IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH: KOLKATA
[Before Shri Shamim Yahya, A.M. & Shri George Mathan, J.M.]

I.T.A. No.1493/Kol/2013
Assessment Year : 2008-09

M/s. Bisakha Sales Pvt. Ltd.,Kolkata
(PAN: AADCB 0527F) ..(Appellant)
-Vs-
CIT(Kol.-II), Kolkata ..(Respondent)

Date of concluding the hearing : 11.09.2014
Date of pronouncing the Order : 19.09.2014

Appearances : For the Appellant : S/Shri J.P.Khaitan, Sr.Counsel
R.K.Kankaria, FCA &
Sanjay Bhoumik, Advocate
: For the Respondent : Shri Ajoy Kr.Singh, CIT(DR),

O R D E R

Per Shri George Mathan,J.M.

This is an appeal filed by the assessee against the order of the Ld. CIT-II, Kolkata passed under section 263 of the Income-Tax Act dated 28th March, 2013 for the assessment year 2008-09.

2. Shri J. P. Khaitan, Sr. Counsel represented on behalf of the assessee and Shri Ajoy Kr. Singh, CIT(DR) represented on behalf of the Revenue.

4. It was submitted by the ld. Sr. Counsel, representing on behalf of the assessee, that the ld. CIT had invoked her powers under section 263 on the ground that the AO did not make proper inquiry regarding the share capital. It was a submission that the assessee had for the relevant assessment year filed its return of income on 16.05.2008. As the assessee did not receive the intimation under section 143(1), the assessee had filed a letter dated 11.12.2009 to the AO requesting for a copy of the intimation under section 143(1). This has been shown at page 26 of the paper book. It was a further submission that on 15.12.2009, notice under section

148 was issued, which was shown at page 27 of the paper book. The assessee had filed a reply on 17.12.2009. It was a submission that notice under section 143(2) was issued on 19.02.2010 and another notice under section 142(1) on 24.02.2010 shown at page 30 of the paper book. It was a submission that in serial no.3 of the notice under section 142(1), the AO had specifically asked the assessee to show cause why the amount increased on account of the share applicants should not be added under section 68 of the Act. It was a submission that the assessee had replied by a letter on 08.03.2010 shown at page 31 of the paper book, wherein in para 3 of the reply, the assessee had provided all the information in respect of the share application money received by the assessee. It was a submission that from page 37 of the paper book was the list of the share application moneys received along with the details of the premium, etc. It was a submission that the assessment order was passed under section 143 r.w.s. 147 on 05.04.2010. It was a further submission that in the show cause notice issued under section 263, the ld. CIT had raised two issues, one was the issue of premium on shares and the second was the issue of no proper inquiry by the AO. It was a submission that the assessee is a private limited company and the provision of section 56(2)(viib) was introduced to the Income-Tax Act w.e.f. 01.04.2013 and consequently before such date, the issue of the shares at a premium was not an issue on which any relevant inquiry could have been made.

4.1 The ld. Sr. Counsel further drew our attention to the order passed under section 263 by the ld. CIT to submit that the ld. CIT had in his order passed under section 263 generalised the concept and had applied such general concepts to the facts of the assessee's case for the purpose of setting aside the assessment order originally passed by the AO on 05.04.2010. It was a submission that the AO had specifically raised inquiries on the issue of share application money. The assessee had replied to the same along with the evidence and the AO was satisfied with the reply and therefore did not deem it necessary to make any further verification. It was a further submission that in the order passed under section 263, the direction

given under the second and third clauses had no relevance to the order under appeal in so far as such directions were in respect of change in the Directorship and the controlling interest in the company as also source of realization from the liquidation of the assets. It was a submission that both did not occur during the relevant assessment year and in the relevant assessment year only the capital had been raised. It was a submission that the assessment year 2008-09 was the second year, after the incorporation of the assessee's company. It was thus the submission of the ld. Sr. Counsel that the issues in the appeal could be crystallized into four issues, (i) being that the AO had made such inquiry as the facts of the case warranted and the CIT had found no fault of the AO to show that the AO has not made proper inquiry, (ii) the CIT could have made the inquiry herself to show how the order is erroneous and (iii) holding the order erroneous on a generalized background statement for which there is no material on record is unsustainable. The ld. AR further placed reliance on the following decisions of various Hon'ble High Courts and the Tribunal.

1) 354 ITR 35 (AP) at para 59 – Spectra Shares & Scrips Pvt. Ltd.

2) 357 ITR 388 (Del) at para 5- DIT-vs- Jyoti Foundation

3) 68 Taxmann 215 (Cal) at para 13 & 14 – Mulchand Bagri

4) Lotus Capital Financial Services, being the decision of the Coordinate Bench of this Tribunal in ITA No.479/Kol/2011 dated 21.11.2011 on which the appeal has been dismissed by the Hon'ble Jurisdictional High Court in GA No.1507/2012 dated 16.07.2012

4.2 The fourth issue being there was no tangible material for the purpose of invoking the powers under section 263 for which proposition, the decision of the Hon'ble Bombay High Court in the case 323 ITR 206 at para 210 was relied upon. It was a submission that the Hon'ble Supreme Court in Malabar Industries reported in 243 ITR 83 has also held that there should be some tangible material for the purpose of treating an order as erroneous and prejudicial to the interest of revenue. It was a further submission that the issue on the share capital was now

settled in so far as the Hon'ble Supreme Court in the case of Lovely Exports reported in 216 CTR 195(SC) has upheld the issue that if the details of the share applicants are provided then no addition on account of the share application money was liable to be made in the hands of the assessee company. It was a further submission that the ld. CIT has referred to the decision of the Hon'ble Delhi High Court in the case of Nova Promoters and Finlease (P) Ltd. reported in 342 ITR 169 (Delhi). It was a submission that the facts in the said case were completely different from the facts in the assessee's case. It was a submission that facts as mentioned in para 39 of the order in Nova Promoters and Finlease (P) Ltd. (*supra*) was in no way identical to the facts of the assessee's case. It was a submission that the Commissioner had relied upon the decision of the Active Traders Pvt. Ltd. reported in 214 ITR 583. It was a submission that this decision was distinguishable in so far as in Active Traders enquiry was not taken to its logic end whereas in the assessee's case, the AO had conducted inquiry and was satisfied with the replies given by the assessee. It was a submission that the decision in the case of Nivedita Vanijya Niyojan Ltd. relied upon by the CIT in 263 ITR 623(Cal) was on its own set of facts in so far as in that case the assessee did not produce all shareholders as called for by the AO, whereas in the assessee's case, the AO did not feel the necessity to call for the shareholders at all. It was a further submission that the provisions of section 56(2)(viia) are prospective in nature and it is to be read with section 2(24)(xvi).

