IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCHES : B : KOLKATA

BEFORE SHRI R.S. SYAL, AM & SHRI N.V. VASUDEVAN, JM

ITA No.1104/Kol/2014
Assessment Year: 2009-10

M/s Subhlakshmi Vanijya Pvt. Ltd., 226/1, AJC Bose Road, 6th Floor, Kolkata – 700 020.	Vs.	Commissioner of Income Tax,-I, Aayakar Bhawan, P-7, Chowringhee Square, Kolkata – 700 069.
PAN: AALCS5695R (Appellant)		(Respondent)

Assessee by : Shri Rajesh Bagri,FCA

ITA No.1790/Kol/2013
Assessment Year: 2008-09

Ramshila Enterprises Pvt. Ltd., 5th Floor, Room No.503, Narayani Building, 27, Brabourne Road, Kolkata – 700 001. PAN: AABCR3063J	Vs.	Commissioner of Income Tax, Kolkata-II, Aayakar Bhawan, 3rd Floor, P-7, Chowringhee Square, Kolkata – 700 069.

ITA No.1905/Kol/2013
Assessment Year: 2008-09

Tulsi Tracom Pvt. Ltd., B-222, 2nd Floor, Okhla Industrial Area, Phase-I, New Delhi – 110 020. PAN: AACCT6121K	Vs.	Commissioner of Income Tax, Kolkata-II, Aayakar Bhawan, 3rd Floor, P-7, Chowringhee Square, Kolkata – 700 069
(Appellants)		(Respondents)

Assessee by: Shri N.K. Poddar, Sr. Counsel, Smt. A.K. Tibrewal & Shri Amit Agarwal, Advocates.

ITA No.1419/Kol/2013
Assessment Year: 2008-09

M/s Linsey Vinimay Pvt. Ltd., 2C, Mahendra Road, Kolkata – 700025. PAN:AABCL3787D	Vs.	Commissioner of Income Tax-II, Aayakar Bhawan, P-7, Chowringhee Square, Kolkata – 700 069.

ITA No.1425/Kol/2013
Assessment Year : 2008-09

M/s Balaka Vinimay Pvt. Ltd., Rajesh Mohan & Associates, 34, GC Avenue, 5th Floor, Unit No.18, Kolkata – 700 013. PAN: AABCO0670L	Vs.	Commissioner of Income Tax, Kolkata-II, P-7, Chowringhee Square, Aayakar Bhawan, Kolkata – 700 069.

ITA No.1213/Kol/2013
Assessment Year : 2009-10

M/s Orbital Contractors Financiers Pvt. Ltd., 16, Ganesh Chandra Avenue, 7th Floor, Kolkata – 700 013.	Vs.	Commissioner of Income Tax, Kolkata-III, P-7, Chowringhee Square, Aayakar Bhawan, Kolkata – 700 069.

PAN: AAACO3799D

(Appellants) (Respondents)

Assessee by : Shri K.M. Roy, FCA

ITA No.1262/Kol/2013
Assessment Year: 2008-09

M/s Satabdi Vincom Pvt. Ltd., 52, Weston Street, Kolkata – 700012. PAN:AAKCS9972L	Vs.	Commissioner of Income Tax-II, Aayakar Bhawan, P-7, Chowringhee Square, Kolkata – 700 069.

ITA No.1073/Kol/2014
Assessment Year: 2009-10

M/s Parasmani Commercial Pvt. Ltd.,C/o Rajesh Mohan & Associates, Chartered Accountants, Unit No.18, 5th Floor, 34, Ganesh Chandra Avenue, Kolkata – 700013. PAN:AAECP9542		Commissioner of Income Tax-I, Aayakar Bhawan, P-7, Chowringhee Square, Kolkata – 700 069.

ITA No.1481/Kol/2013
Assessment Year: 2008-09

M/s Radha Krishna Tradecom Pvt. Ltd., 71, Metcalfe Street, Kolkata – 700013. PAN:AADCR7605N	Commissioner of Income Tax-I, Aayakar Bhawan, P-7, Chowringhee Square, Kolkata – 700 069.
(Appellants)	(Respondents)
Assessee by :	Shri R.K. Aggarwal, FCA, S.M. Surana, Advocate & Sunil Surana, Advocate

ITA No.1499/Kol/2014
Assessment Year: 2008-09

M/s Reward Tie-up Pvt. Ltd., C/o Salarpuria Jajodia & Co., 7, Chittaranjan Avenue, Kolkata – 700072. PAN:AADCR2573D	Vs.	Commissioner of Income Tax-I, Aayakar Bhawan, P-7, Chowringhee Square, Kolkata – 700 069.

ITA No.2135/Kol/2013
Assessment Year : 2008-09

Capetown Merchandise Pvt. Ltd., Room No.1B, 2nd Floor, 542, GT Road (South), Howrah – 711101. PAN: AADCC2015P	Vs.	Commissioner of Income Tax, Kolkata-II, P-7, Chowringhee Square, Aayakar Bhawan, Kolkata – 700 069.

ITA No.1465/Kol/2013
Assessment Year : 2008-09

M/s Vinayak Financial Consultant Pvt. Ltd., C/o Salarpuria Jajodia & Co., 7, CR Avenue, Kolkata – 700 072.	Vs.	Commissioner of Income Tax, Kolkata-III, P-7, Chowringhee Square, Aayakar Bhawan, Kolkata – 700 069.

PAN: AACCV6187E

ITA No.861/Kol/2014
Assessment Year : 2009-10

Orbit Vintrade Pvt.Ltd., C/o RSVPC & Company, 41A, Ach. JC Bose Road, Suite No.613, Kolkata – 700 014.	Commissioner of Income Tax, Kolkata-II, P-7, Chowringee Square, Aayakar Bhawan, Kolkata – 700 069

PAN: AABCO0670L

(Appellants)	(Respondents)

Assessee by : Shri Sujoy Sen, Advocate

ITA No.1365/Kol/2013
Assessment Year: 2008-09

M/s Marigold Nirman Pvt. Ltd., 27, Sir R.N. Mukherjee Road, Kolkata – 700001. PAN:AAFCM0455M	Commissioner of Income Tax-II, Aayakar Bhawan, P-7, Chowringhee Square, Kolkata – 700 069.

ITA No.1386/Kol/2013
Assessment Year: 2008-09

M/s Kasturi Home Pvt. Ltd., 85, Metcalfe Street, 2nd Floor, Room No.206, Kolkata – 700013. PAN:AADCK0548F	Commissioner of Income Tax-II, Aayakar Bhawan, P-7, Chowringhee Square, Kolkata – 700 069.
	(Respondent)

ITA No.1385/Kol/2013
Assessment Year: 2008-09

M/s Aradhana Plaza Pvt. Ltd., 27, Sir R.N. Mukherjee Road, Kolkata – 700001. PAN:AAGCA2835A	Vs.	Commissioner of Income Tax-II, Aayakar Bhawan, P-7, Chowringhee Square, Kolkata – 700 069.
(Appellant)		(Respondent)
Assessee by :		Shri S.K. Tulsiyan, Advocate

ITA No.1538/Kol/2013
Assessment Year: 2008-09

Madhuban Vyapar Pvt. Ltd., 255, Rabindra Sarani, 4th Floor, Room No.3, Kolkata – 700007. PAN:AAFCM1858E	Commissioner of Income Tax-I, Aayakar Bhawan, P-7, Chowringhee Square, Kolkata – 700 069.
(Appellant)	(Respondent)
Assessee by :	Shri Subhash Aggarwal & Shri Brijesh Kumar, Advocates

ITA No.1809/Kol/2013
Assessment Year: 2008-09

Banke Behari Construction Pvt. Ltd., 4, BBD Bagh (E), Stephen House, 5th Floor, Room No.77, Kolkata – 700001. PAN:AADCB1786G	Vs.	Commissioner of Income Tax-II, Aayakar Bhawan, P-7, Chowringhee Square, Kolkata – 700 069.

ITA No.1105/Kol/2014
Assessment Year: 2010-11

Hebiscus Commotrade Pvt. Ltd., 9/12, Lal Bazar Street, Mercantile Building, 3rd Floor, Kolkata – 700001. PAN:AADCB7777K		Commissioner of Income Tax-II, Aayakar Bhawan, P-7, Chowringhee Square, Kolkata – 700 069.
(Appellants)		(Respondents)

Assessee by	:	Shri Rajesh Kumar Duggar, FCA & Shri A.K. Upadhyay, Advocate
Department in all appeals by	:	S/Shri Sachchidanand Srivastava, Niraj Kumar & Dr. Adhir Kumar Bar, CITs, DRs
Dates of Hearing	:	From 14.07.2015 to 23.07.2015
Date of Pronouncement	:	.07.2015

ORDER

PER R.S. SYAL, AM:

Through this batch of appeals, different assesses assail the correctness of separate orders passed by the Commissioners of Income-tax (CIT) u/s 263 of the Income-tax Act, 1961 (hereinafter also called 'the Act') in relation to the assessment years 2008-09 and 2009-10. Since all these appeals are based on largely similar facts and common grounds of appeal, we are proceeding to dispose them off by this consolidated order for the sake of convenience.

2. Succinctly, the facts of M/s Subhlakshmi Vanijya Pvt. Ltd. are that this assessee filed its return on 2.2.2010 declaring total income of Rs.1,478/-. The return was processed u/s 143(1) of the Act. The assessee, vide its undated letter submitted on 31.12.2010, stated before the Assessing Officer (AO) that income of Rs.18,449/- earned by it was omitted to be offered for taxation. The AO issued notice u/s 148 of the Act on 14.1.2011 and completed the assessment. Apart from making addition of Rs.18,449/-, which was brought to the notice of the AO by the assessee itself and a further addition of Rs.9,600/- on account of

Preliminary expenses, the AO observed during the course of such proceedings that the assessee issued fresh share capital of Rs.14,71,800/- on premium of Rs.7,21,18,200/-. Notices u/s 133(6) were issued to eight subscribers to the share capital out of total 21 subscribers. Replies to such notices were received confirming subscription to the equity share capital of the assessee company at premium. Considering these replies, the AO finalized the assessment at a total income of Rs.29,530/-, by making the aforenoted additions of Rs.28,049/-.

3. The ld. CIT, on perusal of the assessment record, observed that the issue of share capital with huge share premium, was not properly examined by the AO inasmuch as notices were issued u/s 133(6) to only eight subscribers against the total number of 21 subscribers of the assessee company. He further noticed that replies in response to notices u/s 133(6) were received in the office of the AO, which appeared to have been prepared by a single person as these were more or less in the same format and language. In this backdrop of the facts, it was opined that the entire exercise of filing confirmations was stage-managed by a single

person or a group of persons to complete the formalities of filing confirmations so as to lend semblance of credibility to the subscription of share capital with huge premium. The AO was found to have not cross-examined the subscribers nor recorded statement of any of the directors of the assessee or subscriber companies. It was also noted that the assessee's balance sheet reflected investments of Rs.8.80 crore in shares of some other relatively new private limited companies at much higher price than their real worth. In the opinion of the ld. CIT, the AO failed to carry out proper investigation of the matter. He also took note of a racket under which a large number of companies were floated in identical manner apparently showing to have introduced share capital at a huge premium by rotating the unaccounted money. He observed that the AO ought to have conducted thorough enquiry into at least 2-3 layers to reach the source or the real investor. Considering the fact that issue of a share with a face value of Rs.10/- by the assessee company at a premium of Rs.490/- per share required thorough examination by the AO, which he failed to carry out, the ld. CIT, after considering the

objections of the assessee, came to hold that the assessment order was rendered erroneous and prejudicial to the interest of the Revenue. He, therefore, set aside the assessment order with a direction to the AO for making a fresh assessment after conducting independent, detailed and complete enquiries into the subscription to the share capital and premium introduced in this case and also the investments of Rs.8.80 crore allegedly made by the assessee in certain other such companies. The assessee is aggrieved against the impugned order.

4. There is another case, namely, M/s Ramshila Enterprises Pvt. Ltd., which has been argued before us for four days at a stretch. We have a quick look at its facts. This assessee filed its return declaring total income at Rs. Nil. The return was processed u/s 143(1). The case was reopened by means of notice u/s 148. During the course of assessment proceedings, it was noticed by the AO that this company had issued shares with face value of Rs.10 at a premium of Rs.190. Notices u/s 133(6) were issued to some of the subscribers. Replies were received. No further inquiries on the question of issue of share capital at premium

were conducted. Assessment was finalized on the total income of Rs.20,447 making certain disallowances. The ld. CIT set aside the assessment order on more or less the same reasoning as given in the case of M/s Subhlakshmi Vanijya Pvt. Ltd. and directed the AO to reframe the assessment fresh on the lines as directed by him in the case of M/s Subhlakshmi Vanijya Pvt. Ltd.

