it falters, the consequence may well be an addition under Section 68. This court recollects the robustness with which the issue was dealt with, in A. Govindarajulu Mudaliar v. CIT [1958] 34 ITR 807 (SC), in the following terms:

Now the contention of the appellant is that assuming that he had failed to establish the case put forward by him, it does not follow as a matter of law that the amounts in question were income received or accrued during the previous year, that it was the duty of the Department to adduce evidence to show from what source the income was derived and why it should be treated as concealed income. In the absence of such evidence, it is argued, the finding is erroneous. We are unable to agree. Whether a receipt is to be treated as income or not, must depend very largely on the facts and circumstances of each case. In the present case the receipts are shown in the account books of a firm of which the appellant and Govindaswamy Mudaliar were partners. When he was called upon to give explanation he put forward two explanations, one being a gift of Rs.80,000 and the other being receipt of Rs.42,000 from business of which he claimed to be the real owner. When both these explanations were rejected, as they have been it was clearly upon to the Income-tax Officer to hold that the income must be concealed income. There is ample authority for the position that where an assessee fails to prove satisfactorily the source and nature of certain amount of cash received during the accounting year, the Income-tax Officer is entitled to draw the inference that the receipt are of an assessable nature. The conclusion to which the Appellate Tribunal came appears to us to be amply warranted by the facts of the case. There is no ground for interfering with that finding, and these appeals are accordingly dismissed with costs."

(c) The next judgement cited by Mr. Ghosal is in the case of CIT –Vs- Active Traders Pvt. Ltd. reported in (1995) 214 ITR 583 (Cal). The receipt was on account of share application money of Rs.10 lakhs. The Commissioner revised the order on the ground that the assessing officer had not made a proper and

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detailed enquiry which rendered the assessment order erroneous in so far as it was prejudicial to the interest of the revenue.

The assessing officer in that case also had made test checks at random. The Tribunal quashed the order under Section 263. In an appeal preferred by the revenue this Court allowed the appeal and revived the order under Section 263 holding as follows:-

"The Tribunal proceeded on the footing that there could be no enquiry regarding the source of investment of the shareholders in the shares of the company but we are not in a position to accept this extreme proposition. If the shares had been purchased by the shareholders out of their unaccounted for money, such investment may be liable to be added as the undisclosed income of such shareholders and as such the assessment of the company may not be affected. If a cash credit is shown by the company in its books of account and if the source cannot be explained properly, the Income-tax Officer may assess the sum as the income of the company from undisclosed sources. We do not find any reason why the Income-tax Officer will be precluded from making an enquiry where such enquiry is called for on the facts and in the circumstances of a case. Whether or not ultimately the shareholder fails to disclose the income out of which the shares of the assessee-company were acquired will be for the Assessing Officer to deal with, depending on the facts and circumstances of the case. Before any sum is added as the undisclosed income of the assessee-company, a link has to be established between the company and the shareholders' unaccounted money and, unless such link is established, it may not be possible to sustain the assessment ultimately. It is one thing to adjudge the validity of an assessment, but another to say as to what procedure should be followed by the Assessing Officer in making the assessment of the company. In our view, on the facts of this case, it cannot be said that the Assessing Officer has no jurisdiction to ask for information from the shareholders regarding the source of investment made in the company. As a matter of fact, the Commissioner of Income-tax, in this particular case, came to the conclusion on the facts that the matter relating to shareholders and their subscription to the shares of the assesses-company was not looked into by the Assessing Officer while framing the assessment relevant to the subsequent assessment year and it was found that the Assessing Officer issued summons to all the 34 persons to appear before him and to make depositions in this connection. Out of that, 13 notices came back unserved with the

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postal remark "not known". With respect to 17 other persons, though the summons was served, they did not appear and they simply sent letters confirming their subscription to the share capital of the company. It was also seen that the letters were written on similar papers and typed in the same typewriter. No acknowledgment or reply was received from six others.