4.3 On a specific query from the Bench as to the implication of the proviso to the section 68, which specifies that the assessee is to prove the source of the source also in respect of the share applicants and share premium, the assessee's submission was that the said proviso was also prospective in operation w.e.f. 01.04.2013. It was a submission that the said proviso was explaining the deeming fiction of section 68 and it could not be held to be retrospective. It was thus the submission that the order passed under section 263 was liable to be quashed.

5. In reply, the ld. CIT,DR submitted, at the outset, that the decisions relied upon by the ld. A.R., appearing on behalf of the assessee, were distinguishable in its entirety. It was a submission that the decision in the case of Lotus Capital Financial Services, the assessee had provided the complete details. It was a submission that in assessee's case, only part of the details had been provided and the details whatever had been provided itself were incomplete. It was a submission that the bank account details provided were only for one or two months and the entire transaction was not produced to show the cash transaction which had been done initially. Also no enquiry worth its name was also done. It was a submission that in less than four months, 148 proceeding had been completed, which itself creates a doubt in regard to the veracity of the proceedings itself. It was a submission that the decision of the Hon'ble Calcutta High Court in the case of Active Traders 214 ITR 583 was more applicable to the facts of assessee's case in so far as no inquiry had been done to take a considered view in the course of assessment proceedings then the Commissioner was entitled to invoke her powers under section 263. It was a submission that consequential orders to the order passed under section 263 had also been passed and there was absolutely no compliance from the assessee's side in the course of the consequential assessment. The ld. DR further drew our attention to the decision of the Hon'ble Karnataka High Court in the case of Infosys Ltd. reported in 341 ITR 293 to submit that provision of section 263 was intended to plug leakages to the Revenue by reviewing orders passed by the lower authorities, whether by mistake or in ignorance or even by design. It was a submission that in the present case, these were by design. The ld. DR further drew our attention to page 31 of the paper book, which was a copy of the reply filed by the assessee, in reply to the notice under section 142(1). It was a submission that below signature of the Director, a date 08.03.2010 has been written. This date is not found in the letter, which is found in the assessment records. It was a further submission that a perusal of the order-sheet records clearly shows that the AO has been recording in the order-sheet the letters which have been filed by the assessee but this letter, in response to

the notice under section 142(1) along with the details filed with the letter, itself has no mention whatsoever in the order-sheet notings. It was also a reference made by the ld. DR that even the letter-head of the letter alleged to have been filed on 08.03.2010 was different from the earlier letter-heads filed a few months earlier.

5.1 The ld. DR placed before us copy of order-sheet noting. It was a submission that when the assessee has filed any letter before the AO, the AO has invariably noted the filing of such letter in the order-sheet. However, there is no mention whatsoever of the so-called letter alleged to have been filed on 08.03.2010. It was a further submission that a perusal of the assessment records also clearly shows that an order under section 143(1) had been passed on 07.10.2009. The undated letter of the assessee intimating the non-receipt of the intimation under section 143(1) is filed on 11.12.2009. The assessment record has only one copy of the intimation dated 07.10.2009. Thus, the presumption is that the second copy of intimation under section 143(1) had been served on the assessee. It was a submission that the letter filed on 11.12.2009 is, in fact, just a garb to let the AO initiate proceedings under section 148 for the purpose of getting the seal of approval under the garb of scrutiny assessment in respect of genuineness of the share capital introduced. It was a submission that no independent inquiry whatsoever had been conducted by the AO. Even the so-called bank statements submitted in respect of share applicants were incomplete.

5.2 The ld. CIT,DR further submitted that there has been a total violation of the provisions of section 78 of the Companies Act in so far as section 78 specifies as to how share premium is to be used. It was a submission that pending allotment of the shares, amount must be kept in the bank. The ld. DR drew our attention to the paper book filed on behalf of the assessee to submit that the shares had been allotted to the applicants only on 31.03.2008 in all the cases but the funds have been used for making further investments in the share application of other such companies immediately on receipt of the funds. It was a submission that even the Chartered Accountant, who has audited these companies, were the same and the

said C.A. has audited the accounts of more than the prescribed number of companies. In respect of 263 order passed, the ld. CIT,DR further placed reliance on the decision of the Hon'ble Kerala High Court in the case of Apollo Tyres Ltd. in ITA No.196 of 2013 wherein the Hon'ble High Court, by an order dated 17.10.2013, has held as follows:

> *"3. This order of the Commissioner was challenged before Tribunal, who confirmed the order of the Commissioner by order dated 8.2.2013. Aggrieved by this, the appellant assessee is before us.*
>
> *4. According to learned Senior Counsel, Commissioner failed to appreciate that the Assessing Officer did consider the specific nine points raised under section 263 of the Act, therefore, there was nothing which could be termed as erroneous consideration on the part of the Assessing Officer, as the Assessing Officer is not required to make roving enquiry into each and every issue concerned, item-wise while accepting the returns of the assessee. On perusal of records, we notice that the order of the Commissioner passed under Section 263 of the Act is a detailed ITA.196/13 order discussing each of the nine points raised by the revisional authority. Tribunal, after referring to decision of Bombay High Court in the case of Grasim Industries Ltd. v. CIT (321 ITR 92), analysed what exactly would mean prejudice to the interest of revenue and how an authority exercising powers under Section 263 of the Act has to proceed in the matter. Ultimately, following the decision of Apex Court in Malabar Industrial Co. Ltd. v. CIT [(2000)243 ITR 83], Tribunal also confirmed the opinion of the Commissioner that there was no application of mind while considering the assessment under Section 143(3) of the Act, therefore, it is not only erroneous, but also, prejudicial to the interest of revenue. Opining that the procedure adopted definitely would have implication on the tax computation which ultimately causes prejudice to the revenue, Tribunal confirmed the orders of the Commissioner under Section 263 of the Act.*
>
> *5. Having regard to reasoning of the Tribunal, we affirm the opinion of Tribunal that the fresh consideration of the matter by the assessing authority in the light of observations of revisional authority has to be made afresh untrammelled by any of the observations made by the authorities concerned.ITA.196/13.*

We find no good ground to interfere with the opinion of the authorities concerned. Hence, the appeal is dismissed. MANJULA CHELLUR, CHIEF JUSTICE, A.M. SHAFFIQUE, JUDGE"