5. Facts and circumstances of the other companies in this batch of appeals are *mutatis mutandis* similar to those discussed above. All the ld. Counsel representing such companies have admitted about the similarity of facts between their respective cases and those of M/s Subhlakshmi Vanijya Pvt. Ltd. and Ram Shila Enterprises Pvt. Ltd., with minor but inconsequential changes. Such companies also issued shares at a huge premium (ranging from Rs.90 to Rs.490 per share having face value of Rs.10) and made investments in the shares of other private limited companies at a very high price. In all these cases, returns were filed with meager income. Either the attention of the AOs was invited by these assessees towards some nominal income not properly offered for

taxation or the AOs *suo motu* noticed some escapement. Reassessments were made u/s 147 making additions for nominal amounts, after those AOs issuing notices u/s 133(6) to some of the subscribers and getting satisfied with the genuineness of receipt of share capital with premium without recording statements of the directors either of such companies or those of investee companies, whose shares were purchased at a much higher value. In all such cases, the ld. CITs have set aside such assessment orders u/s 263 and directed the AOs to conduct proper enquiry before deciding the matter. All the assessees in this batch of appeals are aggrieved against the orders passed u/s 263 of the Act.

6. The ld. ARs have made elaborate submissions on various aspects of the issue, which we discuss *infra* at appropriate places.

7. The ld. DR tried to explain the *modus operandi* of conversion of black money into white through the medium of companies instantly before us and others whose appeals have either been fixed along with this batch of appeals or are yet to be fixed, with the help of a simple illustration. He explained that the entire episode is completed through

three levels. In the first level, Company 'A' is incorporated on papers, which does not carry out any substantial business activity. Suppose, this company issues ten shares to another dummy company, say X with face value of Rs.1/- at a premium of Rs.49, raising its share capital to Rs.500/-. The sum of Rs.500/- standing on the liability side of the balance sheet of company A is equalized with Investment in shares of Company 'B', which is again a paper company, at a much higher price than its real worth. Company 'B', in turn, gets Rs.500/- and invests the same in the shares of another dummy private limited company 'C', again at a huge undeserving market price. This process goes on as the same amount of Rs.500 is rotated through various dummy companies eventually showing their capital and share premium at Rs.500/- represented by investment in shares of other dummy companies by equal amount of Rs.500/- subject to the deduction of certain expenses incurred or some petty income earned. In the second level, a person, say Mr. Y, intending to convert his black money into white enters into a deal with company X, who is shareholder of company 'A'. Company X sells its

shares of Company A with the purchase price of Rs.500 at its real worth, say, Rs.6 per share. Mr. Y purchasing shares of company A for apparent consideration of Rs.6, pays Rs.494/- in cash and, thus, acquires all the shares of Company 'A' with apparent investment of Rs.6/- and real investment of Rs.500/-. Mr. Y retains these shares for a period exceeding one year. In the third level, the operators who have created this web of dummy companies assist Mr. Y in selling the shares of company 'A' at Rs.500/- through fictious transactions entered into with Mr. Z. Mr. Y realizes Rs.500/- in cash and brings this amount into circulation. Profit of Rs.494/- [Rs.500(sales price) minus Rs.6(apparent purchase price)] earned by Mr. Y is not chargeable to tax in terms of section 10(38) as it arises `from the transfer of a long-term capital asset, being an equity share in a company'. That is how, Mr. Y converts Rs. 494/- from black to white. The shares of company 'A' are sold through operators to Mr. Z, who is interested in purchasing share loss. Mr. Z treats the shares of company A either as his stock in trade or Investment, depending upon his requirement. If these shares purchased

for an apparent consideration of Rs.500 are held by Mr. Z as stock in trade, then at the end of the year, he will value such stock in trade at market price, say at Rs.10. By doing so, he will show a loss of Rs.490 from the valuation of shares, which will be adjusted against his normal business income to this extent. If Mr. Z treats these shares as Investment, then the operator will help him in selling the shares at their market price of Rs.10. Loss from the sale of Investment, being loss under the head `Capital gain', will be set off against any other capital gain genuinely earned by Mr. Z. This is the entire mechanism by which Mr. Y, who purchased the shares of Company A has succeeded in converting his black money of Rs. 494 into white. In the same manner, Mr. Y1 and Mr. Y2 etc. convert their black money of Rs.494 into white by purchasing the shares of Company B and Company C etc. The end result is achieved by operators by routing the transactions of shares through several layers of companies, thereby giving colour of genuineness, which in reality is nothing but a camouflage. The ld. DR explained that in the instant appeals, we are concerned with the first level in which

share worth Rs.10/- are issued for Rs.500/- and the assessee has also made investment in the shares of other paper companies at huge price, not in conformity with its market worth, and such companies are not carrying on any worthwhile business activity.

8. The ld. DR explained that there are hundreds of appeals on this issue before the Kolkata benches of the tribunal in all of which returns were filed by such companies with meager income; intimations were issued u/s 143(1); thereafter notices u/s 148 were issued either at the instance of such companies divulging a paltry escapement of income or otherwise ; assessment orders were passed u/s 143(3) read with section 147 after making nominal additions and the AOs, during the course of such assessment proceedings, made some formal enquiries about shares issued by such companies at huge premium by issuing notices u/s 133(6) to some of the shareholders and getting satisfied without any further investigation. The jurisdictional CITs have passed orders u/s 263 in all such cases, which have been assailed before the Tribunal.

9. We have heard Shri N.K. Poddar, Sr. Advocate, Sh. Rajesh Bagree, Shri K.M. Roy, Shri R.K. Aggarwal, Shri Rajesh Kumar Duggar, C.A.s, Smt. A.K. Tibrewal, Shri Amit Agarwal, Sh. S.M. Surana, Sh. Sunil Surana, Shri Sujoy Sen, Shri S.K. Tulsiyan, Shri Subhash Aggarwal, Shri Brijesh Kumar, Shri A.K. Upadhyay, Advocates (hereinafter also commonly referred to as the `ld. AR' for convenience), S/Shri Sachchidanand Srivastava, Niraj Kumar & Dr. Adhir Kumar Bar, the ld. CIT, DRs (hereinafter commonly referred to as the `ld. DR' for convenience). Now we proceed to decide the question of validity of the orders passed by the ld. CIT u/s 263 of the Act in this batch of appeals. Detailed written and oral submissions advanced by both the sides have been taken into consideration in the light of material placed before us and precedents relied on.

10. The primary question which arises for our consideration is as to whether the CITs were within their power to revise the assessment orders passed by the AOs u/s 143(3) read with section 147? A view has been canvassed by the ld. CITs in all the cases under consideration that

the respective AOs should have carried out proper investigation before accepting the genuineness of the receipt of share capital at such a huge premium. Improper examination of this aspect, in the opinion of the ld. CITs, has led to the passing of erroneous orders which are prejudicial to the interest of the revenue. In order to answer this main question on merits, we need to examine two broader questions : -

A) Whether the provisions of section 68 can be attracted if share capital with premium is not properly explained by the assessee company?; and

B) Whether the failure of the AO to give a logical conclusion to the enquiry conducted by him gives power to the CIT to revise such assessment order?

11. Adverting to the facts of the case of M/s Subhlakshmi Vanijya Pvt. Ltd., we find that it issued shares with face value of Rs.10 at a premium of Rs.490/- per share. In this process, the increase in the paid up share capital by a sum of Rs.14,71,800/- was coupled with increase in share premium amounting to Rs.7.21 crore. Its balance sheet depicted investment of Rs.8.80 crore which was also represented by shares of

some other private companies at a huge price with trivial backgrounds. The AO did examine certain aspects of this issue during the course of reassessment proceedings by issuing notices u/s 133(6) to some of the subscribers to the share capital. After obtaining details about some of the shareholders, such as their PANs, investment through banking channel etc., the AO kept such replies on record without considering it appropriate to personally examine the directors of the shareholder companies or finding out the source of investment by such shareholders in the light of the fact that the shares with face value of Rs. 10 of the assessee, a relatively new private company not having any substantial source of income, were claimed to have been issued at a huge premium of Rs.490 per share.

12. Similar is the position about other appeals in this batch. The ld. CITs in the impugned orders have noticed that these cases form part of large number of cases in which share capital is shown to have been introduced by rotating the unaccounted money through various companies or entities. Such introduction of share capital was shown in

large number of cases on the basis of dummy companies, which were created solely for the purpose of building up share capital. He further noticed the *modus operandi* of introduction of such bogus share capital with unaccounted cash getting deposited in the accounts of different persons/companies and cheques going from these accounts to various other companies and, after rotating the money in 3-4 layers, getting introduced as share capital in other companies.

A) Whether the provisions of section 68 can be attracted if share capital with premium is not properly explained by the assessee company?

13.a. Now, we turn to the first broader question as to whether the provisions of section 68 can be attracted in case the share capital with premium is not properly explained by the assessee company? The ld. AR argued that the AO is not empowered to examine any aspect of the issue of share capital with premium in the hands of a company. Relying on the judgment of the Hon'ble Supreme Court in the case of *CIT vs. Lovely Exports Pvt. Ltd. (2008) 216 CTR 195(SC),* he vehemently argued that no addition can be made in the hands of a company for

unexplained or improperly explained issue of share capital. It was put forth that if the share transactions are not genuine, then, the addition can be made u/s 69 in the hands of such shareholders and not u/s 68 in the assessment of the company. Taking his argument to next level, it was stated that the Finance Act, 2012 has inserted a proviso to section 68 w.e.f. 1.4.2013, which only permits the AO to make addition u/s 68 if the assessee company fails to offer an explanation to the satisfaction of the AO in respect of receipt of share capital with premium. He argued that simultaneous with the insertion of the proviso to section 68, the legislature has also brought in an amendment to section 56(2)(viib) inserted w.e.f. 1.4.2013 providing that 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, shall be chargeable to income-tax under the head "Income from other sources". In the backdrop of these

amendments brought in by the Finance Act, 2012, the ld. AR contended that excess share premium can be charged to tax as income from other sources and the AO is entitled to make addition u/s 68 in respect of unsatisfactory explanation given for the receipt of share capital with premium only from the A.Y. 2013-14. As the year under consideration is A.Y. 2009-10, the ld. AR argued that the hands of the AO are tied either to examine the genuineness of share capital with premium in the hands of the company or to tax the excess share premium. It was stated that once the question of issue of shares cannot be examined in the hands of the assessee company, there can be no rationale in the ld. CIT directing the AO to examine the genuineness of share capital in proceedings pursuant to section 263. The ld. DR opposed this contention tooth and nail.

13.b. In order to appreciate the rival contentions in this regard, let us have a look at the prescription of section 68, the relevant part of which provides that : ` Where *any sum* is found credited in the books of an assessee maintained for any previous year, and the assessee offers no

explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year.'. This section has received the attention of the Hon'ble Supreme Court and almost all the High Courts in numerous cases. It has been almost unanimously held that the burden under this section is discharged by the assessee only when the assessee proves three things to the satisfaction of the AO, viz., identity of the creditor, capacity of the creditor and genuineness of the transaction. The Hon'ble jurisdictional High Court in *CIT Vs. Korlay Trading Co. Ltd. (1998) 232 ITR 820 (Cal)* has held that mere filing of the income-tax file number of the creditors is not enough to prove the genuineness of the cash credit. The creditor should be identified. There should be creditworthiness. There should be a genuine transaction. In *K.M. Sadhukhan & Sons P. Ltd. Vs. CIT (1999) 239 ITR 77 (Cal)*, it has been held that the burden lies on the assessee to prove the genuineness of loan. The Hon'ble High Court has held that the initial burden is on

the assessee to prove the identity of the creditor, the capacity of the creditor to advance the loan and the genuineness of the transaction. In *CIT Vs. Precision Finance P. Ltd. (1994) 208 ITR 465 (Cal),* the Tribunal deleted the addition on the footing that since the transactions were through bank account, hence it was to be presumed that those were genuine. Setting aside the tribunal order, the Hon'ble High Court has held that : `It is for the assessee to prove the identity of the creditors, their creditworthiness and the genuineness of the transactions. Mere furnishing of the particulars is not enough.'. Similar view has been taken in several cases. On going through the above judgments, it is explicit that the onus u/s 68 can be said to have been discharged only when the assessee proves identity and capacity of the creditor along with the genuineness of transaction to the satisfaction of the AO. All the three constituents are required to be cumulatively satisfied. If one or more of them is absent, then the AO can lawfully make addition.