The examination of records by the Commissioner revealed that there was no existence of N. K. Trading Company, at 132, Cotton Street, where Atmaram Goel and Mahendra Kedia were stated to be working. They could not also produce any document to show that they were the employees of N. K. Trading Co., and that they were receiving salaries from the alleged firm in the year under reference. The Income-tax Officer only enquired of six of the shareholders. Having regard to all these facts, if the Commissioner was of the view that the assessment was not made after proper and detailed enquiries which should have been made before the subscription on account of share capital was accepted, it cannot be said that the conclusion of the Commissioner on these facts is erroneous. In our view, the Tribunal decided the question purely on a question of law and not on the facts found by the Commissioner of Income-tax."

(d) The last judgement cited by Mr. Ghosal is in the case of CIT –Vs- Jawahar Bhattacharjee reported in (2012) 341 ITR 434 (Gau) (FB). What had happened, in that case was that for the assessment year 2002-03 the assessment was completed during the period of exemption under Section 54F of the Income Tax Act for a long-term capital gains from sale of shares. The shares were purchased on 21st April, 2000 at Rs.19, 536/- and sold on 2nd May, 2001 at a sum of Rs.6,36,640/-. There was, thus an appreciation of more than 30 times within a period of one year. The CIT was of the opinion that the assessment order was erroneous and prejudicial to the interest of the revenue. He passed an order under Section 263.

In an appeal the Tribunal set aside the order passed by the CIT. In an appeal preferred by the revenue the matter was placed before the Larger Bench because of an apparent conflict between the judgements of two Division Benches. The Larger Bench after analyzing various authorities came to the following conclusion:-

"We have already referred to the judgments of this court In Rajendra Singh [1990] 79 STC 10 (Gauhati) and two single Bench judgments following the said judgment in Bongaigaon Refinery and Petrochemicals Ltd. [2006] 287 ITR 120 (Gauhati) and Shyam Sundar Agarwal [2003] 131 STC 70 (Gauhati) as also the second Division Bench judgment in Daga Entrade P. Ltd. [2010] 327 ITR 467 (Gauhati). No doubt, in Rajendra Singh [1990] 79 STC 10 (Gauhati), an observation was made that erroneous assessment referred to the defect which is jurisdictional in nature, as against substitution of one view for the other, merely on the ground that a different view was possible. If read as a whole, the judgment does not exclude error in assessment order, by ignoring relevant material. Not holding such inquiry as is normal and not applying mind to the relevant material would certainly be "erroneous" assessment warranting exercise of revisional jurisdiction. Judgment has to be read as a whole and an observation during the course of reasoning in the judgment should not be divorced from the context in which it was used. The judgment is neither to be interpreted as an Act of Parliament nor as a holy book. If this principle is kept in mind, we do not find any conflict in the view taken in Rajendra Singh [1990] 79 STC 10 (Gauhati) and Daga Entrade P. Ltd. [2010] 327 ITR 467 (Gauhati). Disagreement in Daga Entrade P. Ltd. [2010] 327 ITR 467 (Gauhati) is only to the interpretation which limits the ratio of the judgment by relying only one sentence in isolation divorced from the entire judgment. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being "erroneous" non-application of mind and omission to follow natural justice are in same category. Accordingly, we hold that Daga Entrade P. Ltd. [2010] 327 ITR 467 (Gauhati) lays down correct law and the same is not in conflict with the earlier order of this court in Rajendra Singh [1990] 79 STC 1O (Gauhati). Jurisdiction under section 263 can be exercised whenever it is found that the order of assessment was erroneous and prejudicial to the interests of the Revenue. Cases of assessment order passed on wrong assumption of facts, or incorrect application of law, without due application of mind or without following the principles of natural justice are not beyond the scope of section 263 of the Act."

(21) After hearing the learned advocates, we are of the opinion that the following questions arise for consideration:-

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(a)Whether in the light of the views expressed in the case of Lovely Exports (supra) & Steller Investment (supra) the order under Section 263 directing further investigation is legal?

(b) Is the finding of the Commissioner of Income Tax that unaccounted money was or could have been laundered as clean share capital by creating facade of paper work, routing the money through several bank accounts and getting it the seal of statutory approval by getting the case reopened under Section 147 suo motu perverse?

(c) Whether the order passed by the assessing officer under Section 143(3)/147 of the Income Tax Act is erroneous and also prejudicial to the interest of the revenue?