5.3 He further placed reliance upon the decision of the Hon'ble Karnataka High Court in the case of Infosys Technologies Ltd. to submit that it was always open to the assessee to justify the claim of the share capital before the AO. It was a submission that there is no finding of the ld. CIT in the 263 order directing that the share capital should be disallowed for added as the undisclosed income of the assessee. It was submission that there is no prejudice to the assessee. It was a submission that the decision of the Coordinate Bench of this Tribunal in the case of Star Griha in ITA no.1244 of 2013 for the assessment year 2008-09 dated 14th August, 2014 applied in the assessee's case also in so far as many of these companies are under investigation by the Ministry of Corporate Affairs as well as CBI, ED and SIT. It was a submission that in the cases of politically exposed, also investigations are at a critical level. It was a submission that though the ld. CIT in some cases has dropped proceedings initiated under section 263 in some cases, it did not preclude the AO from initiating proceedings under section 147/148 for reopening of the assessment. It was a submission that the time for such reopening was also available. It was a submission that the order of the ld. CIT passed under section 263 was liable to be upheld.

6. In reply, the ld. Sr. Counsel, appearing on behalf of the assessee, placed before us a copy of the letter written by Shri R.K.Kankaria, Chartered Accountant explaining how the date 08.03.2010 appeared on the left hand bottom of the document submitted at page 31 of the assessee's paper book, which is extracted hereinbelow.

"11.09.2014

The Hon'ble Members,
Income Tax Appellate Tribunal,
'C' Bench
Kolkata.

Ref: ITA No.1493/Kol/2013 in the matter of Bisakha Sales P.Ltd. Vs. CIT, Kol-II, Kolkata

Respected Sirs,

This is to place on record that in course of the hearing on September 9, 2014, a question arose with regard to the date '8.3.2010' appearing at the left hand bottom of the document at page 31 of the assessee's Paper book where it was duly explained by me that the said document did not carry any date and that it was identified as having been filed before the Assessing Officer on '8.3.2010" upon checking with the certified copy of the order sheet which date was noted in pencil on a copy thereof and that due to oversight such copy with such pencil written date '8.3.2010' came to be used for preparing the Paper books filed before this Hon'ble Tribunal. In course of the hearing, I had also placed before the Hon'ble Bench the certified copy of the document at page 31 as obtained from the Assessing Officer, which did not carry any date, as 'also the copy of the certified copy with the aforesaid pencil writing. If so required I may be granted leave to file an affidavit stating the aforesaid facts on oath.

And for this act of kindness, I shall ever remain grateful.

Thanking you,

Yours faithfully,
Sd/-
(R.K.Kankaria)
Authorised Representative."

6.1 It was a submission by the ld. Sr. Counsel that the AO had called for an explanation in respect of share capital in the notice under section 142(1). Reply had been given that the associated shareholders are income-tax assessees and they have also explained the source of the fund as also the relevant bank extracts were produced. After verifying the reply filed by the assessee, the AO had felt that he did not need to do any further inquiry. Possibly, because of this, the AO did not do any further inquiry also. It was a submission that the ld. CIT was liable to demonstrate, while making the inquiry as to where the AO has committed the error, which is prejudicial to the interest of Revenue. It was a submission that this

had not been done by the ld. CIT. The ld. CIT has passed the order under section 263 only on presumption and assumption.

6.2 The ld. Sr. Counsel further placed reliance on the decision of the Hon'ble Jurisdictional High Court in the case of J.L.Morrison reported in 366 ITR 593. It was a submission that in the said decision the principle laid down was that when the record shows that the inquiry was made by the AO then revision does not lie. It was a further submission that the Revenue was attempting to support an unsupportable order under section 263 by taking the recourse to external ground. It was a further submission that the order under section 263 must stand on its own as has been held by the Hon'ble Calcutta High Court in the case of CIT -vs- Howrah Flour Mills Ltd. reported in 236 ITR 156. It was a further submission that the scope of the amendment to section 68 by introduction of the proviso thereto is as per the notes on the clauses and the memorandum explaining the clauses to operate from the assessment year 2013-14. The ld. Sr. Counsel drew our attention to 342 ITR Statute 55 & 56 at clauses 21 and 22 of the Bill as also the notes to the clauses as statute pages 159 and 160 and the memorandum explaining the clauses at statute pages 242,244 and 247.

6.3 The ld. A.R. further placed before us copy of the appeal filed by the assessee before the ld. CIT(A) against the consequential assessment order passed as consequence to the order under section 263. It was a submission by the ld. Sr. Counsel that the decision of the Bench of the Hon'ble Gauhati High Court in the case of Jawahar Bhattacharjee reported in 241 ITR 434, referred to by the Revenue, was distinguishable in so far as in the assessee's case what was called for by the AO was provided. It was a further submission that the decision of the Hon'ble Karnataka High Court in the case of Infosys Technologies Ltd. was on totally different facts and in respect of decision of the Hon'ble Delhi High Court in the case of Bhagwati Jewels Ltd. reported in 201 ITR 461. There was no decision on the issue of 263. Only the Hon'ble Delhi High Court had held that there was a question of law and the appeal was liable to be admitted. It was a submission that

the decision in the case of Rose Valley and Lotus Capital relied upon by the assessee was applicable in so far as the assessee had produced all the details as called for by the AO. It was a further submission that the decision of the Coordinate Bench of this Tribunal in the case of Star Griha, referred to *supra*, was not applicable, as the same was an *ex parte* order and on different facts. It was also the submission that the violation of any of the provisions of the Companies Act, if any, will not have any impact on the assessment order passed by the AO in so far as the said violation was not an issue raised in the order issued under section 263. It was further a submission that the decision of the Hon'ble Kerala High Court in the case of Apollo Tyres (*supra*) also did not apply in so far as the said decision was based on the facts of that case. Note in respect of section 78 of the Companies Act, as called for by the Bench and the balance-sheet and Profit & Loss a/c. from the year 31.03.2009 upto 31.03.2013 along with the schedules thereto and the incorporation certificate of the Company were also placed before the Bench.