13.c. Now, we take up the major contention advanced by the ld. AR to the effect that a company issuing shares is not required to discharge the

burden cast u/s 68 in respect of share capital. This has been buttressed taking assistance from the judgment of the Hon'ble Supreme Court in *Lovely Exports (supra)*. It is no doubt true that Hon'ble Summit Court has held that if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the AO, then, the Department is free to proceed to reopen their individual assessments in accordance with the law, but, it cannot be regarded as undisclosed income of the assessee.

13.d. It is a well settled legal position that every case depends on its own facts. Even a slightest change in the factual scenario alters the entire conspectus of the matter and makes one case distinguishable from another. The crux of the matter is that the *ratio* of any judgment cannot be seen divorced from its facts.

13.e. At this stage, it is relevant to mention that the Hon'ble jurisdictional High Court has recently in the case of *CIT Vs. Maithan International (2015) 277 CTR 65 (Cal)* dealt with *Lovely Exports* and

also reproduced the relevant part of the *Lovely Exports* in para 25 of its judgment, reading as under : -

> "*This reasoning must apply* a fortiori to large scale subscriptions *to the shares of a public company* where the latter may have no material other than the application forms and bank transaction details to give some indication of the identity of these subscribers. *It may not apply* in circumstances *where the shares are allotted directly by the Company*/assessee or to creditors of the assessee. This is why this Court has adopted a very strict approach to the burden being laid almost entirely on an assessee which receives a gift."

13.f. In this case, the Hon'ble jurisdictional High Court appreciated the `possible difficulty which an assessee may be faced with when asked to establish unimpeachable creditworthiness of *the share subscribers'*. It observed that the "this aspect has to be decided on factual matrix of each case and strict or stringent test may not be applied to arms length angel investors or normal public issues.... The said doctrine is applied when

there is evidence to show that assessee may not be aware, could not have knowledge or was unconcerned as to the source of money paid or belonging to the third party. .... However, *when there is surrounding evidence and material manifesting and revealing involvement of the assessee in the "transaction "* and that it was not entirely an arm's length transaction, resort or *reliance to the said doctrine may be counter-productive* and contrary to equity and justice. The doctrine is not an eldritch or a camouflage to circulate ill gotten and unrecorded money." Thereafter in para 25, the Hon'ble High Court specifically considered the judgment in the case of *Lovely Exports (supra).* It also took into consideration the judgment in the case of *CIT Vs. Nova Promoters & Finlease P. Ltd. (2012) 342 ITR 0169 (Del)*, in which it was held that 'in view of the link between the entry providers and incriminating evidence, mere filing of PAN number, acknowledgement of income tax returns of the entry provider, bank account statements etc. was not sufficient to discharge the onus'. After thoroughly examining the *Lovely Exports* judgment in the light of other judgments, the Hon'ble

jurisdictional High Court has concluded by holding that: `*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....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 Section 68 and 69 of the Income Tax Act.'

13.g. The ld. AR vehemently argued that this judgment of the Hon'ble jurisdictional High Court be ignored as the same is based on concession of the AR appearing in that case and, hence, cannot be treated as an authority for other cases to follow.

13.h. We are totally unimpressed with the submission advanced by the ld. AR. It is true that where a concession is made and court simply decides the issue on the basis of such concession without going into its legality, it can be said that the judgment is *in personam* and not *in rem*. But, where, despite the concession, the court thoroughly analyses the factual and legal provision prevailing in that case and, after making an

elaborate examination, draws a conclusion, then it cannot be said that the decision is based on a mere concession. In such circumstances, the *ratio* of the judgment applies with full force to all the parties. This contention of the ld. AR, ergo, fails.

13.i. The Hon'ble Delhi High Court in *Nova Promoters (supra),* while discussing the factual matrix in the case of *Lovely Exports (supra)* noticed that the reasoning of accepting the genuineness of share capital, even if the shareholders are bogus, must apply a fortiori to large-scale subscriptions to the shares of a public company where the latter may have no material other than the application forms and bank transaction details to give some indication of the identity of these subscribers. The Hon'ble High Court further observed that: "*It may not apply in circumstances where the shares are allotted directly by the company/assessee or to creditors of the assessee'.*

13.j. The Hon'ble Delhi High Court in *CIT Vs. Navodaya Castles Pvt. Ltd. (2014) 367 ITR 0306 (Del)* following the principle laid down in *Nova Promoters (supra)* has held that the share capital in case of a

closely held company is required to be examined by the AO in terms of section 68 and the failure of the assessee to satisfy the AO, calls for addition u/s 68. It is useful to mention that the SLP filed by the assessee against this judgment has been dismissed by the Hon'ble Supreme Court which has been since reported as *Navodaya Castles Pvt. Ltd. Vs. CIT (2015) 230 Taxman 268(SC).*

13.k. The Hon'ble jurisdictional High Court in *CIT Vs. Active Traders (P) Ltd. (1995) 214 ITR 583 (Cal)* has held that the Assessing Officer in the assessment of the company has jurisdiction to ask for the information from the shareholders regarding the source of investment made in the company. It set aside the view of the tribunal that there could be no enquiry regarding the source of investment of the shareholders in the shares of the company. Their Lordships observed that *: `If a cash credit is shown by the company in its books of accounts and if the source cannot be explained properly the ITO may assess the sum as income of the company from undisclosed source.'*

13.l. In *Mimec (India) P. Ltd. & Anr Vs. DCIT & Ors. (2013) 353 ITR 0284 (Cal)* also, the assessee relied on the ratio in the case of *CIT vs. Lovely Exports Pvt. Ltd.* for contending that if share application money was received even from bogus shareholders, the Department could not regard it as undisclosed income of the assessee company. Repelling such contention, the Hon'ble High Court observed that : `*The judgment in Commissioner of Income Tax vs. Lovely Exports Pvt. Ltd. was rendered in the particular facts and circumstances of that case. The judgment may not lay down any proposition of law that operates as a binding precedent on this Court….'.*

13.m. The Hon'ble jurisdictional High Court in *CIT Vs. Nivedan Vanijya Niyojan Ltd. (2003) 263 ITR 0623 (Cal)* has held that where the assessee-company did not produce the subscribers of its share capital when required to do so, it failed to establish the identity of said subscribers, prove their creditworthiness and the genuineness of the transaction and therefore, addition under section 68 was justified.

13.n. We consider it our duty to mention that the ld. AR has also referred to certain judgments rendered by the Hon'ble Calcutta High Court in which the *ratio* of *Lovely Exports (supra)* has been followed and additions deleted.

13.o. Under such circumstances the question arises that if on one point there are conflicting judgments of one High Court, then which of the conflicting views should be followed. It can be noticed that judgment in *Maithan International(supra)* is latest in the point of time having been rendered on 21.1.2015 by two Hon'ble judges. None of the contrary judgments has been rendered by a Bench of more than two judges and such judgments are older in point of time vis-à-vis *Maithan International (supra)*. In our considered opinion the question of the applicability of which of the contrary decisions by one High Court has been fairly settled in several cases including the judgment in *Bhika Ram & Ors. Vs. Union of India (1999) 238 ITR 113 (Del)* wherein it has been held that a later judgment of the same strength of judges is binding. It is relevant to mention that the counsel in that case argued that the

earlier judgment of the Hon'ble Supreme Court on the point should be followed as against the later judgment, because the earlier judgment was not brought to the notice of the Hon'ble Supreme Court in the later case and even the case was not argued from that angle. Jettisoning such argument, the Hon'ble High Court has held as under : -

> `However, learned counsel for the petitioner relied on Satinder Singh vs. Umrao Singh AIR 1961 SC 908, to submit that compensation would not be treated as income. Learned counsel further submitted that the decision of the Supreme Court in Satinder Singh's case (supra) was not brought to the notice of the Supreme Court when Bikram Singh's case (supra) was decided. It is also submitted that the reasoning on which their Lordships have proceeded in the case of Satinder Singh (supra) was also not argued before the Supreme Court in Bikram Singh's case (supra). Not only are we not satisfied about the correctness of the submission so made, *we are also of the opinion that such a plea is not open for consideration by us and Bikram Singh's case (supra), being a later pronouncement of the Supreme Court by a Bench of co-equal strength, it is binding on us*.'

13.p. Similar view has been taken by the Full Bench judgment of the Hon'ble Gujarat High Court in *Gujarat Housing Board Vs. Vagaji Bhai Laxman Bhai AIR 1986 Guj 81 (FB)*. As such, we are disinclined to ignore this rule of precedence of judgments and hold that the later judgment in the case of *Maithan International (supra)* with equal

strength of judges is binding on us.

13.q. The ld. Counsel then submitted that the judgment in the case of *Maithan International (supra)* cannot be considered as a binding precedent *qua* the addition u/s 68 with reference to share capital because the question before the Hon'ble Court was about the genuineness of the loan creditors and not that of subscribers to the share capital. It was submitted that the discussion made in this judgment about the share capital and the attractability of section 68 is simply o*biter dicta* and cannot be construed as *ratio decidendi*.

13.r. We are not persuaded by the argument put forth by the ld. AR. There is no doubt that the question before the Hon'ble High Court was in relation to loan creditors. However, the fact remains that their Lordships have laid down that section 68 can be invoked when the three ingredients of section 68 are not satisfied in relation to share capital as well. There is an elaborate discussion on this issue starting from para 24. Their Lordships have not only considered the judgment in the case of *Lovely Exports*(supra), but also several other judgments including

Nova Promoters (supra), *Stellar Investment, Sofia Finance, Nipun Builders and Developers, (2013) 350 ITR 407 (Del)* etc., all of which deal with the applicability of section 68 in respect of share capital. In view of such a threadbare analysis of the issue coupled with the fact that unsecured loans and share capital have been kept by the Hon'ble High Court on the same pedestal for the purposes of section 68, it is difficult for us to accept the contention that the entire discussion concerning the attractability of section 68 on share capital/premium in the case of a closely held companies is *obiter dicta* and hence be ignored.

13.s. Be that as it may, even *obiter* of the jurisdictional High Court cannot be held as non-binding. The Hon'ble Bombay High Court in *Tata Iron and Steel Company Ltd. Vs. D.V. Bapat , ITO (1975) 101 ITR 292 (Del)*, has held that obiter dicta of Supreme Court is binding on all High Courts. When the obiter dicta of Supreme Court is binding on all High Courts, we fail to appreciate as to how obiter dicta of the Hon'ble jurisdictional High Court can be claimed as not binding on all the

authorities falling within its jurisdiction. We, therefore, refuse to accept this contention.

13.t. On an overview of the legal position flowing from the above discussion it becomes evident that in case of a closely held company where the shares are issued to the family members or close friends/relatives, the burden of proof rests on the company to properly explain the identity and capacity of shareholders along with the genuineness of the transactions. *Ex consequenti,* the argument of the ld. AR that the assessee was not obliged to explain the genuineness of share capital after having furnished preliminary details about the shareholders etc., is not capable of acceptance and hence rejected. We hold that in all cases, where the assessee fails to cumulatively prove to the satisfaction of the AO, the identity and capacity of the shareholders along with the genuineness of the transactions there can be no escape from section 68.

13.u. Now we espouse the next leg of the arguments of the ld. AR that the insertion of proviso to section 68 by the Finance Act 2012 w.e.f.

1.4.2013 empowering the AO to examine the genuineness of the share capital in the case of a company in which public are not substantially interested, is prospective and, hence, the CIT in the year under consideration question was not right in directing the AO to examine the genuineness of share capital with premium. On the other hand, the ld. DR advocated the retrospective operation of this amendment.

13.v. In order to evaluate the rival the contentions on this issue, we consider it apt to reproduce the relevant part of the proviso to section, which reads as under : -

> **`Provided** *that where the assessee is a company, (not being a company in which the public are substantially interested) and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless—*
>
> *(*a*) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and*
>
> *(*b*) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:*
>
> **Provided further** *that nothing contained in the first proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB) of* section 10'.