(d)Whether the impugned judgement of the learned Tribunal is perverse?

[22] We shall consider the second question first.

In a commentary on the Prevention of Money Laundering Act, 2002 by Dr. M. C. Mehanathan published by Lexis Nexis, 2014, the steps of money laundering are described as follows:-

"STEPS OF MONEY-LAUNDERING

Although money-laundering often involves a complex series of transactions, it generally includes the following three basic steps:

1. Placement

It involves introduction of the proceeds of crime into the financial system. This is accomplished by breaking up large amounts of cash into smaller sums that are then deposited directly into a bank account, or by purchasing monetary instruments, transferring the cash overseas for deposit in banking/financial institutions, use for purchase of high value things such as gold, precious stones, art works etc. and reselling the same through cheques or bank transfers etc.

2. Layering

This involves formation of complex layers of financial transactions which distance the illicit proceeds from their source and disguise the audit trail. In this process a series of

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conversions or transactions are involved for moving the funds to places such as offshore financial centres operating in a liberal regulatory regime. Often "front" companies are formed to accomplish this task. These companies obscure the real owners of the money through the bank secrecy laws and attorney-client privilege. The techniques used for the purpose are to lend the proceeds back to the owner as loans, gifts and etc., under invoicing the items exported to the real owner or etc. In some cases, the transfers may be disguised as payments for goods or services, thus giving them a legitimate appearance.

3. Integration

This involves investment in the legitimate economy so that the money gets the colour of legitimacy. This is achieved by techniques such as lending the money through "front" companies etc. The money may be invested in real estates, business and etc.

The stages at which money-laundering could be easily detected are those where cash enters into the domestic financial system, either formally or informally, where it is sent abroad to be integrated into the financial systems of tax haven countries and where it is repatriated in the form of transfers."

The role of the revenue authorities in tackling the menace of laundering black money was commented by the learned author as follows:-

"It has to be kept in view that India has a problem of black economy, which is unacounted and many a time the holders of black money also launder the black money in order to acquire legitimate assets. Legal or illegal income which evades tax and illegal income that comes within the exempted taxation slab constitute the unreported Gross Domestic Product or black economy. Laundering the black money and laundering proceeds of crime are two different issues, although there is frequent overlap between the two. While laundering black money is to be handled through taxation laws or similar laws, the laundering of proceeds of crime is to be handled through special anti-money-laundering laws."

(23) The following pieces of evidence are noticeable:-

(a) 39 corporate subscribers purchased 7,92,737 shares of Rs.10 each at a premium of Rs.390/- per share. In the process the assessee company raised a paid up share capital of Rs.79.27 lakhs with a premium of Rs.31.7 crores.

(b) From the information made available by the assessee, it appears that 19 out of 39 applicants secured funds, for the purpose of contributing to the share capital of the assessee, on account of share application money. In other

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words, those 19 applicants collected funds on account of share application money in their respective companies and that money was contributed to the share capital of the assessee. 15 out of the 39 applicants procured the requisite fund by selling shares. The rest of the applicants of shares, in the share capital of the assessee company, did not disclose the nature of receipt at their end though the source of fund was identified. What has not been specified is, as to on what account was the money received.

(c) The forms of share application purporting to have been signed by the applicant companies have also been disclosed from which it appears that the date of allotment, number of allotment, number of shares allotted, share ledger folio, allotment register folio, application number, have all been kept blank. These particulars, Mr. Poddar, submitted should have been filled up by the assessee, but that has not been done.

(d) Another significant fact admitted by the assessee in reply to the notice to show cause under Section 263 is that the *"shares were offered to, and subscribed by the closely held companies owned by the Promoters/Directors or their close relatives and friends"*.

(e) From the bank statements disclosed it appears that to have the cheques issued in favour of the asseessee honoured, matching amounts were credited to the accounts of the subscribers shortly before the cheques issued in favour of the assessee were presented for collection.

(f)19 applicants of shares within a period of less than six months had money contributed to their share capital which in their turn they contributed to the share capital of the assessee. So that, the 19 companies which contributed to the share capital of the assessee in the name of assets were left merely with the share-scripts of the assessee. The other lot of 15 subscribers in substance had the share-scripts held by them substituted by the share-scripts of the assessee.