6.4 In regard to the provisions of section 78 of the Companies Act, Shri R.K. Kankaria has submitted a note, which reads as follows:

> "*1. It is submitted that share premium is capital in nature and is not a revenue receipt. Reference in this behalf is invited to the following decisions: -*
>
> *(i) Asiatic Oxygen Ltd. v. Deputy Commissioner of Income Tax, (1994) 49 ITD 355 (Cal).*
>
> *(ii) Deputy Commissioner of Income Tax v. MAIPO India Ltd., (2008) 24 SOT 42 (Del).*
>
> *(iii) Brooke Bond India Ltd. v. C.I.T., (1997) 225 ITR 798 (SC) - where it was held that issue of shares at a premium was directly related to the expansion of the capital base of the company and expenditure incurred for such issue was capital expenditure.*
>
> *2. It is further submitted that in the instant case, there was no contravention of section 78 of the Companies Act, 1956. Sub-section (1) of section 78 was duly complied with by transferring a sum equal to the premium to "share premium account". Sub-section (2) of section 78 provides for application of the "share premium account" in*

the manner specified. The assessee's "share premium account" remains intact. Submission on behalf of the revenue that section 78 regulates the manner of utilisation of the money received by way of share premium is not borne out from the section."

7. We have considered the rival submissions. A perusal of the order of the ld. CIT passed under section 263 shows that on the basis of substantial information available to her that there were numerous companies which were created with bogus share capital for the purpose of money laundering, the ld. CIT has called for the records and has, after due verification, issued the show cause notice to the assessee. It further shows that the ld. CIT, after obtaining the replies from the assessee and due inquiry, has drawn a conclusion that the assessment order passed under section 143(3) read with section 147 was erroneous and hence prejudicial to the interest of Revenue. A perusal of the order of the ld. CIT further shows that there are a number of companies in this regard, doing the business of money laundering under the guise of share capital introduction.

7.1 Facts in the present case show some of the peculiarities of the various number of cases on which such revision has been done by the CIT. There are more than 500 appeals against such 263 orders at the Calcutta benches of this Tribunal. We are given to understand that many more are under the process of reopening. The peculiarities of these type of cases are that after the return is filed, under the guise of a letter from the assessee, the AO's attention is drawn to this file. The AO issues notice under section 148 for some reasons. In the course of the reopened assessment, allegedly various documents in respect of share capital introduction are also placed before the AO and the issue on which the reopening is done is practically accepted as the amounts involved for the purpose of reopening are very meager. The reassessment is completed by making minor additions and without doing any investigation in respect of share capital introduced. One of the conspicuous peculiarities in these type of cases are that from the time of issuing notice under section 148 to the date of the completion of the assessment, the whole process normally is completed within a period varying between two months to four

months. This is so that such reopening never gets recorded in the registers maintained by the AO in respect of such reopening and intimation to higher authorities.

7.2 The first question comes to our mind is as to why this hurry in completing the reassessment proceedings especially when substantial time is still available and detailed inquiry is expected. Normally, once reopening is done by issuance of notice under section 148, the full time as available under the Act is used by the AO but conspicuously in all such cases the assessments are closed fast. These are special cases where within such a short period of issuance of notice under section 148, assessment stands concluded without any investigation or verification or inquiry worth its name. One is left wondering as to whether it is on purpose and design or whether it was in the normal course as this feature is special only to such companies where large share capital has been introduced.

7.3 Tax avoidance is an accepted principle. Any person is entitled to adjust its affairs in such manner as to minimize tax liability. However, the methodology and acts done in such cases of capital formation is not tax avoidance. It is more in the nature of tax evasion by money laundering. These transactions have in effect three limbs. The first limb is the creation of the shell companies with substantial share capital which is balanced with inventories in the form of shares in other shell companies. The second limb is the transfer of such shell companies to persons who desire to use such substantial share capital companies for converting their unaccounted money into accounted funds and use such shell companies to do legitimate business. The third limb is when the shell companies after being taken over, the assets in the form of inventories are encashed whereby the unaccounted monies are laundered and brought into the company for conducting the legitimate business. All these three limbs are not done in one assessment year but in different assessment years. In fact, in the present case the share capital has been introduced in the assessment year 2008-09, the management started the change in the assessment year 2010-11 and was completed in the assessment year 2011-12 when

even the investments were redeemed. Thus it is not in one year the whole process is done and it is done over a period of more than two and sometimes three assessment years. There can be companies which were created in the assessment year 2005-06, or even 2006-07 being years which would be beyond the period of limitation for reopening but the change in management and the conversion of the inventories take place in 2008-09 or later which is within the period of limitation for reopening. The ld. CIT by including clauses (ii) and (iii) in her order under section 263 is but only drawing the attention of the AO as to the line of enquiry that is expected to be done. At two points unaccounted monies are laundered. At the first stage and at the third stage, i.e. once at the point of creation of share capital and then again at the point of converting the inventories/investments/ loans and advances into funds for the legitimate business purpose.

7.4 It is relevant because the creation of the shell companies and introduction of the share capital is not the only issue that comes up. This is but the tip of the ice-berg. A perusal of the Balance sheet and Profit & Loss account in the case of the assessee shows that the share application monies received by the assessee along with the premium are represented in the Balance sheet in the form of current assets being the unquoted equity shares in other such companies. That is the share application money received by the assessee is used for making further investments in other such similar shell companies from whom cash is taken and rerouted through cheques. These shell companies which are acquired by the interested third parties purchase these companies at a fractional amount of the value of the shares. That means a company whose share value is Rs.10/-, the share is issued at a premium of Rs.490/- total value of the share becomes Rs.500/-. This contains first portion of the unaccounted cash brought in or *converted* through the accommodation entry. Now this 500 rupees share is purchased by the third party or the interested person in taking *over* the company for the purpose of utilizing its capital. It may be two rupees or three rupees per share. Here the purchase price is *even* below the face *value* of the shares or at the face *value.* The

premium is in effect the bonus. The premium already introduced sits in the liability side as a reserve and on the asset side as investments in other shell companies. Now once the controlling interest is taken, then the balance sheet has to be cleaned. The balance sheet which now holds in current assets the un-quoted shares of other shell companies and loans and *advances* get cleaned by again liquidating these current assets. Now these current assets representing the share application money or the inventories being shares in the unquoted companies are sitting at a premium because these shares *have* also been applied for and purchased at a premium. How this money was brought back into the company has not been examined. When this has come back has not been examined and who are the people responsible when these transactions took place has not been examined. Here the second round of laundering of unaccounted funds is done. Much less being examined, the details are not available nor *given.* This is because the inventories are also shares of shell companies and no investor worth his salt would acquire the shares of such shell companies at such premium. The question would arise also as to whether any of these shell companies in which the assessee company has made the investment, *have* also been sold or transferred. In such a case, it becomes more intricate. There is no information as to whether there is a claim of capital loss or there is an offer of capital gains in the returns of income of the assessee how these shares more so the current assets were cleaned from the balance sheet. These are cases of clear human ingenuinity with the clear and contumacious intention to defraud the revenue. It is not the handiwork of one person alone. One person has created the shell, another has funded the shell with an intention to launder unaccounted funds and after having acquired the shell has used it for converting its funds also. There is no information as to who are the latest beneficiaries of such shell companies and for what purpose the companies are being used. This is just the reason why the provision of section 56(viib) has been introduced.