13.w. As per this proviso where any share capital etc. is credited in the case of closely held company, the explanation given by such company shall be deemed to be not satisfactory, unless the resident shareholder offers an explanation about the nature and source of such sum so credited and such explanation is found to be satisfactory by the AO. The essence of this amendment is that a closely held company is required to satisfy the AO about the share capital etc. issued by it, in the absence of which, an addition u/s 68 can be made in the hands of the company. If we accept the amendment to be prospective, then it would mean precluding the AO from examining the genuineness of transactions of receipt of share capital with premium under consideration and hence prohibiting him from making any addition u/s 68 notwithstanding the same being non-genuine. In the oppugnation, if the amendment is held to be prospective, then it would mean that the AO would have all the powers to examine the genuineness of share capital and share premium received by the assessee company on the touchstone of section 68. If the assessee fails to satisfy him on the identity and capacity of the

subscribers and genuineness of transactions, then addition will be called for u/s 68 of the Act. We, therefore, firstly need to decide as to whether the amendment to section 68 by way of insertion of proviso is retrospective or prospective?

13.x. It is settled rule of construction that every statute is *prima facie* prospective unless it is expressly or by necessary implication made to have retrospective operation. Ordinarily the courts are required to gather the intention of the legislature from the overt language of the provision as to whether it has been made prospective or retrospective, and if retrospective, then from which date. However, some times what happens is that the substantive provision, as originally enacted or later amended, fails to clarify the intention of the legislature. In such a situation if subsequently some amendment is carried out to clarify the real intent, such amendment has to be considered as retrospective from the date when the earlier provision was made effective. Such clarificatory or explanatory amendment is declaratory. As the later amendment clarifies the real intent and declares the position as was originally intended, it

takes retroactive effect from the date when the original provision was made effective. Normally such clarificatory amendment is made retrospectively effective from the earlier date. It may also happen that the clarificatory or explanatory provision introduced later to depict the real intention of the legislature is not specifically made retrospective by the statute. Notwithstanding the fact that such amendment to the substantive provision has been given prospective effect, the judicial or quasi judicial authorities, on a challenge made to it, can justifiably hold such amendment to be retrospective. The justification behind giving retrospective effect to such amendment is to apply the real intention of the legislature from the date such provision was initially introduced. The intention of the legislature while introducing the provision is gathered, *inter alia*, from the Finance Bill, Memorandum explaining the provision of the Finance Bill etc.

13.y. The facts of *CIT Vs. Gold Coin Health Food (P.) Ltd. (2008) 304 ITR 308 (SC)* are that the Finance Act, 2002 amended Explanation 4 to section 271(1)(c) with effect from 01.04.2003 providing that the penalty

would be imposed even if the returned income is loss. In the case of *Virtual Soft Systems Ltd. Vs. CIT (2007) 289 ITR 83 (SC)* (a Bench comprising of two Hon'ble Judges) it was held that prior to the amendment with effect from 1st April, 2003 penalty for concealment of income could not be levied in the absence of any positive income. Doubt was expressed over the correctness of this view by a subsequent Bench. Thereafter in the case of *Gold Coin Health Food P. Ltd. (supra),* a bench of three Hon'ble Judges overruled the judgment in the case of *Virtual Soft Systems Ltd. (supra)* by holding that Explanation 4 to section 271(1)(c)(iii) regarding the imposition of penalty, even if there is a loss, is clarificatory and not substantive. It was held to be applying even to the assessment years prior to 1st April, 2003, being the date from which it was brought into force. Thus, it can be easily noticed that the retrospective effect to the amendment to Explanation 4 by the Finance Act, 2002 has been given by holding that the position even anterior to such amendment was the same inasmuch as the penalty was imposable even in the case of loss. The intention of the legislature was found to be

imposing penalty in all such cases even prior to the amendment and that is how this amendment was held to be clarificatory and therefore, retrospective.

13.z. Similar is the position in the case of *CIT Vs. Kanji Shivji And Co. (2000) 242 ITR 124 (SC).* Explanation 2 to section 40(b) was introduced with effect from 1st April, 1985 providing that where an individual is a partner in a firm otherwise than as partner in representative capacity, interest paid by the firm to such individual shall not be taken into account for the purposes of clause (b) to section 40. The Hon'ble Supreme Court in the case of *Brij Mohan Das Laxman Das Vs. CIT (1997) 223 ITR 825 (SC)* held this insertion to be declaratory in nature and hence retrospective. In this case it was held that the interest paid by the firm to a partner on his individual deposits is not hit by section 40(b), if the person is a partner not in his individual capacity but as representing HUF. The same view was taken in *Suwalal Anandilal Jain Vs. CIT (1997) 224 ITR 753 (SC).* However in *Rashik Lal And Co. Vs. CIT (1998) 229 ITR 458 (SC)*, somewhat contrary view was expressed.

That is how the matter came up before the larger bench of the Hon'ble Supreme Court in *Kanji Shivji And Co. (supra)*. In this case Explanation 2 to section 40(b) has been held as declaratory and hence retrospective in operation by affirming the judgments in the cases of *Brij Mohan Das Laxman Das (supra)* and *Suwalal Anandilal Jain (supra)*.

13.aa. A survey of the above judgments makes it patent that any amendment to the substantive provision which is aimed at clarifying the existing position or removing unintended consequences to make the provision workable has to be treated as retrospective notwithstanding the fact that the amendment has been given effect prospectively. In our considered opinion the border line between a substantive provision having retrospective or prospective effect, is quite prominent. One needs to appreciate the nature of the original provision in conjunction with the amendment. Once a provision has been given retrospective effect by the legislature, it shall continue to be retrospective. If on the other hand, if the statute does not amend it retrospectively, then one has to dig out the intention of the Parliament at the time when the original provision was

incorporated and also the new amendment. If the later amendment simply clarifies the intention of the original provision, then it will always be considered as retrospective. Like the case of *Gold Coin Health Food P. Ltd. (supra)* in which the Hon'ble Supreme Court held that the amendment to Explanation 4 to section 271(1)(c)(iii) simply clarified the position which was existing since inception of the provision that the penalty is leviable on concealment irrespective of the fact whether ultimately assessed income is positive or negative. Similarly in the case of *Kanji Shivji And Co. (supra)*, the Hon'ble Apex Court held that the purpose of Explanation 2 to section 40(b) was simply to clarify that the Income-tax Act recognizes individual statues of a person as different from his representative capacity. This Explanation did not bring in a new provision but clarified that the position was so since the introduction of the provision itself. In this class of clarificatory or explanatory amendments to the substantive provisions, the object is always to clarify the intention of the legislature as it was there at the time of insertion of the original provision. That is the reason for which

the clarificatory amendments are always retrospective irrespective of the date from which effect has been given to them by the legislature.

13.ab. Armed with the above understanding of the retrospective or prospective effect, let us analyze whether or not the insertion of proviso to section 68 is clarificatory? We have noted above that for ruling out the application of section 68, the assessee must satisfy the AO as to the identity and capacity of the creditor in addition to the genuineness of transaction. When we advert to the language of section 68, it transpires that it refers to `*any sum credited'* in the books of an assessee maintained for any previous year. The expression `any sum credited' has not been specifically defined in the provision. Thus, it would extend to all the amounts credited in the books of account. A sum can be credited in the books of account, which would invariably either find its place either on the income side of the Profit and loss account or in the liability side of the balance sheet. Items credited to the Profit and loss account are themselves income and hence there can be no reason to make addition once again for them. Items appearing on the liability side of the

balance sheet can be loans or share capital etc. Once there is specific reference in section 68 for applying it to `any sum credited', there can be no reason to restrict its application only to `loans' and not to `share capital'. The burden of proof under 68 can be no different in respect of issue of share capital by closely held companies *vis-à-vis* loans or gifts. The Hon'ble jurisdictional High Court in *Maithan International (supra)*, *Active Traders (supra), Mimec (India) P. Ltd. (supra)* and *Nivedan Vanijya Niyojan Ltd. (supra)* has specifically held that the above three ingredients are required to be satisfied even in case of issue of share capital by a closely held company. First two out of the above four judgments have considered the judgment in the case of *Lovely Exports*. It shows that the intention of the legislature, as interpreted by the Hon'ble jurisdictional High Court, is always to cast duty on the assessee to prove the satisfaction of the three ingredients in case of transaction of issue of share capital by a closely held company in the same way as is in the case of transaction of loans.

13.ac. At this juncture, it would be relevant to note the relevant part of the Memorandum explaining the provisions of the Finance Bill, 2012, which is as under : -

> "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 such shareholder or persons making payment towards issue of shares before such sum is accepted as genuine credit. If the company 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 and 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."

13.ad. A careful perusal of the first para of the Memorandum brings out that the onus of satisfactorily explaining issue of share capital with premium etc. by a closely held company is on the company. In the next para, it has been clarified that : `*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…'. Next para recognizes that judicial pronouncements, while considering 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.* After going through the above parts of the Memorandum explaining provisions of the Finance Bill, there remains no doubt whatsoever that the onus has always been on the closely held companies to prove the issue of share capital etc. by the company in terms of section 68. An analysis of the above discussed judgments, including four from the Hon'ble jurisdictional High Court, reveals that section 68 has been understood as casting obligation on the closely held companies to explain the amount of share capital etc. credited in its books of account. When we read the Memorandum explaining the

provisions of the Finance Bill, it becomes vivid that certain contrary judicial pronouncements created doubts about the onus of proof and the requirements of this section. Thus, the amendment makes it manifest that the intention of the legislature was always to cast obligation on the closely held companies to prove receipt of share capital etc. to the satisfaction of the AO and it was only with the aim of setting to naught certain contrary judgments which `*created doubts*' about the onus of proof by holding that there was no requirement on the company to prove the share capital etc. and as such no addition could be made in the hands of company even if such share holders are bogus. As the amendment aims at clarifying the position of law which always existed, but was not properly construed in certain judgments, there can be no doubt about the same being retrospective in operation.

13.ae. The about discussed judgments from the Hon'ble Summit Court holding a clarificatory substantive provision as retrospective, despite the same being made applicable from a particular year, fully govern the position under consideration. It is interesting to note that the judgment

of the Hon'ble jurisdictional High Court in *Maithan International (supra)* holding that the burden of proving the credit of share capital etc. is on a closely held company and failure to do so attracts the rigor of section 68, has been delivered on 21.1.2015, much after the amendment carried out by the Finance Act, 2012. This case pertains to pre-amendment era as the order of the tribunal assailed in this case is dated 24.6.2011. It shows that the Hon'ble High Court has also impliedly approved the proposition that the position anterior to the A.Y. 2013-14 was the same inasmuch as the onus to prove the share capital by a closely held company was on it. We, therefore, hold that the amendment to section 68 by insertion of proviso is clarificatory and hence retrospective. The contrary arguments advanced by the ld. AR, being devoid of any merit, are hereby jettisoned.

13.af. At this stage, we consider it appropriate to discuss the submission of the ld. AR that a simultaneous amendment to section 56(2) connected with the amendment to section 68, has also been made w.e.f. 1.4.2013 and hence section 68 amendment is also retrospective.

Before appreciating this argument, we set out clause (viib) of section 56(2) as under : -

> "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:" shall be considered as income from other sources.

13.ag. This provision mandates that where a closely held company receives any consideration for issue of shares in any previous year from any resident and the consideration received for issue of shares exceeds the face value of such shares, then the aggregate consideration received for such shares, as exceeds the fair market value of the shares, shall be chargeable to income-tax under the head "Income from other sources". A bare perusal of this provision makes it explicit that a new obligation has been put on the closely held companies which issue shares for a consideration greater than the fair market value of its shares. When the shares are so issued at a higher price, then such excess becomes income from other sources in the hands of the company. This amendment is obviously prospective as the position of law before such amendment was

different. Such share premium was always considered as a capital receipt not chargeable to tax. Since this insertion has increased the ambit of income of such companies henceforth for the first time, which was not the position hitherto, it ceases to be clarificatory and hence cannot be construed as retrospective.