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(g) Though, Mr. Poddar made extensive submissions scanning the order under Section 263 in between the lines, he did not criticize the finding of the Commissioner that "the A.O. did not examine a single Director of the assessee company or of the subscribing company" which goes to show that correctness of this assertion is not in dispute.

(24) From the aforesaid evidence the following, prima facie, inferences can safely be drawn:-

(a)The promoter/directors of the assessee and their close relatives and friends had united with the common object of creating at least 20 (19+1) companies apparently having a large capital base, but, in fact these are mere paper companies having no real worth. The transaction of sale and purchase of shares was nominal rather than real.

(b)The allegation, in response to the notice to show-cause u/s. 263 that "it bears importance to state here that the investor companies of shares were interested to subscribe shares of the assessee company as, according to them, the assessee company had prospect in future," is a plain lie.

(c) The blank share application forms etc. tabulated above go to show that the alleged application for shares and the alleged allotment were not in the usual course of the business.

(d) In the light of the aforesaid pieces of evidence and the prima facie finding, we are emboldened to say that the three requirements: (A) identity of the share-holders; (B) genuineness of the transaction and (C) the creditworthiness of the share-holders repeatedly impressed, by Mr. Poddar, upon us, have not been satisfied. Identity of the alleged share-holders is known but the transaction was not a genuine transaction. The transaction was nominal rather than real. The creditworthiness of the alleged share holders is also not established because they did not have any money of their own. Each one of them received from somebody and that somebody received from a third person. Therefore, prima facie, the share-holders are mere name lenders.

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[25] For the reasons discussed in the preceding paragraph, we are satisfied that the judgement in the case of CIT –Vs- Steller Investment (supra) has no manner of application to the facts and circumstances of this case. The question as to whether there has been a device adopted for money laundering also did not crop up for consideration in that case.

The Prevention of Money Laundering Act, 2002 was not also there on the statute at that point of time. Before the appeal in Steller Investment Ltd. was dismissed by the Apex Court, the question had cropped up in the case of Sophia Finance Ltd. reported in (1994) 205 ITR 98 wherein a special bench held as follows:-

"As we read section 68 it appears that whenever a sum is found credited in the books of account of the assessee then, irrespective of the colour or the nature of the sum received which is sought to be given by the assessee, the Income-tax Officer has the jurisdiction to enquire from the assessee the nature and source of the said amount. When an explanation in regard thereto is given by the assessee, then it is for the Income-tax Officer to be satisfied whether the said explanation is correct or not. It is in this regard that enquiries are usually made in order to find out as to whether, firstly, the persons from whom money is alleged to have been received actually existed or not. Secondly, depending upon the facts of each case, ***the Income-tax Officer may even be justified in trying to ascertain the source of the depositor, assuming he is identified, in order to determine whether that depositor is a mere name-lender or not. Be that as it may, it is clear that the Income-tax Officer has jurisdiction to make enquiries with regard to the nature and source of a sum credited in the books of account of an assessee and it would be immaterial as to whether the amount so credited is given the colour of a loan or a sum representing the sale proceeds or even receipt of share application money. The use of the words "any sum found credited in the books" in Section 68 indicates that the said section is very widely worded and an Income-tax Officer is not precluded from making an enquiry as to the true nature and source thereof even if the same is credited as receipt of share application money."***

In the case of Sumati Dayal –Vs- CIT reported in (1995) 214 ITR 801 (SC) Their Lordships held that a capital receipt can become taxable if the explanation

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offered by the assessee about the nature and source thereof is not satisfactorily explained.

The judgement in the case of CIT –Vs- Lovely Exports Pvt. Ltd. reported in (2008) 299 ITR 268 lends no assistance to the assessee because in that case the Division Bench reiterated that omission to make an enquiry, where such an exercise is provoked, shall render the order of the assessing officer both erroneous and prejudicial to the revenue. The Division Bench went on to hold that the revenue should not harass the assessee where "the preponderance of evidence indicates absence of culpability". In the present case there exists reasonable suspicion if not prima facie evidence of culpability.