7.5 Coming to the issue of premium, though there has been an argument by the ld. Sr. Counsel that the ld. CIT has dropped the issue of premium, it is nowhere found in the order. The issue of share premium in line with the provision of section 78 needs to be examined.

7.6 We find that the ld. CIT has exercised his jurisdiction u/s 263 of the Act due to the following two reasons :

i) Huge Share premiums were received and this was not enquired into by the AO.

ii) AO has not done proper enquiry into the share application money received.

7.6.1 As regards the share premium receipt, we find that the assessee company was incorporated on 12.02.2007. During the current year the assessee company has received share application money for a share of nominal value of Rs.10 each per share at a premium of Rs.240/- each. Apparently there was no reason as to why the share of this company would command so much share premium. Since the AO has not done any examination in this respect the ld. CIT has exercised his jurisdiction u/s 263 of the Act. In this regard the ld. Counsel of the assessee has submitted that the share application money was received with a huge share premium only to reduce the incidence of ROC fee which is attracted when shares are allotted at par.The ld. Counsel of the assessee further submitted that the AO need not make any enquiry in this regard as it was not warranted as Section 56(vii)(b) was inserted by Finance Act 2012 w.e.f. 01.04.2013.

7.6.2 Now we find that the above submission of the ld. Counsel of the assessee is not acceptable. In this case shares of Rs.10 were applied at a premium of Rs.240/-. There is no apparent reason as to why such huge amount of share premium would be paid for obtaining share of face value of Rs.10. Any normal prudent person who makes investment in shares would make the investment in accordance with the fair market value of the shares. It certainly warranted an enquiry by the AO.

Moreover, the enquiry into the other aspect of share application money receipt was also to be done keeping in view this aspect of huge share premium receipt.

7.6.3 In this regard we may note that section 56 (vii)(b) reads as under :-

> *56 (viib) :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."*

7.6.4 By no stretch of imagination it can be said that examination u/s 68 of disproportionate share premium money hinges on the provision of section 56(viib). Admittedly this sub-section was inserted by the Finance Act 2012 w.e.f. 01.04.2013. Simply because this section was inserted w.e.f. 01.04.2013 it cannot be inferred that any huge share premium receipt much beyond the fair market value prior to this insertion does not require any examination by the revenue authorities under section 68 of the IT Act. As a matter of fact section 54(v) was inserted w.e.f 01.04.2005. This was in connection with the amounts received without consideration and the treatment thereof. In other words this related to taxation of gifts received. By no stretch of imagination it can be claimed that prior to this insertion the receipt of money without consideration as gift was not required to be examined. As a matter of fact, the Hon'ble Apex Court in the case of CIT vs Mohan P. 291 ITR 278 was exactly considering this issue.

7.6.5 Hence the submission of the ld. Counsel of the assessee that as insertion of section 56(viib) was done w.e.f. 01.04.2013 there was no requirement on the part of the AO to enquire the receipt of huge share premium u/s 68 is not at all sustainable.

7.7 There is another important aspect which should also be borne in mind in this case. These shares were received after paying huge premium by the allottees. These were subsequently transferred at face value or even at discount. This means

that on transfer of shares the allottee did not receive any premium. This means that huge amount was received and paid as share premium with full knowledge that there will be no recovery or there is no scope of recovery of share premium. This was designed to facilitate the transfer of these companies to other persons on payment of nominal or discounted value of shares. In other words the value embedded in the share premium was meant to be transferred under hand, and prima facie it appears that the transfer took place upon payment of under hand money. This is a classic case of money laundering and the share premium was being received and paid to launder the black money. This happens at the second limb i.e., when the directors change and the company changes hand.

7.7.1 The above facts clearly provide that receipt of share application money with huge share premium warranted detailed enquiry by the AO and not a perfunctory enquiry.

7.8 The Hon'ble Apex Court in the case of CIT vs Durga Prasad More 82 ITR 540 and in the case of Sumati Dayal vs CIT 214 ITR 801 has expounded that revenue authorities are also supposed to consider the surrounding circumstances and apply the test of human probability. In these cases the transactions though apparent were held to be not real ones.

7.8.1 In 63 ITR 609 in the case of CIT vs Sri Meenakshi Mills Ltd Hon'ble Apex Court has held that in exceptional circumstances courts are entitled to lift the veil of corporate entity and to pay regard to the economic realities behind the legal facade.

7.8.2 Hence just because the share application with huge and unjustified share premium was received from corporate entities through banking channel, no enquiry is warranted is not at all a sustainable plea on the facts and circumstances of the case and on the basis of exposition of the Hon'ble Apex Court as referred above. In fact it warrants a more detailed enquiry.

7.9 We further find that the Hon'ble Apex Court in the case of Bharat Fine Insurance Company vs CIT (1964) 34 Cos. 683 has held that prior to the enactment of section 78 premium received on issue of shares were profits. Now section 78 of the Act provides that aggregate value of share premium should be transferred to an account to be called the securities new account. Section 78(2) of the Act provides that share premium account may be utilized for the following purpose :-

(a) in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares :

(b) in writing off the preliminary expenses of the company;

(c) in writing off the expenses of, or the commission paid or discount allowed on, any issue of shares or debentures of the company; or

(d) in providing for the premium payable on the redemption of any redeemable preference shares or of any debentures of the company

7.10 From the above it is apparent that but for the restriction provided u/s 78(2) the amounts credited in the share premium account would take the character of the profit and consequentially would be liable to be taxed as such. But the adherence to section 78(2) gives the share premium account the characteristic of capital receipt. In the present case before us we find that there is no examination as to whether the company has ever adhered to the prescription of the Companies Act in this regard. If the company has not adhered to the prescription of the Act, the amount involved was liable to be taxed as revenue receipt.