13.ah. We fail to find out any parallel between the amendments made to section 68 and section 56(2)(viib) except for the fact that these provisions have been added by the Finance Act, 2012. A conjoint reading of proviso to section 68 and section 56(2)(viib) divulges that where a closely held company receives, *inter alia*, some amount as share premium whose genuineness is not proved by the assessee company or its source etc. is not proved by the shareholder to the satisfaction of the AO, then the entire amount including the fair market value of the shares, is chargeable to tax u/s 68 of the Act. If however, the genuineness of the amount is proved and the shareholder also proves his source, then the hurdle of section 68 stands crossed and the share premium, to the extent stipulated, is chargeable to tax u/s 56(2)(viib) of

the Act. It shows that only when source of such share premium in the hands of a shareholder is properly explained to the satisfaction of the AO, that the provisions of section 56(2)(viib) gets triggered. Approaching this section pre-supposes that the assessee genuinely received share premium from the share-holder having satisfactorily explained the transaction. Thus it is evident that sections 68 and 56(2)(viib) can never simultaneously operate. The later excludes the former and *vice versa*. Consequently, we are unable to accept the contention of the ld. AR that the proviso to section 68 attached a new obligation and hence should be declared as prospective. It is axiomatic that proving genuineness of a transaction of any credit, including share capital, was always an essential constituent of section 68. Since section 68 covers *`any sum credited'* in the books without any exception, which, *inter alia,* includes share capital, it cannot be held that the examination of share capital with premium etc. was earlier outside the ambit of section 68 and now this amendment has brought it into its purview. We have noted it from several judgments dealing with share

capital in pre-amendment period and the Memorandum explaining the provisions that proving the genuineness of share capital etc. by a company has always been considered a necessary requirement to escape the magnetization of section 68. The amendment has simply made express which was earlier implied. We, therefore, hold that though amendment to section 56(2)(viib) is prospective, but to section 68 is prospective. If that is the position, then the assessee is always obliged to prove the receipt of share capital with premium etc. to the satisfaction of the AO, failure of which calls for addition u/s 68.

13.ai. The ld. AR relied on the judgment of the Hon'ble Bombay High Court in *Vodafone India Services Pvt. Ltd. Vs. Addl. CIT (2014) 368 ITR 1 (Bom)* to contend that share premium can under no circumstances be construed as a revenue receipt chargeable to tax. He submitted that the ld. CIT was not justified in revising the assessment order requiring the AO to examine the receipt of share capital/premium from the angle of taxability. It was argued that the share premium can be charged to tax

only in the circumstances given in section 56(2)(viib) and that too from the assessment year 2013-14.

13.aj. We are in full agreement with the ld. AR that the judgment in the case of *Vodafone India Services (supra)* is an authority for the proposition that share capital/premium are capital receipts and cannot be charged to tax. We also fully endorse the argument about the introduction of section 56(2)(viib) w.e.f. assessment year 2013-14 which provides for charging share premium to tax in the circumstances and to the extent provided therein. However, it is significant to note that we are not concerned with the chargeability of share premium to tax in the present appeal. Here, the question is about the taxability or otherwise of such share capital/premium in terms of section 68. It is self evident that when the assessee fails to prove the identity and capacity of shareholders along with the genuineness of transactions, the amount of share capital, etc. is liable to be added u/s 68. It is only where share capital/ premium are genuinely received and all the three necessary ingredients stand proved to the satisfaction of the AO that the share premium is not

chargeable to tax before assessment year 2013-14 and, thereafter, chargeable to the extent and in the circumstances as enshrined in section 56(2)(viib). This contention, consequently, fails.

13.ak. To sum up, we hold that the contention of the ld. AR that since the AO of the assessee-company is not empowered to examine or make any addition on account of receipt of share capital with or without premium before amendment by the Finance Act, 2012 w.e.f. A.Y. 2013-14 and hence the CIT by means of impugned order u/s 263 could not have directed the AO to do so, is unsustainable.

B. Now we espouse the second broader question as to whether the failure of the AO to give a logical conclusion to the enquiry conducted by him gives power to the CIT to revise the assessment order?

14. In this regard, Sh. Poddar submitted that the AO, during the course of proceedings u/s 147, thoroughly examined the question of issue of share capital at premium. Not only notices u/s 133(6) were issued to majority of the subscribers, but such notices were also properly responded giving complete details of their identity with PANs etc., and

also the sources of investment, being copies of bank accounts from which the monies were invested by them in the assessee company's share capital. He took us through certain pages of the paper book which indicate that the AO called for information from some of the subscribers, who submitted the necessary details. The ld. AR contended that the AO, on examination of such material, got satisfied with the genuineness of transactions along with identity and capacity of the shareholders. In such circumstances, it could not be said that the AO did not properly apply his mind. It was stated that the way in which assessment should be finalized falls in the exclusive domain of the AO. Relying on section 142(1) and 143(2) of the Act, the ld. AR stated that it is within the province of the AO to decide that which points he wants to take up for enquiry and to what extent and, as such, the CIT cannot interfere with the same. It was contended that once an enquiry is conducted by the AO, even if inadequate, that precludes the CIT from taking recourse to revision u/s 263. He argued that at worst, it may be a case of an inadequate enquiry but cannot be branded as lack of enquiry. He took us

through certain decisions for canvassing a view that revision u/s 263 is possible only in case of lack of enquiry and not inadequate enquiry. It was also argued that the order of the CIT is based on suspicion and surmises and has no legal legs to stand on, more so, when the AO took a possible view on the matter.

15. The other ld. counsel have adopted the arguments of Sh. Poddar on merits except for separately giving account of some minor differences, such as, the amount of share premium, number of subscribers examined by the AO, the information submitted by such shareholders accepting subscription to the shares of the companies at the given premium in their respective cases. Such minor differences in the facts of each case in this batch of appeal, in our considered opinion, have no bearing on the overall legal position emerging on the merits of the case, except for case specific separate legal issues challenged before us, which we will advert to a little later in this order.

16. Firstly, we are proceeding to examine the legality of the impugned orders on merits, which is common to all the cases under consideration.

The larger question of the validity of the orders passed u/s 263 can be decided by examining the following aspects, which have been argued by the ld. AR : -

i) Whether the enquiry conducted by the AO in such cases can be construed as a proper enquiry?

ii) Whether CIT can set aside the assessment order and direct the AO to conduct a thorough enquiry, thereby interfering with the jurisdiction of the AO conferred on him in terms of section 142(1) and 143(2) of the Act?

iii) Whether inadequate inquiry conducted by the AO empowers the CIT to revise the assessment order?

iv) Whether the order of the CIT is based on irrelevant consideration and further was he not supposed to point out specifically where the AO went wrong in not properly examining the issue of share capital?

v) If the AO has taken a possible view, can still the revision be ordered?

We will examine all the above aspects, one by one.

i) Whether the enquiry conducted by the AO can be construed as a proper enquiry?

17.a. There is no denial of the fact that the AO did issue notices u/s 133(6) of the Act to some of the subscribers of the share capital, who, in turn submitted details of their PANs, bank accounts, etc., copies of which have been placed on record. The AO kept such documents on record and came to hold that the share capital was rightly subscribed and there was no case for invoking the provisions of section 68. In this process, he did not consider it fruitful to comprehend the rationale or logic behind issuing shares at such a high premium, nor to examine any of the directors of the companies which were subscribers to share capital. No attempt was made to require the assessee to justify the charging of such a high premium and further what prompted the subscribers to purchase shares at such a huge premium when the company did not have any worthwhile net worth and was relatively a new one without any business activity. Appeal of Ramshila Enterprises

Pvt. Ltd. has been heard by us as a representative case on merits and it is the common submission of the other assesses that facts and circumstances are similar. Now let us see the so-called enquiry conducted by the AO in the case of Ramshila Enterprises, which has two directors, namely Sh. Sham Lal Khaitan and Sh. Ankit Kumar Khaitan. In all it has 51 shareholders, out of which the AO called for the particulars only from ten companies to whom shares with face value of Rs.10 were issued at Rs.190 each. Out of such ten companies, there are eight companies [Gururkul Dealers (P) Ltd., Rich Valley Traders (P) Ltd., Fetish Traders (P) Ltd., Tanya Enclave (P) Ltd., Dolphin Tie-up (P) Ltd., Gajanan Dealers (P) Ltd., Dreamz Vanijya (P) Ltd., and Shambhureshwar Vincom (P) Ltd.], in which the directors of the assessee company are, in turn, directors. This fact has been brought to our attention from the notices issued by the AO to these companies which bear signatures of Sh. Sham Lal Khaitan or Sh. Ankit Kumar Khaitan as receiver of notices on behalf of such companies. Relevant documents have been placed in the Departmental Paper Book. Now let

us have a look at the Profit and Loss account of Ramshila Enterprises P. Ltd., a copy of which has been placed at page 26 of the assessee's paper book, for having an idea of the extent of its income with a view to ascertain justification for premium of Rs.190 against the face value of Rs.10. It can be noticed that on the Income side, there is only one item of Income, namely, Interest received of Rs. 2,20,962. On the expenses side, there are Administrative expenses of Rs. 1,97,783 and Preliminary expenses written off to the tune of Rs.27,232 and net result is loss of Rs.4,053. The portrait of the assessee's state of affairs evident on the very face of it, emerging even on a casual look, in our considered opinion was sufficient enough to prompt the AO to investigate the matter further and not stop at merely collecting necessary details from the companies, most of which had the directors of the assessee company only.

17.b. The Hon'ble Supreme Court in *Sumati Dayal Vs. CIT (1995) 214 ITR 801 (SC)* considered a question whether the apparent can be considered as real. It was observed that apparent must be considered real

until it is shown that there are reasons to believe that the apparent is not the real and that *the taxing authorities are entitled to look into the surrounding circumstances to find out the reality and the matter has to be considered by applying the test of human probabilities.* It was further observed that an inference should be drawn on the basis of the circumstances available on the record. Considering the circumstances of the transaction in that case, the Hon'ble Supreme Court has held that an inference could reasonably be drawn that the winning tickets were purchased by the appellant after the event and the authorities were right in drawing an adverse inference against the assessee.

17.c. Adverting to the facts of the instant case, we find that the circumstances as discussed in earlier para indicated that the apparent did not *prima facie* appear to be real and further investigation was called for. It is highly improbable for any person having sound mind to purchase at arm's length the shares of a private limited company, hardly having any worth, with face value of Rs.10 at a premium of Rs.190. This mere fact should have been cornerstone for the AO to embark upon further enquiry

to unearth the truth. The genuineness of transactions of issue of share at such hefty premium in this background of the matter was under dark cloud and it skipped the attention of the AO. The contention of the assessee that the capacity of the share subscribers was proved as they subscribed to shares through banking channels after offloading their investments in shares of other companies, needs to be weighed properly in the background of the transactions in the instant cases. In so far as the establishment of genuineness of payment made through banking channels is concerned, we need not go anywhere else except looking at the judgment of the Hon'ble jurisdictional High Court in *CIT Vs. Precision Finance P. Ltd. (1994) 208 ITR 465 (Cal)*, in which it has been held that : `Mere payment by account payee cheque is not sacrosanct nor can it make a non-genuine transaction genuine'. In our considered opinion, the AO miserably failed to examine all such relevant aspects, which must have been gone into during the course of assessment proceedings.

17.d. Position is more or less same in all the cases under consideration and other cases, which we are simultaneously disposing by separate orders. It is significant to note that almost in all such cases, the same set of shareholder companies of one company find their names in the list of investee companies, whose shares have been purchased by such companies. It is manifest from a chart filed by the ld. AR in the case of Aradhana Plaza Private Limited showing the list of share subscribers who have been subjected to proceedings u/s 263. It has been demonstrated that three of the shareholders of this company, namely, RBM Finance Pvt. Ltd., D. D. Deposits And Advances Pvt. Ltd. And Sudhakar Commodeal (P) Ltd. have also been subjected to revision u/s 263 on the same score. It has further been shown that six companies (Guru Amardas Hire Purchase Pvt. Ltd., JNJ Finance Co. P. Ltd., Oliver Vanijya P. Ltd., Paltani Investemnt & Finance Co. Ltd., RMB Finance Co. Ltd. and SSA Hire Purchase P. Ltd.) whose shares have been purchased by Aradhana Plaza Private Limited have also been subjected to revisions u/s 263 in similar circumstances.

17.e. Similar is the position in case of Kasturi Home Pvt. Ltd., for which the ld. AR has filed a separate chart showing the list of share subscribers who have been subjected to proceedings u/s 263. It has been shown that three of the shareholders of this company, namely, Rajlakhmi Vanijya Pvt. Ltd., Guru Amardas Hire Purchase Pvt. Ltd. and Paltani Investment & Finance Co. Pvt. Ltd. have also been subjected to revision u/s 263 on the same score. It has further been shown that seven companies (D. D. Deposits And Advances Pvt. Ltd., RBM Finance Pvt. Ltd., JNJ Finance Co. P. Ltd., Mandyati Dealcomm Pvt. Ltd., Nirupama Commerce Pvt. Ltd Shaker Credits Pvt. Ltd. and SSA Hire Purchase P. Ltd.) whose shares have been purchased by Kasturi Home Pvt. Ltd., have also been subjected to revisions u/s 263 in similar circumstances.