[26] The learned Tribunal in the impugned judgement in paragraphs 3, 4 and 5 observed, inter alia as follows:-

"We have heard the rival submissions and perused the relevant material on record. It is relevant to mention that we have disposed of more than 500 cases involving same issue through certain orders with the main order having been passed in a group of cases led by Subhlakshmi Vanijya Pvt. Ltd. –Vs- CIT (ITA No.1104/Kol/2014) dated 30.07.2015 for the A. Y. 2009-10.

Both the sides have fairly admitted that facts and circumstances of the cases under consideration are mutatis mutandis similar to those decided earlier, except for certain issues which we will advert to a little later. In our aforesaid order in Subhalakshmi Vanijya Pvt. Ltd., vs. CIT (ITA No. 1104/Kol/2014 A.Y. 2009-10), we have drawn the following conclusions:-

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It is noticed that all or some of the above conclusions are applicable to the appeals in this batch."

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The appellant has disclosed a copy of the judgement delivered by the learned Tribunal in Subhalaxmi Vanijya Pvt. Ltd. –Vs- CIT. The learned Tribunal in paragraph 17.i. opined as follows:-

"All the cases under consideration have the same common feature of passing assessment orders in undue haste. When we consider the above factual matrix, there can be no escape from an axiomatic conclusion that in all these cases the enquiry conducted by the AOs is exceedingly inadequate and hence fall in the category of 'no enquiry' conducted by the AO, what to talk of charactering it as an 'inadequate enquiry'. In our considered opinion, the highly inadequate enquiry conducted by the AO resulting in drawing incorrect assumption of facts, makes the orders erroneous and prejudicial to the interests of the revenue."

[27] In the case of Smt. Tara Devi Aggarwal –Vs- CIT reported in (1973) 88 ITR 323 (SC) the Tribunal had held as follows:-

"The Tribunal further held that if the orders for 1955-56 to 1959-60 were left out and the assessment order for 1960-61 was considered by itself, it could not be said that the assessment order was prejudicial to the interests of revenue. It was also observed that the factum of advance of initial capital, realization of amounts by sale of gold ornaments and the carrying on of the money-lending and speculative business had already been accepted and assessed in the previous years, that even in the year of assessment in question the Income-tax Officer had added Rs.1,499 to the disclosed income from speculative business and Rs.1,270 to the disclosed income from interest and made the assessment on a total income of Rs.9,037; as such it could not be said that the assessment was prejudicial to the interests of revenue and that at the most it could be said that the assessee could not have carried on any business at the addresses given by her but where an assessment has been made without territorial jurisdiction it could not be said to be prejudicial to the interests of revenue."

This Court set aside the order of the learned Tribunal. In an appeal by the assessee before the Apex Court their Lordships upheld the order of this Court holding, inter alia as follows:-

"The learned advocate for the assessee contends that under section 33B the Commissioner had no jurisdiction to cancel the assessment made by the Income-tax Officer inasmuch as it cannot be

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said that where an assessee has been assessed to tax it was prejudicial to the interests of revenue on the ground that no assessment could have been made in respect of the income of which she made a voluntary return. This contention in our view is unwarranted by the language of section 33B. The words of the section enable the Commissioner to call for and examine the record of any proceeding under the Act and to pass such orders as he deems necessary as the circumstances of the case justify when he considers that the order passed was erroneous in so far as it is prejudicial to the interests of the revenue. It is not, as submitted by the learned advocate, prejudicial to the interests of the revenue only if it is found that the assessment for the year was disclosed on the basis that an income had been earned which is assessable. Even where an income has not been earned and is not assessable, merely because the assessee wants it to be assessed in his or her hands in order to assist someone else who would have been assessed to a larger amount, an assessment so made can certainly be erroneous and prejudicial to the interests of the revenue. If so and we think it is so the Commissioner under section 33B has ample jurisdiction to cancel the assessment and may initiate proceedings for assessment under the provisions of the Act against some other assessee who according to the income-tax authorities is liable for the income thereof."