7.10.1 In fact this is part of the examination directed by the ld. CIT in clause (i) of her order. Another interesting factor in this case is the earnings per share (E.P.S.). Till the year ended 31/3/2010 the E.P.S. was zero. When the E.P.S. was zero the company's share with a face value of Rs.10/- was commanding a

premium of Rs.490/-. As on 31/3/2011, the E.P.S. rose to Rs.6.84. This itself shows the change in the management and the liquidation of the "investment in shares", "unquoted shares". But with this E.P.S. the profit after taxation is only Rs.9,77,992/-. For the year ended 31/8/2012 the profit after taxation is Rs.15,22,581/- and the E.P.S. is Rs.10.64. Thus clearly when the E.P.S. is 0, the issuance of such premium on the shares itself calls for detailed enquiry.

7.10.2 Another interesting aspect in this case is the dates. As we mentioned earlier the change in management took place in the assessment year 2010-11, i.e. year ended 31/3/2010, i.e. the period 1/4/2009 to 31/3/2010. The reopening of the assessment and the reassessment proceedings took place during this time. This clearly shows the due diligence being attempted with the contumacious intent to attempt to obtain the seal of approval of the Income-tax department in respect of the bogus share capital introduced.

7.11 Now coming to the issue of the letter at page 31 of the paper book on which the date 8/3/2010 has been incorporated. One is left wondering as to why in the first place the certified copies were being obtained. These are as admitted by the assessee to be documents and letters submitted by the assessee itself. If it is so, then the copies of the same would be available with the assessee. Now after getting the certified copies the date is not incorporated on the certified copy but on a zerox copy of the certified copy and then by mistake such incorporated Xerox copy is used for making the paper book when all other copies are the certified copies. Even to an untrained mind obviously the sight of a document without the original blue coloured seal in a mass of papers should have drawn attention. Without saying anything more, we leave the issue as it is.

7.12 The issue of the merits in respect of the addition on account of share capital, nor the change in management, nor the merits of the issue of the source of realization from the liquidation of assets shown in the balance-sheet after the change of directors, if any, are not before us. Therefore, we would not go into the

merits of these issues. However, the facts in the present case clearly warrant the upholding of the order under section 263 as passed by the ld. CIT and we do so.

7.13 Now coming to the case laws that have been cited. Admittedly, we must concur with the ld. Sr. Counsel that the decision of the Hon'ble Delhi High Court in the case of Bhagwati Jewels Ltd. reported in 201 ITR 461 (Del) has no bearing in so far as in that case the Hon'ble Delhi High Court has only held that the question under reference was liable to be referred. Coming to the decision in the case of Rose Berry Mercantile (P) Ltd. in G.A. No.3296 of 2010 dated 10/01/2011, the Hon'ble Calcutta High Court has held that the issue of share capital was covered by the decision of the Hon'ble Supreme Court in the case of Lovely Exports Pvt. Ltd. reported in 216 CTR 195(SC). However, this decision has no applicability to the facts in this case in so far as the said decision is not on the issue of 263. If at all, this is a decision which could be considered when the issues are decided on merits of the addition subject to all the conditions being fulfilled therein. Coming to the decision of Lotus Capital Financial Services Ltd. in G.A. 1507 of 2012 dated 16/07/2012, the Hon'ble Calcutta High Court has upheld the quashing of the order passed under section 263 by the ITAT on the ground that the assessee has filed complete details, and the same was verified by the A.O. and the prospective shareholders also replied and the AO has given his finding in his order passed under section 143(3). In the present case, the facts are completely different. In the first place, the submission of all the details before the AO by the letter dated 08/03/2010 itself is questionable. The AO has done no further verification and the AO has not given any finding in respect of the share capital in the assessment order nor in the order-sheet notings. Only the issue of share application money received has been mentioned. The assessment order is bald in respect of the findings on the issue of share application money received. In these circumstances, this decision also is not of any help to the assessee. The decision relied upon by the ld. Sr. Counsel in the case of Mulchand Bagri reported in 68 Taxman 215 (Cal) is also not applicable in so far as in that case, there was exchange of

correspondence and actual enquiries were conducted by the AO. In the assessee's case, this is not so.

7.13.1 Similarly, in the case of Spectra Share & Scrips as also Jyoti Foundation, enquiries had been done by the AO therein. In the assessee's case the absence of enquiry is expressly evident from the absence of any order-sheet noting in respect of such enquiry as also the absence of any mention of any enquiry in the assessment order.

7.14 Further the fact that the ld. CIT has in her order under section 263 addressed the issues of the three layers in the transaction clearly shows the enquiry done by the ld. CIT. Such background statements as made by the ld. CIT also clearly shows the enquiry done by her. The claim that the background is a generalized background also does not hold water in so far as the *modus operandi* of the assessees are similar and the differences are minimal.

7.15 Coming to the issue of tangible material, a perusal of the provisions of section 263 shows that the ld. CIT has the power to give directions for assessment of a particular issue as also the powers to set aside the assessment for fresh consideration on specific issues or *de novo*. When the ld. CIT is directing to assess a particular income then such directions must be on specific tangible material. In the present case, the order under section 263 clearly shows that the ld. CIT did have very tangile information and material on the basis of which she has conducted the enquiry and then has set aside the assessment to conduct enquiry in respect of the three limbs of the transactions and grant the assessee the opportunity to explain its case. Consequently the decision relied by the ld. Sr. Counsel in the case of Development Credit Bank Ltd. reported in 323 ITR 206 (Bom.) does not help the case of the assessee.

7.15.1. In fact the decision in the case of Active Traders reported in 224 ITR 583 (Cal) wherein the Hon'ble High Court of Calcutta has held that the enquiry was

not taken to its logic end is more applicable to the facts of this case. Also the decision in the case of Infosys Technologies Ltd. reported in 341 ITR 293 (Kar) wherein the Hon'ble High Court of Karnataka has held "The provision is intended to plug leakages to the revenue by erroneous orders passed by the lower authorities, whether by mistake or in ignorance or even by design" is more apt to explain the actions that have lead to the 263 orders being passed in such cases.

7.15.2. Here the decision of the Hon'ble Full Bench of the Hon'ble Gauhati High Court in the case of Jawahar Bhattacharjee reported in 341 ITR 434 (Gauhati((FB) is found to be substantially similar to the assessee's case in so far as the Hon'ble High Court has held "Not holding such inquiry as is normal and not applying the mind to relevant material in making an assessment would be erroneous assessment warranting exercise of revisional jurisdiction." We may further extract some relevant paragraphs from the said order.