17.f. Same position prevails in the case of Marigold Nirman Pvt. Ltd., for which the ld. AR has filed a distinct chart showing the list of share subscribers who have been subjected to proceedings u/s 263. It has been demonstrated that five of the shareholders of this company, namely, RBM Finance Pvt. Ltd., D. D. Deposits And Advances Pvt. Ltd.,

Monalisa Goods Pvt. Ltd., Improve Investment Management Pvt. Ltd and Shankar Credits Pvt. Ltd. have also been subjected to revision u/s 263 on the same score. It has further been shown that six companies (Guru Amardas Hire Purchase Pvt. Ltd., JNJ Finance Co. P. Ltd., Paltani Investemnt & Finance Co. Ltd., RMB Finance Co. Ltd., Adonis Nirman Pvt. Ltd. and Sudarshan Goods Pvt. Ltd.) whose shares have been purchased by Marigold Nirman Private Limited have also been subjected to revisions u/s 263 in similar circumstances. A close scrutiny of the names of the shareholders and investee companies in respect of the above discussed three companies, whose details have been filed by the ld. AR, divulges that the names of companies are rotating from being a shareholder in one company to Investee company in other. To cite example, RBM Finance Pvt. Ltd., which is shareholder in Aradhana Plaza Pvt. Ltd. is investee company in Kasturi Home Pvt. Ltd and Marigold Nirman Pvt. Ltd. Similarly, Paltani Investment & Finance Co. Pvt. Ltd. who is shareholder in Kasturi Home Pvt. Ltd is investee company in Marigold Nirman Pvt. Ltd and Aradhana Plaza Pvt. Ltd.

This shows that the shareholder companies of one company become investee companies of other companies and in turn, such later company, whose shares are purchased, further invest in the shares of other companies, so on and so forth. This is a striking example of circulation of capital from one company to another and the rotation is continuing in all the companies under consideration. This conclusion finds further corroboration from the arguments advanced by some of the ld. ARs, while justifying issue of shares at premium, admitting that all the shares were issued to the related companies only and premium was charged to avoid payment of fees payable to the Registrar of companies on the higher figure of authorised capital at the time of incorporation. We fail to find it as a sheer coincidence that hundreds of companies brought into existence, having link with each other and none of them doing any worthwhile business activity, come together to issue shares at such a huge premium. At best, this argument could have been taken into consideration if these companies had issued shares to its related companies at premium and invested the proceeds in some other business

activity and not purchasing the shares of other related companies through such a circular route. This shows that the transactions of issuing shares at a premium to related companies and then purchasing the shares of other related companies at a huge market price and none of the companies has any worthwhile business activity, when considered on an overall basis, is nothing but a smokescreen.

17.g. The ld. AR unsuccessfully tried to justify the premium by submitting that the break-up value of the shares of the assessee companies is quite substantial, somewhere close to the premium. This break-up value has been computed by adding the share capital (say, face value of Rs. 10) and Reserve & surplus (say, premium of Rs.190) and then divided with the number of shares issued. This exercise leads us to nowhere. The reason is obvious that break-up value is being computed after taking into consideration the share premium received with this issue or an earlier issue on the same pattern. Such a break-up value at the close of the year after issue of shares at premium, is bound to remain close to the issue price of shares with premium. What is required to be

shown is the break-up value of shares *de hors* the issue of any shares at premium. Since none of these companies has any other business activity except circulation of money from one company to another and by subscribing to or purchasing shares of other companies at premium/market price, there can be no justification of such a huge premium. We see no force in this contention of the ld. AR.

17.h. When we see the entire conspectus of the facts of the companies before us, there remains no doubt whatsoever that in the given circumstances, the AO conducted half-baked enquiry ignoring vital aspects which were required to be examined. If a company recently incorporated without carrying out any worthwhile business activity issues shares with face value of Rs.10/- at a premium of Rs.190/-, the immediate concern of the AO ought to have been to find out as to whether the receipt of such a premium was justified and whether the parameters of section 68 stood complied with. In the instant case, the AO merely issued notices u/s 133(6) to some of the shareholders whose replies, indicating that they overtly purchased the shares at Rs.200/-

each, were kept on record. Putting a lid at the matter at that stage only, the AO did not consider it prudent to examine such shareholders as to their capacity and genuineness of the transactions. Confronted with such peculiar and hair-raising circumstances, the AO should have got alerted and dug the matter deep for unearthing the reality of the transaction. Unfortunately, nothing of this sort was done by him. It is a perfect citation for a complete non-application of mind by the AO and of passing the assessment order in undue haste.

17.i. We agree with the contention of the ld. AR that the mere fact of completing an assessment within a short period of say one or two months, *per se,* cannot lead to an irreversible conclusion that the assessment was done in undue haste. But where the primary facts themselves point out objectively towards the need to carry out further investigation, as is there in all the cases under consideration, which the AO fails to carry out, it will be called as a case of passing assessment orders in undue haste without application of mind. 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.

ii. Whether CIT can set aside the assessment order and direct the AO to conduct a thorough enquiry, thereby interfering with the jurisdiction of the AO conferred on him in terms of section 142(1) and 143(2) of the Act?

18.a. The ld. AR submitted that the ld. CIT was wholly unjustified in directing the AO to examine share capital in the way he considered it expedient. It was argued that when the AO issued notices to some of the subscribers to the share capital and satisfied himself about the genuineness of the transactions, then, it was not possible for the ld. CIT

to step into the shoes of the AO and direct him to conduct an inquiry in the way he considered it correct. Relying on sections 142(1) and 143(2), the ld. AR submitted that it is the AO who has to conduct an inquiry in the way he feels like. It was further stated that it cannot be expected of the AO to examine each and every detail concerning the return of income. When the legislature has empowered the AO to conduct the inquiry on the points which the AO may require, the ld. AR argued, that the ld. CIT cannot be allowed to interfere by imposing his opinion upon the AO.

18.b. Section 142(1) unequivocally provides that for the purposes of making an assessment under this Act, the AO may serve a notice on any person who has made a return requiring him to produce or cause to be produced such accounts and documents as he may require or: "to furnish in writing and verified in the prescribed manner information in such format and *on such points or matters* (including a statement of all assets and liabilities of the assessee whether included in the accounts or not) as the AO may require." Language of section 143(2) also gives discretion

to the AO to serve on the assessee a notice specifying particulars of claim of loss, exemption, deduction, allowance or relief and require him, `where he has reason to believe that any claim of loss, exemption, deduction, allowance or relief made in the return is inadmissible'. A careful perusal of these provisions unveils that it is the prerogative of the AO to require the information "on such points or matters" as he may require. We are highlighting the expression "on such points or matters" used in section 142(1) to bring out that it is the privilege of the AO, which should prevail in requiring the assessee to furnish information only on such points or matters as he may require. We agree with the ld. AR that ordinarily it is not possible for the AO to inquire into each and every entry recorded in the books of account of the assessee. He has to exercise his acumen in extracting out the relevant points or matters on which he wants to concentrate. But, what is important in this regard is that the operation of sections 142(1)/143(2) of the Act comes to an end when an assessment is completed after examining such point or matters which the AO feels to inquire before finalizing the assessment. It is only

thereafter that the revisional powers of the CIT u/s 263 can come into play for ascertaining if the AO examined all the relevant points, which ought to have been examined. If the CIT, on examination of records of assessment, comes to the conclusion that the AO failed to enquire into certain other relevant aspects which, in fact, necessitated thorough investigation, then he has all the power to revise the assessment order. To argue that once the AO, as per his wisdom, has inquired into certain aspects of assessment which he considered relevant and, thereafter, CIT cannot intervene, is wholly untenable. If this argument is taken to its logical conclusion, then it would mean obliterating the provisions of section 263 from the statute. We are extantly not concerned with a situation in which the CIT is directing the AO to make assessment in a particular way, when the assessment proceedings are underway. Rather, the assessment already stands finalized and now the CIT is examining whether the AO properly examined the facts of the case. In such circumstances, it is impermissible to have a recourse to the provisions of section 142(1) and 143(2) for demolishing the order u/s 263 of the Act.

We, therefore, refuse to uphold this contention as a reason for setting aside the order passed u/s 263 of the Act.

iii) Whether inadequate inquiry conducted by the AO empowers the CIT to revise the assessment order?

19.a. Now we take up the argument of the ld. AR that since the AO conducted enquiry, which might not have been adequate in the opinion of the ld. CIT, there can be no revision because the power u/s 263 can be invoked only in cases of lack of inquiry and not conducting inadequate inquiry. We partly agree with the contention that where an enquiry is conducted by the AO and he gets satisfied with the genuineness of the transaction, then the CIT cannot intervene through revision for coming to a conclusion that the assessment order passed by the AO was erroneous and prejudicial to the interests of the Revenue. The crux of the matter is that the AO should conduct enquiry to satisfy himself about the genuineness of transactions. Scope of the term `enquiry' can be diverse in different circumstances. There cannot be straitjacket formula to positively conclude as to conducting or non-conducting of `enquiry'

by the AO. While, in some cases, collection of necessary material by the AO may lead to an inference about conducting `enquiry', in others, mere obtaining and placing the documents on record may not be equalized with conducting an enquiry. It depends on the facts and circumstances of each case. Where the facts are just ordinary and *prima facie* there is nothing untoward the recorded transaction, in such circumstances, the obtaining of the documents and the application of mind thereon, without a further outside enquiry, may mean that the AO did conduct enquiry, leaving the question open as to whether it was a proper or an improper enquiry. But, where the factual scenario of a case *prima facie* indicates abnormalities and cry for looking deep into it, then a mere collection of documents cannot be held as conducting enquiry, leave aside, adequate or inadequate. In such later cases, only when the AO, after collection of the initial documents, embarks upon further investigation, that we can say that he initiated enquiry. Where the facts of a particular transaction cry hoarse about its non-genuineness and even a casual look at such facts, *prima facie*, divulges foul play, then the

alarm bell must ring in the mind of the AO for making further examination. Collection of papers on record in such circumstances cannot be construed as conducting a proper enquiry. If in such circumstances, the AO simply gathers documents and keeps them on record, then such nominal enquiry falls within the overall category of `no enquiry' because of the inaction on the part of the AO to read a writing on the wall. The facts and circumstances and arguments by the rival parties in other cases in this batch of appeals are similar.

19.b. At this juncture, we would like to deal with the judgment of the Hon'ble jurisdictional High Court in the case of *Maithan International (supra).* The assessee in that case obtained loans aggregating to Rs.1.60 crore from six private limited companies ranging between Rs.7 lac to Rs.1.10 crore. These companies had filed their returns with nominal income. The AO mentioned in the assessment order that Inspector was deputed to verify fresh loans received during the year. The Inspector verified such loans and gave a positive report. Keeping such report on record, the AO accepted the genuineness of the transactions. The CIT

invoked section 263 by observing that the report given by the Inspector was very elementary and simply mentioned that he had verified bank passbooks, Profit & loss account and Balance sheets of these companies. In none of the reports, he had commented on the issue of credit worthiness of the parties. The CIT opined that the AO was required to make proper investigation to determine whether the loans were really made by the third parties or they had come out of the sources of the assessee himself. The Tribunal set aside the order u/s 263 of the Act by observing that the AO did conduct enquiry and: "*if there is an enquiry, even inadequate, that would not by itself give occasion to the ld. CIT to pass order u/s 263 of the Act.*" Setting aside the order passed by the Tribunal, the Hon'ble jurisdictional High Court has laid down that : "CIT had reasons to hold that credit worthiness of the alleged lenders was not enquired into." It further went on to hold that a mere examination of the bank passbook, Profit & loss account and Balance sheet is not enough. When the requisite enquiry was not made, the Hon'ble High Court held that, the order was to be considered as

erroneous and prejudicial to the interests of the Revenue. It also set aside the view of the Tribunal on inadequate enquiry by holding that: "*If the relevant enquiry was not made, it may in appropriate cases amount to no enquiry and may also be a case of non-application of mind.*" It further observed that the question of inadequate enquiry should be understood in its proper perspective and: "if it can be shown that the inadequate enquiry led the AO or may have led into assumption of incorrect facts, that could make the order erroneous and prejudicial to the interests of the revenue." Setting a bad trend has also been held to be prejudicial to the Revenue.