The reasoning advanced by their Lordships in respect of an alleged revenue receipt is, according to us, equally applicable to an alleged capital receipt which, in fact, was received only in papers. The attempt of the assessee, it was apprehended in the case of Tara Devi (supra) was to assist someone else. An identical attempt is involved in this case. Who is the person sought to be assisted by the assessee? This question can only be answered after a thorough enquiry, directed by the CIT, is held. The assessee is interested in stalling that investigation on the plea that the order of the assessing officer is neither erroneous nor prejudicial to the interest of the revenue.

(28) We have indicated above the pieces of evidence which go to show that the Commissioner had reasons to entertain the belief that this was or could be a case of money laundering which went unnoticed because the assessing officer did not hold requisite investigation except for calling for the records. The evidence which we have tabulated above and the prima facie inference drawn by

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us is deducible from the documents also submitted before the assessing officer. The fact that the assessing officer did not apply his mind to those pieces of evidence would be evident from the assessment order itself which reads as follows:-

"During the Financial Year the assessee company has issued 792737 No. of equity share with a face value of Rs.10/- along with a premium of Rs.390/-.

Thereafter, Notices u/s. 133(6) of the I.T. Act, 1961 were also issued to verify the transactions of the assessee on test check basis. The case is discussed and heard. Issue relevant for determination of total income of the assessee is discussed as under:"

The issues relevant according to the assessing officer were a receipt of a sum of Rs.61,000/- on account of consultancy charges and the preliminary expenses written off amounting to a sum of Rs.60,000/-. He, therefore, completed the assessment after making addition of a sum of Rs.1,21,000/-. When is an order erroneous in so far as the same is prejudicial to the interest of the revenue was considered by this Court in the case of CIT –Vs- Maithan International reported in (2015) 375 ITR 123 (Cal) to which one of us (Girish Chandra Gupta, J.) was a party wherein the following views were expressed:-

"It is not the law that the Assessing Officer occupying the position of an investigator and adjudicator can discharge his function by perfunctory or inadequate investigation. Such a course is bound to result in erroneous and prejudicial orders. Where the relevant enquiry was not undertaken, as in this case, the order is erroneous and prejudicial too and, therefore, revisable. Investigation should always be faithful and fruitful. Unless all fruitful areas of enquiry are pursued the enquiry cannot be said to have been faithfully conducted. In a different context the apex court observed "contra veritatem lex nunquam aliquid permittit : implies a duty on the court to accept and accord its approval only to a report which is the result of faithful and fruitful investigation"

(See Sidhartha Vashisht alais Manu Sharma v. State (NCT of Delhi) reported in [2010] 6 SCC 1 paragraph 200 at page 80)"

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In the case of CIT –Vs- N. R. Portfolio Pvt. Ltd. reported in (2014) 2 ITR 68 (Delhi) the following views were expressed:-

"What we perceive and regard as correct position of law is that the Court or Tribunal should be convinced about the identity, creditworthiness and genuineness of the transaction. The onus to prove the three factum is on the assessee as the facts are within the assessee's knowledge. Mere production of incorporation details, PANs or the fact that third persons or company had filed Income-tax details in case of a private limited company may not be sufficient when surrounding and attending facts predicate a cover up. These facts indicate and reflect proper paper work or documentation but genuineness, creditworthiness, identity are deeper and obtrusive. Companies no doubt are artificial or juristic persons but they are soulless and are dependent upon the individuals behind them who run and manage the said companies. It is the persons behind the company who take the decisions, control and manage them."

The persons behind the assessee company and the persons behind the subscribing companies were not interrogated which was essential to unearth the truth. Reference may also be made to the judgement of this Court in the case of CIT –Vs- Active Traders Pvt. Ltd. (supra).

The question for consideration is whether in the presence of materials discussed above the Commissioner was justified in treating the assessment order erroneous and prejudicial to the interest of the revenue. That question in the facts and circumstances has to be answered in the affirmative.

[28] We find no substance in the submission that the order of the learned Tribunal is perverse, after examining all the submissions advanced by Mr. Poddar.