> "*Reference may briefly be made to the facts giving rise to the issue. The assessee was asessed for the assessment year 2002-03 by Assessing Officer (AO) giving the benefit of exemption under section 54F of the Income-tax Act, 1961, for long-term capital gains from sale of shares. The shares were purchased on April 21, 2000, for Rs.19,536 and sold on May 2, 2001, for Rs.6,36,640, i.e., on the increased price of more than 30 times in one year. The Commissioner of Income-tax (CIT) held the order to be erroneous and prejudicial to the interests of the Revenue and exercised suo motu revisional jurisdiction under section 263 of the Act. It was inter alia, observed that " while accepting the genuineness of the share transaction, the Assessing Officer failed to make any enquiry which, in the facts and circumstances, would normally be made to ascertain the capital gain in question. The assessee was not a habitual operator of share market and had no share of any other company; share was not of a well known company; the price jumped from Rs.6 per share to Rs.200 per share within a short span of thirteen months without any apparent reason. The Assessing Officer could have obtained annual accounts of the company to satisfy himself whether the commercial activities of the company justified such a jump in price. He could have obtained price quotations of the shares on a few dates to examine the reasonableness of the jump. The alleged sellers and buyers should have been examined. Accordingly, the order was held to be erroneous and prejudicial to the interests of the Revenue. The Assessing Officer was directed to reframe the assessment after conducting the necessary enquiries."*

7.16 These are the facts. Now in the findings, the Hon'ble High Court has held as follows:

To determine the question in hand, let us first have a look at the statutory provision.

"263. Revision of orders prejudicial to Revenue – (1) Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the Revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment."

The object of the provision is to correct an erroneous order prejudicial to the interests of Revenue, as the Department has no right to file an appeal against the order of the Assessing Officer. While the power is not meant to be substituted for the power of the Assessing Officer to make assessment, the same can certainly be exercised when the order of the Assessing Officer is erroneous and prejudicial to the interests of the Revenue. Whether or not the order is erroneous has to be decided from case to case.

Interpretation of section 263 has been the subject-matter of consideration in various decisions. In Malabar Industrial Co. Ltd. v. CIT [2000] 243 ITR 83 (SC), it was observed (pages 87 and 88) :

"There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. ***In*** *the same category fall orders passed without applying the principles of natural justice or without application of mind ....*

Mr. Abraham relied on the judgment of the Division Bench of the High Court of Madras in Venkntakrishna Rice Company v. CIT [1987] 163 ITR 129 interpreting 'prejudicial to the interests of the Revenue.' The High Court held (page 138) :

'In this context, it must be regarded as involving a conception of acts or orders which are subversive of the administration of revenue. There must be some grievous error in the order passed by the Income-tax Officer, which might set a bad trend or pattern for similar assessments, which on a broad reckoning, the Commissioner might think to be prejudicial to the interests of the Revenue administration.'

In Our view, this interpretation is too narrow to merit acceptance. The scheme of the Act is to levy and collect tax in accordance with the

provisions of the Act and this task is entrusted to the Revenue if due to an erroneous order of the Income-tax Officer, the Revenue is losing_ tax lawfully payable by a person, it will certainly be prejudicial to the interests of the Revenue."

7.17 We have extracted only such portion as are relevant to the issue of the revision under section 263. On the touchstone test of these decisions, we are of the view that even on jurisdiction the ld. CIT has rightly invoked her powers under section 263 of the Act and the same is upheld.

7.18 We are not taking reference to the decision in the case of Star Griha Pvt. Ltd. in ITA No.1244/Kol/2013 dated 14/08/2014 in so far as that was a case in which the assessee was unrepresented.

7.19 The ld. DR has raised an issue that in some cases, 263 proceedings have been dropped by the ld. CIT but the revenue has the liberty to reopen the assessments under section 148. This is not an issue that arises in this appeal and therefore we would not adjudicate on it other than saying that the liberties available to the revenue cannot be controlled by an appellate authority as long as the requisite conditions associated to such actions are complied with in letter and spirit after the introduction of Explanation 2 to section 147.

7.20 This view of ours also finds support from the decision of the Hon'ble Gurajat High Court in the case of Yogendra Kumar Gupta –vs- ITO reported in 366 ITR 186 (Guj) wherein the Hon'ble Gujarat High Court has held as follows:

"18. As mentioned hereinabove, we had called for the original file, which had revealed new, valid and tangible information supporting The Assessing officer's opinion received from the Deputy Commissioner of Income-tax, Kolkata, based on the material found during the search by the CBI, where Basant Marketing Pvt. Ltd., is said to be a dummy company of one Shri Arun Dalmia.

What has been emphasized by the learned senior counsel appearing for the petitioner is that the Assessing Officer had attempted to fill in the gap by terming the amount received from Basant Marketing Pvt. Ltd. as "accommodation entry", which she

could not have done without further inquiry/verification. Yet another contention emphasized by the learned senior counsel is that the post-notice correspondence made after the reasons recorded could not have added anything which was lacking in the reasons themselves. He urged that in the absence of any statement given by any director of Basant Marketing Pvt. Ltd. stating that the assessee received and obtained accommodation entry in the form of loans and advances, the reasons lack basis. The director, Mr. Dalmia of Basant Marketing Pvt. Ltd. as contended also does not reveal anywhere and, therefore, it is premature on the part of the Assessing Officer to so record the reasons. It is further urged that the affidavit of Rishabh Dalmia stating on oath that the loan transactions with the petitioner are genuine for having been carried out only through cheques, prima face vindicates that the entire exercise is based on suspicion. The entire thrust, therefore, is that issuance of notice is nothing but a fishing inquiry.

As discussed at length while adverting to the law, that sufficiency of reasons recorded by the Assessing Officer need not be gone into by this court. Of course, the Assessing Officer when forms his belief on the basis of subsequent new and specific information that the income chargeable to tax has escaped assessment on account of omission on the part of the assessee to make full and true disclosure of primary facts, he may start reassessment proceedings as fresh facts revealed the non-disclosure full and true Such facts were not previously disclosed or it can be said that if previously disclosed, they expose untruthfulness of facts revealed.