19.c. When we comparatively consider the facts of the instant case *vis-a-vis* those of *Maithan International (supra),* it can be seen that the facts under consideration are on a much weaker footing. In the present case, the AO obtained confirmations and copies of bank statements, etc., from some of the shareholders and got himself satisfied, whereas in the case of *Maithen International*, an Inspector was also deputed to conduct a

further enquiry in addition to the collection of documents etc. as has been done in the instant cases.

19.d. Decision of the Hon'ble Full Bench of the Guwahat High Court in the case of *Jawahar Bhattacharjee reported in (2012) 341 ITR 434 (Gau.) (FB)* is also an authority for the proposition that : "*not holding such enquiry as is normal and not applying mind to the relevant material in making an assessment would certainly be erroneous assessment warranting exercise of revisional jurisdiction*".

19.e. Testing the facts of the present case on the touchstone of the *ratio decidendi* of the Hon'ble jurisdictional High Court in *Maithan International (supra)*, we have no hesitation in holding that the present case is a glaring example of not making relevant enquiry, which amounts to `no enquiry' and hence it becomes a case of non-application of mind by the AO. This argument, therefore, fails.

iv) Whether the order of the CIT is based on irrelevant consideration and further was he supposed to point out

specifically where the AO went wrong in not properly examining the issue of share capital?

20.a. The next plank of the marathon submissions of the ld AR was that the ld. CIT passed order based on irrelevant material, surmises and conjectures and was hence unsustainable in law. He submitted that it was the order of the ld. CIT which was perverse and not that of the AO. Relying on the judgment of the Hon'ble Supreme Court in the case of *Lal Chand Bhagat Ambika Ram vs. CIT (1959) 37 ITR 288 (SC)*, the ld. AR argued that the ld. CIT acted without any evidence for coming to conclusion that the shareholders were not genuine.

20.b. We are unable to accept the contention of the ld. AR. It can be seen from the facts recorded in the impugned orders that it has been properly brought out that the assessee company along with hundreds of such other companies were paper companies floated by certain operators with the aim of helping in converting unaccounted money into accounted money. We have also noted above that there several hundred appeals pending before the Tribunal in all of which the same *modus*

operandi has been adopted by issuing shares at huge premium with no substantial business activity and, thereafter, investing the receipt of such share capital with premium in other paper companies again at huge premium and such latter companies being also not undertaking any worthwhile business activity. The further fact that shareholders of one company are investee in other companies so on and so forth also casts great doubt over the genuineness of the transactions. One case cannot be seen in isolation in view of the totality of facts and circumstances as is prevailing in such cases. It is wholly incorrect to say that the action of the ld. CIT, when the web of fictitious companies involved in such dubious practice was unearthed, was based on surmises and conjectures. The judgment in the case of *Lal Chand Bhagat Ambika Ram (supra)* is based on the facts in which there was no evidence of that assessee involved into smuggling. On the contrary, we are confronted with a situation in which the case records of the assessee divulge that it issued shares at huge underserving premium coupled with the fact that it also made investments in the shares of other companies at much higher

prices, without any justification and further the shareholder companies of the assessee company are directly or through its directors, simultaneously investee companies in other such companies, all of which have no meaningful business activity. It is the same pattern which has been adopted by all these companies, of which the assessee is a part. It would be utterly erroneous to hold that in the facts and circumstances of the assessee company, there was no material before the ld. CIT to invoke jurisdiction u/s 263.

20.c. The argument of the ld. AR that any company is entitled to issue shares at any premium which it likes and that the Companies Act does not prohibit issuing shares at premium, does not in our considered opinion, bring any change in our conclusion in background of the factual position as is prevailing before us. We agree that any company can issue shares at any amount of premium. It is only when the shares are genuinely issued at a certain amount of premium that there cannot be any inquiry. If, however, the striking reality of a situation is visible even to closed eyes, that the shares were not genuinely issued at the given

premium, then there can be no fetters on the powers of the authorities to examine the genuineness of the persons subscribing to share capital. A line of distinction should be drawn between the cases where shares are genuinely issued at premium on one hand and the cases where the shares are not genuinely issued at premium or there is some foul play in the issue of shares at premium on the other. In such latter situations, the authorities cannot be debarred from thoroughly examining the aspect of share premium from all the possible angles. If, on such examination, it is found that the transaction of issue of shares at premium was not genuine, then the law will have to take its own course.

20.d. Another contention was put forth by the ld. AR that if the view point of the Department was presumed to be correct for a moment that it was a case of circular transactions, meaning thereby, that one amount of money has passed through several companies, then the addition, if any, can be made only the hands of first company and not the others, through whom the money came into rotation. It was argued that the ld. CIT was

not justified in this backdrop of facts in directing the AOs of all the companies to investigate the genuineness of credit in all the companies.

20.e. This argument, though looks attractive at the first flush, but does not stand scrutiny in depth. In all these cases under consideration, the issue is about the genuineness of share capital credited in the books of accounts of such companies. Section 68 unequivocally provides that : `Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year.' The crux of the matter is that if any money is credited in the books of accounts of a company in the form of share capital and the assessee fails to satisfy the AO, then the sum so credited has to be charged to tax u/s 68 of the Act. The very fact of such share capital having been credited in the books of account of several

companies, is enough to consider all such cases within the purview of section 68.

20.f. It was then argued by the ld. AR, by relying on certain decisions, that before branding the assessment order as erroneous and prejudicial to the interests of the Revenue, it was incumbent upon the CIT to expressly show some mistake in the assessment order making it erroneous and prejudicial to the interest of the revenue. A mere mention in the order of the CIT that proper enquiry was not conducted, in the opinion of the ld. AR, was an incorrect appreciation of the provisions of section 263. So long as there is an evidence on the record of the AO about the conducting of a proper enquiry, the ld. AR argued, that the ld. CIT cannot invoke the provisions of section 263. The sum and substance of the submission was that before assuming jurisdiction u/s 263, the ld. CIT was supposed to point out where the AO went wrong. Since the impugned order of the ld. CIT was silent on this aspect, the ld. AR argued that the same be set aside.

20.g. We agree with the proposition advanced by the ld. AR, but in our considered opinion, the same is not applicable to the facts of the instant case. Such a proposition applies where the AO has made proper enquiry and still comes to a wrong conclusion, which renders the assessment order erroneous and prejudicial to the interest of the revenue. In such circumstances, it becomes the duty of the CIT to expressly point out where the AO went wrong on merits. But in a case, where no enquiry has been conducted at all or the so-called enquiry conducted by the AO is as good as no enquiry, as is the case under consideration, in such circumstances, the CIT simply needs to point out those relevant aspects of assessment, which the AO lost sight of, but were required to be properly probed. This difference, may in certain circumstances, be appreciated with the help of conclusion drawn by the CIT. When he expressly shows a particular aspect of an assessment as going wrong on merits, the order u/s 263 cancels the assessment order on that aspect. But where, the AO fails to conduct enquiry, the obligation of the CIT ends with showing that such and such issues required proper investigation at

the end of the AO, which he failed to do. In such cases, the assessment order is set aside with the direction to the AO for looking into the matter afresh and then deciding the issue properly. There can be no way for the CIT to tell erroneous approach of the AO on merits in such circumstances because the view of the AO on merits is not available. Requiring the CIT to indicate where the AO went wrong on merits in the cases of no enquiry cases, is like requiring an impossible thing to be done. It is axiomatic that the law does not require an impossible to be complied with. We are reminded of the legal maxim, `*Lex neminem cogit ad vana seu impossiblia*', which means that the law compels no one to do impossible things. When we approach the facts of the cases under consideration, it is obvious that the extent of enquiry conducted by the AO, being as good as no enquiry, is sufficient in itself to empower the CIT for invoking his jurisdiction u/s 263. Under such circumstances, we cannot cast an impossible burden on the CIT to show the positive leakage of income in concrete terms, when he has simply set aside the assessment order and restored this aspect of the assessment to the file of

AO for making a proper enquiry and then deciding. This argument of the ld. AR, being devoid of any merits, is rejected.

v) If the AO has taken a possible view, can still the revision be ordered?

21.a. The ld. AR argued that section 263 cannot be arbitrarily invoked where the AO has taken one of the possible views. He bolstered this contention with certain authorities that point out that if the AO adopts one possible view, with which the CIT is not agreeable, that cannot be considered as a case warranting the invocation of section 263. The ld. AR invited our attention towards certain other judgments of the Hon'ble jurisdictional High Court including the case of *CIT vs. Roseberry Mercantile (P) Ltd*., copies of which have been placed on record, in which it has been held that the judgment in the case of *Lovely Exports (supra)* is applicable and the question of share capital cannot be examined in the hands of the assessee. It was submitted that even though there are some judgments holding the non-application of the judgment of the *Lovely Exports (supra)* to closely held companies, it

shows that the issue in question was debatable and, as such, incapable of being examined in the proceedings u/s 263. Relying on *CIT vs. J.L. Morrison (India) Ltd. (2014)366 ITR 0593 (Cal)*, the ld. AR stated that once the AO has taken a possible view, it cannot be said that view taken by him was erroneous making the assessment order amenable to revision.

21.b. Taking into consideration the amendment brought to section 68 by the Finance Act, 2012, we have held in the part (A) of this order that the AO is not only empowered but duty bound to make an addition u/s 68 of the Act on account of receipt of share capital with or without premium even in the period anterior to the A.Y. 2013-14, if the assessee company fails to prove identity and capacity of the shareholders in addition to the genuineness of the transaction.

21.c. It is further interesting to note that in *Maithan International (supra)* also, the appellant assessee relied on the judgment in the case of *J.L. Morrison (India) Ltd. (supra)* for contending that since the AO on examination of the material before him has taken a possible view, then

the CIT gets precluded to invoke section 263. Repelling this contention, the Hon'ble High Court has held in *Maithan International (supra)* that : `The judgment in the case of J. L. Morrison does not assist the assessee because in that case the question was whether the receipt was a revenue receipt or a capital receipt. The Assessing Officer treated the receipt as a capital receipt which the Division Bench found was a possible view. *Unlike in the present case, no factual enquiry was necessary in that case.'* When we examine the facts under consideration, it is obvious that we are dealing with a case in which no meaningful enquiry was conducted by the AO in finalizing the assessment u/s 143(3) read with section 147 and we have before us the order passed by the CIT u/s 263 directing the AO to make proper enquiry *qua* the issue of share capital on highly unreasonable premium. Once the proceedings are thrown open before the AO, the assessee will have full liberty to argue his case on merits. The assessment orders in the instant cases have become erroneous and prejudicial to the interest of the revenue on the very threshold of not making a proper examination of the issue of share

capital at huge premium by the AO. This factor alone renders the assessment order open to revision u/s 263.

21.d. We are reminded of the judgment of the Hon'ble Supreme Court in *Malabar Industrial Company Ltd. Vs. CIT (2000) 243 ITR 83 (SC),* in which it has been held that non-application of mind by the AO makes the order erroneous and prejudicial to the interests of the Revenue. An order is said to be erroneous when it does not conform to the law or proceeds on incorrect assumption of facts. An order is said to be prejudicial to the interests of the revenue not only where the due tax has not come to the coffers of the exchequer, but, also where bad precedent is set by the AO. In other words, the expression 'prejudicial to the interests of the revenue' needs to be viewed in a broader sense and cannot be confined to its narrow meaning of non-realization of the due tax only. It further explained the ambit of the expression 'prejudicial to the interests of the revenue' by laying down that it: "is not an expression of art and is not defined in the Act. Understood in its ordinary meaning, it is of wide import and is not confined to loss of tax." The Hon'ble

jurisdictional High Court in *Maithan International (supra)* has also held that: "Setting a bad trend is also prejudicial to the revenue." The facts of the instant cases speak volumes of the bad trend set up by the AO in not conducting proper enquiries in hundreds of such cases, which in our considered opinion have been rightly set aside by the CITs u/s 263 of the Act.