[29] Whether receipt of share capital was a taxable event prior to 1st April, 2013 before introduction of Clause (VII b) to the Sub-section 2 of Section 56 of the Income Tax Act; whether the concept of arms length pricing in a domestic transaction before introduction of Section 92A and 92BA of the Income Tax Act

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was there at the relevant point of time are not questions which arise for determination in this case. The assessee with an authorised share capital of Rs.1.36 crores raised nearly a sum of Rs.32 crores on account of premium and chose not to go in for increase of authorised share capital merely to avoid payment of statutory fees is an important pointer necessitating investigation. Money allegedly received on account of share application can be roped in under Section 68 of the Income Tax Act if the source of the receipt is not satisfactorily established by the assessee. Reference in this regard may be made to the judgement in the case of Sumati Dayal –Vs- CIT (supra) wherein Their Lordships held that any sum "found credited in the books of the assessee for any previous year, the same may be charged to income tax....". We are unable to accept the submission that any further investigation is futile because the money was received on capital account. The Special Bench in the case of Sophia Finance Ltd. (supra) opined that "the use of the words "any sum found credited in the books" in Section 68 indicates that the said section is very widely worded and an Income-tax Officer is not precluded from making an enquiry as to the true nature and source thereof even if the same is credited as receipt of share application money. Mere fact that the payment was received by cheque or that the applicants were companies, borne on the file of Registrar of Companies were held to be neutral facts and did not prove that the transaction was genuine as was held in the case of CIT –Vs- Nova Promoters and Finlease (P) Ltd. (supra). Similar views were expressed by this Court in the case of CIT –Vs- Precision Finance Pvt. Ltd. (supra). We need not decide in this case as to whether the proviso to Section 68 of the Income Tax Act is retrospective in nature. To that extent the question is kept open. We may however point out that the Special Bench of Delhi High Court in the case of Sophia Finance Ltd. (supra) held that "the ITO may even be justified in trying to ascertain the source of depositor". Therefore, the submission that the source of source is not a relevant enquiry does not appear to be correct. We find no substance in the submission that the

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exercise of power under Section 263 by the Commissioner was an act of reactivating stale issues. In the case of Gabriel India Ltd. (supra) the CIT was unable to point out any error in the explanation furnished by the assessee. Whereas in the present case we have tabulated the evidence which was before the assessing officer which should have provoked him to make further investigation. The assessing officer did not attach any importance to that aspect of the matter as discussed above by us. The judgement in the case of Leisure Wear Exports Pvt. Ltd. (supra) relied upon by Mr. Poddar has no applicability because the evidence furnished by the assessee in this case does suggest a cover up. We also have held prima facie that neither the transaction appears to be genuine nor are the applicants of share are creditworthy.

The judgement in the case of Omar Salay Mohamed Sait (supra) cited by Mr. Poddar has no application for reasons already discussed. It is not true that the Commissioner in this case has merely on the basis of suspicion held that this was or could be a case of money laundering. We as a matter of fact have discussed this issue in great detail and need not reiterate the same. The order passed by the Commissioner is by no means an act of substituting his own views to that of the assessing officer. It is true that the assessing officer had requisitioned the necessary details by his notice u/s.142(1) but he thereafter did not apply his mind thereto. The judgement in the case of J. L. Morrison (India) Ltd. has no manner of application because in that case the question essentially was whether the receipt was of a capital or revenue nature. The facts and circumstances were not in dispute. Moreover the view taken by the assessing officer was not shown nor was held by the Court to be an erroneous view. Whereas in this case we have demonstrated in some detail as to why is the order of the assessing officer erroneous and prejudicial to the revenue.

The judgement in the case of Malabar Industrial Co. Ltd. (supra) and Max India Ltd. do not apply to the facts of this case for reasons already discussed by us. From the judgement of the learned Tribunal in the case of Subholaxmi,

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placed before us in great detail by Mr. Poddar, we find that all important issues placed for consideration by no other than Mr. Poddar himself were duly considered by the learned Tribunal.

[30] For reasons already discussed we answer the issue No. (a) and (c) in the affirmative and the issue No. (b) and (d) in the negative. In the result the appeal fails and is dismissed. It is clarified that the views expressed herein are for the purpose of disposal of this appeal and shall not preclude the statutory authority from arriving at its own conclusion in accordance with law.

The parties shall bear their own costs.

(GIRISH CHANDRA GUPTA, J.)

I agree. (ASHA ARORA, J.)

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