The Assessing Officer required jurisdiction to reopen under section 147 read with section 148 of the Act, where the information must be specific and reliable. As held by the apex court in the case of Phool Chand Bajrang Lal (supra), since the belief is that of the Income-tax Officer, the sufficiency of reasons for forming the belief, is not for the court to judge but is open to an assessee to establish that there exists no belief or that the belief is not at all a bona fide one or based on vague, irrelevant and non-specific information. To that limited extent, the court may look at the view taken by the Income-tax Officer and can examine whether any material is available on record from which the requisite belief could be formed by the Assessing Officer and whether that material has any rational connection or a live link with the formation of the requisite belief. It is also immaterial that at the time of making the original assessment, the Assessing Officer could have found by further inquiry or investigation as to whether the transactions were

genuine or not. If on the basis of subsequent valid information, the Assessing Officer forms a reason to believe on satisfying the twin conditions prescribed under section 147 of the Act that no full and true disclosure of facts was made by the assessee at the time of original assessment and, therefore, the income chargeable to tax had escaped assessment, his belief and the notice of reassessment based on such belief/opinion needs no interference.

In the present case, since both the necessary conditions have been duly fulfilled, sufficiency of the reasons is not to be gone into by this court. The information furnished at the time of original assessment, when by subsequent information received from the Deputy Commissioner of Income-tax, Kolkata itself found to be controverted, the objection to the notice of reassessment under section 147 of the Act must fail At the costs of ingemination, it needs to be mentioned that at the time of scrutiny assessment, a specific query was raised with regard to unsecured loans and advances received from the said company, namely, Basant Marketing Pvt. Ltd. based at Kolkata. These being the transactions through the cheques and drafts, there would arise no question of the Assessing Officer not accepting such version of the assessee and not treating them as genuine loans and advances. Furnishing the details of names, addresses, PANs, etc., also would lose its relevance if subsequently furnished information, which has been made basis for issuance of notice impugned, concludes that Basant Marketing Pvt. Ltd. is merely a dummy company of one Shri Arun Dalmia, which provided the accommodation entries to various beneficiaries.

This court has examined the belief of the Assessing Officer to a limited extent to inquiry as to whether there was sufficient material available on record for the Assessing Officer to form a requisite belief whether there was a live link existing of the material and the income chargeable to tax that escaped assessment. This does not appear to be the case where the Assessing Officer on vague or unspecific information initiated the proceedings of reassessment, without bothering to form his own belief in respect of such material. We need to notice that the Joint Director CBI, Mumbai, intimate to the DIT (Investigation), Mumbai. A case is registered against Mr. Arun Dalmia, Harsh Dalmia and during the search at their residence and office premises, the substantial material indicated that 20 dummy companies of Mr. Arun Dalmia were engaged in money laundering and the income-tax evasion. The said entities included Basant Marketing Pvt. Ltd. also. Form the analysis of details furnished

and the beneficiaries reflected, which are spread across the country, the Commissioner of Income-tax, Kolkata, suspected the accommodation entry related to the assessment year 2006-07 as well, this information has been provided to the Director General of Income-tax, Kolkata, who in turn, communicated to the Chief Commissioner o Income-tax, Ahmedabad. Further revelation of investigation as could be noticed from the record examined (file) deserves no reflection in this petition. Insistence on the part of the petitioner to provide any further material forming the part of investigation carried out against Dalmias also needs to meet with negation, as the law requires supply of information on which Assessing Officer recorded her satisfaction, without necessitating supply of any specific documents. The proceedings initiated under section 147 of the Act would not be rendered void and non-supply of such document for which confidentiality is claimed at this stage, following the decisions of the Delhi High Court in the case of Acorus Unitech Wireless (P.) Ltd. (supra). The assumption of jurisdiction on the part of the Assessing Officer is since based on fresh information, specific and reliable and otherwise sustainable under the law, challenge to reassessment proceedings warrant no interference."

"*Reference to the above quoted observations in the judgment shows that the exercise of the jurisdiction has not been limited to the defect of jurisdiction. It could extend to an order which may be found to be "erroneous" or "not in accordance with law" for having been passed "without making any enquiry in undue haste". The "jurisdictional" defect has been referred to in that sense. Only limitation laid down is that the order could not be revised without the same being "erroneous" merely because a different view could also be taken. It has not been held that even an order passed, ignoring norms or material could not be interfered with under section 263 of the Act.*

It is well known that the word "jurisdiction" does not have a fixed meaning. Though in one sense it means entitlement to enter upon the enquiry in question and in wider sense it implies light to conduct enquiry into the matter in lawful manner. Even if there is jurisdiction to go into a matter, failure to have regard to the relevant material may also render an order without jurisdiction."

"We have already referred to the judgments of this court in Rajendra Singh [1990] 79 SIC 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 m Rajendra Singh [1990] 79 STC 10 (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."

7.21 A perusal of the consequential assessment order passed in the present case on 31/3/2014 shows that the assessee has also not cooperated in the assessment proceedings but in the first appeal has been raising allegations against the AO that he has not accepted documents submitted and has not granted adequate opportunity. This also clearly shows the evasionary tactics that are being adopted to wriggle its way out of the corner it has put itself into by its own acts and commissions. A peculiarity in such cases that is noticed is that sheaves of paper documents are readily produced but when a summon is issued the responsible

persons conveniently disappear. Only the assessee knows the intricacies of its accounts. It is for the assessee to prove its claim of share capital/ application money introduction and its affairs in respect of its accounts. Merely dumping papers and documents on the table of the assessing authority does not in any way mean compliance. The burden of proof cannot be shifted on the revenue by cart loads of documents. The documents submitted must be explained. We do understand the predicament of the assessee in so far as if any responsible person appears then he would have to answer many unpleasant questions which could lead to the reopening of assessments in multiple assessment years and multiple assessees. But then what has been created and knotted up by the assessee must be answered and unraveled only by the assessee and none else would know the facts better than the assessee itself.

7.22 We are live to the fact that some of the observations in the order are academic in nature. However, they are just our expression of distaste to the fraudulent acts done by such assessees which has set a bad trend and pattern for such acts, that even lure honest tax payers to wonder as to what fault have they done to bear the burden of tax when such evaders go scot free. In the circumstances, the appeal filed by the assessee stands dismissed.

8. In the result, the appeal filed by the Assessee is dismissed.

This Order is pronounced in the Court on 19th September, 2014.

Sd/-	Sd/-
(Shamim Yahya)	(George Mathan)
Accountant Member	Judicial Member

Dated : 19th September, 2014

Talukdar(Sr.P.S.)

Copy of the order forwarded to:

1. M/s. Bisakha Sales Pvt. Ltd., 72, Manohar Das Street, Kolkata – 700 007
2 CIT (Kol-II), Kolkata
3. The CIT(A),
4. CIT,
5. DR,

True Copy, By order,

Asstt. Registrar**,** ITAT, Kolkata