21.e. The Hon'ble Delhi High Court in *Gee Vee Enterprises vs. Addl. CIT and Others (1975) 99 ITR 375 (Del)*, was confronted with the facts in which that assessee was incorporated with the object of acquiring loan and making construction. It purchased some bungalow after borrowing loans as its share capital was very limited. Some of the directors and shareholders of that assessee company entered into partnership. An agreement was entered into between two sister concerns. The partnership was to complete a multi-storied building on the plot after taking advances from the licensee to whom flats in the building were to be allotted. The partner was to keep 90% of its money and pay 10% of it to the company as consideration for this agreement. In view of the 10%

of the money so received, the company was to issue shares to licensees who were to take up the flats. The ITO made the assessments of the company and the firm on that basis apparently without ascertaining the truth of the facts. Thereafter, revision was done by the CIT and the matter went before the Hon'ble Delhi High Court. The assessee contended that the ITO had made the enquiries and was satisfied about the truth of the facts and hence revision was not maintainable. Repelling the contention advanced on behalf of the assessee, it was held that the: "CIT was justified in exercising his revisional jurisdiction *on the ground that the ITO had not made sufficient enquiries* before granting registration to the firm *and it was not necessary for the CIT to have himself made enquiries before cancelling assessment."* In our considered opinion, this judgment is an answer to the contention put forth on behalf of the assessee that the CIT must initially indicate the mistake in the assessment order on merits by making proper enquiry at his end before cancelling assessment under section 263. This judgment makes it palpable that the very fact that the ITO "had not made sufficient

enquiries before granting registration to the firm" was considered as sufficient enough to clothe the CIT with the power to revise the assessment order and it was not considered necessary in such circumstances: "for the CIT to have himself made enquiries before cancelling the assessment." It transpires that the fact that no enquiry was conducted by the AO or even though the enquiry was conducted, but, the relevant enquiry was omitted to be conducted, is sufficient to brand an assessment order erroneous and prejudicial to the interests of the revenue. Similar view has been taken by the Hon'ble Supreme Court in the case of *Rampyari Devi Saraogi vs. CIT (1968) 67 ITR 84 (SC)* in which it has been held that an assessment made by the AO "in undue haste without making any enquiry" would render an assessment order erroneous and prejudicial to the interests of the revenue. Similar view has been taken by the Hon'ble Apex Court in *Smt. Tara Devi Aggarwal vs. CIT (1973) 88 ITR 323 (SC).* We have held in an earlier para that the assessment orders under consideration were passed in undue haste in

terms of lack of proper enquiry, thereby making them eligible for revision by the CIT u/s 263 of the Act.

21.f. The Hon'ble Gujarat High Court in *Addl. CIT vs. Mukur Corporation (1978) 111 ITR 312 (Guj)*, has held that it is not necessary that CIT in his order u/s 263 should come to a firm conclusion that the order of the AO was erroneous in so far as it was prejudicial to the interest of the revenue. Where the AO allowed deduction without properly probing the matter, the Hon'ble High Court held that the initiation of proceedings u/s 263 was proper.

21.g. From an overview of the above discussed judgments, it is crystal clear that where the AO fails to conduct an enquiry or proper enquiry, which is called for in the given circumstances, the CIT is empowered to set aside the assessment order by treating it as erroneous and prejudicial to the interests of the revenue. In such circumstances, it is not further required on the part of the CIT to expressly show where the assessment order went wrong. The very fact that no enquiry was conducted or no

proper enquiry was conducted in the required circumstances, is sufficient in itself to invoke the provisions of section 263.

22. We, therefore, answer all the five aspects discussed above by holding that : i) the enquiry conducted by the AO in such cases can't be construed as a proper enquiry; ii) CIT u/s 263 can set aside the assessment order and direct the AO to conduct a thorough enquiry, notwithstanding the jurisdiction of the AO in making enquiries on the issues or matters as he considers fit in terms of section 142(1) and 143(2) of the Act, which is relevant only up to the completion of assessment ; iii) Inadequate inquiry conducted by the AO in the given circumstances is as good as no enquiry and as such the CIT was empowered to revise the assessment order ; iv) The order of the CIT is not based on irrelevant considerations and further in the present circumstances, he was not obliged to positively indicate the deficiencies in the assessment order on merits on the question of issue of share capital at a huge premium ; v) the AO in the given circumstances can't be said to have taken a possible view as the revision is sought to be done

on the premise that the AO did not make enquiry thereby rendering the assessment order erroneous and prejudicial to the interest of the revenue on that score itself.

23. a. Having dealt with all the five major points taken up by the ld. AR in support of contention for setting aside the orders passed u/s 263, now we turn to the respective precedents directly on the point, relied by both the sides on the sustainability or otherwise of order u/s 263. The ld. AR submitted that the Kolkata bench of the Tribunal in Lotus Capital Financial Services Ltd. Vs. ITO (ITA No.479/Kol/2011) has decided similar issue of revision in the assessee's favor. It was submitted that this Tribunal order has been affirmed by the Hon'ble jurisdictional High Court vide its judgment dated 16.7.2012, a copy of which was placed on record. He submitted that when the AO passed the order, these precedents in favour of the assessee enabled him to form a view that examination of share capital with premium was not contemplated u/s 68 and, hence, the ld. CIT entertaining a contrary view could not invoke the provisions of section 263. Per contra, the ld. DR also relied on certain

tribunal orders passed by the tribunal directly on the point upholding revision.

23.b. We have heard both the sides. It is no doubt true that the Tribunal in the case of *Lotus Capital Financial (supra)* has set aside the order passed by the CIT in which the latter revised the assessment order, *inter alia*, on the ground of improper examination by the AO of certain shares issued by the assessee company at premium. When we go to the judgment rendered by the Hon'ble Calcutta High Court in the case of Lotus Capital, it is manifested that the substantial question of law was not found to arising from the Tribunal order as the same was based on the facts recorded by the Tribunal. The Hon'ble High Court refused to interfere with the factual findings recorded by the tribunal, being the final fact finding authority. Not admitting the question as a substantial question of law arising from the Tribunal order, cannot be equated with the approving the view taken by the Tribunal. Since the Hon'ble High Court refused to re-appreciate the facts as recorded by the Tribunal and, thereafter, did not admit the question of law proposed by the Revenue,

the only conclusion which can be drawn is that at best, there is no decision of the Hon'ble High Court on various legal aspects of the matter as have been discussed above. *Au contraire*, we find that identical issue came up for consideration before the Kolkata Bench of the Tribunal in five cases. In all such cases, the facts were *mutatis mutandis* similar inasmuch as these companies before the tribunal had issued shares at huge premium and the AO had accepted the genuineness of the transactions in proceedings u/s 147. In all such cases, the CIT invoked his power u/s 263 thereby restoring the matter to the AO for a proper examination and the Tribunal has upheld the action of the CIT by dismissing the appeals filed by the assessees. Detailed orders have been passed by the Kolkata Bench in the case of M/s Bisakha Sales Pvt. Ltd. Vs. CIT (ITA No.1493/K/2013, dated10.9.2014), Brindavan Commodities Pvt. Ltd. VS. CIT (ITA No. 1607/Kol/2013, dt. 24.10.2014), Ridhi Sidhi Vincom (P) Ltd. Vs. CIT (ITA No.1410/K/2013, dated 10.10.2014), Star Griha Pvt. Ltd. Vs. CIT (ITA No.1244/K/2013, dated 14.8.2014) and Bee Tee Credit Marketing

Pvt. Ltd. Vs. CIT (ITA No.1598/K/2013, order dated 14.8.2014). In all the above five cases, the Tribunal has upheld the orders passed by the CIT u/s 263, dismissing the appeals of the assesses. It is further relevant to note that the order in the case of Bisakha Sales (supra) has been passed by the tribunal after duly considering the earlier order favourable to the assessee in Lotus Capital (supra). On further analysis, we find that the fact of such dummy companies floated on a large scale involving similar *modus operandi,* was not there before the Tribunal in the case of Lotus (supra), which order was passed in 2011. This case was decided in isolation without the overall background of a web of several hundred companies floated on the same pattern with ulterior motive. As against that, most of the above orders passed by the tribunal against the assessee have been passed in 2014 after considering the factual matrix in a great detail. Considering the totality of the facts and circumstances in the instant case, we are more inclined to follow the latter considered view taken by the Kolkata Bench of the tribunal against the assessee in five orders. Apart from that, the recent judgment of the Hon'ble

jurisdictional High Court in *Maithan International (supra)* has clearly approved the standpoint of the Revenue in upholding the order passed u/s 263 where the AO conducted inadequate enquiry which has been equated with no enquiry in the given circumstances. The *ratio* of this judgment applies with full force to the facts under consideration. Respectfully following the *ratio decidendi* of the judgment of the Hon'ble High Court in the cased of *Maithan International (supra)* and the aforequoted five Tribunal orders against the assessee, we are of the considered opinion that the ld. CIT was justified in revising the assessment order and remitting the matter to the file of AO for conducting proper enquiry in the light of the directions given by him.

24. We, therefore, sum up our conclusion that the ld. CIT was justified in setting aside all the assessment orders in question, on merits.

25. We have noticed above that apart from merits of the cases, some of the ld. ARs have taken up and argued other legal grounds challenging the jurisdiction, limitation, non-service or improper service of notice u/s 263 etc., which we will take up consideration hereinafter.

C. Issue of Non-service of show cause notice u/s. 263 :

26.a. In the case of Reward Tie-up Private Limited, the assessee has also challenged the order u/s. 263 of the Act as void in law for non-service of show cause notice before passing of the impugned order. The learned AR brought to our notice para 5 of the order u/s. 263 of the Act, wherein the ld. CIT has recorded the fact that notices u/s. 263 of the Act were issued to the assessee on 4.3.2013 and 6.3.2013 but were not served since no such company existed at the given address and hence was duly served by affixture at the last known address of the assessee on 12.3.2013. The ld. CIT has also recorded the fact that none appeared on behalf of the assessee nor any reply received on the date of hearing on 18.3.2013. The order u/s.263 of the Act, was therefore, as an *ex-parte* order.

26.b. The learned AR contended that as per the provisions of sec. 282(1)(b) of the Act read with order V Rule 17 of Code of Civil Procedure, 1908 (CPC), affixture as a mode of service of notice can be resorted to only where the person on whom notice is sought to be served

or his agent refuses to sign acknowledgement or where the serving officer, after using all due and reasonable diligence, cannot find the defendant (i.e., the assessee on whom notice is sought to be served). The learned AR thereafter brought to our notice that the order u/s. 263 of the Act as well as the consequential order dated 18.3.2014 passed by the AO were duly served on the assessee at the address as found in the records of the Revenue. As per his version, the assessee was available at all points of time at the address as found in the records of the Income-tax Department. The service of show cause notice u/s. 263 of the Act by affixture was therefore claimed to be not in accordance with the requirements of order V Rule 17 CPC as it was not true that service of notice in the usual manner could not have been effected even after due and reasonable diligence as the assessee could not be found.

26.c. For the proposition that before passing an order u/s.263 of the Act the assessee must be given a reasonable opportunity of being heard by issue and service of a show cause notice, the learned counsel for the assessee relied on certain decisions including *Smt. Kiron Devi Singhee*

vs. CIT & Ors. 58 ITR 0419 (Cal) and *CIT vs. Ramendra Nath Ghosh 82 ITR 0888 (SC).* In support of the proposition that if a notice u/s.263 of the Act is not properly served, the order passed u/s. 263 of the Act is liable to be held as invalid and void, the learned counsel for the assessee relied on certain decisions including *Tin Box Co. Vs. CIT 249 ITR 0216 (SC)*. Certain other decisions on the importance of opportunity of being heard before passing orders having civil consequences by statutory and other authorities, were also brought to our notice.

26.d. Per contra, the learned DR placed reliance on the order of the CIT on this issue and highlighted the fact that two notices were sent to the assessee at the known address but could not be served and only thereafter service by affixture was resorted to. Our attention was also drawn towards the conduct of the assessee in as much as in the assessment proceedings after the order u/s. 263 of the Act, he did not participate in the proceedings resulting in an order u/s. 144 of the Act. The assessee however received the order of assessment at the known address. According to him the non-service of notice u/s. 263 of the Act

at the known address is also part of the design of the assessee whereby it was trying to avoid the process of scrutiny of the receipt of share capital during the previous year. In this regard he pointed out that the reassessment proceedings were initiated only at the instance of the assessee by his filing letter before the AO for issue of intimation u/s.143(1). Thereafter, the assessment was reopened and the assessee promptly participated in such proceedings. When the assessment completed u/s. 147 of the Act was sought to be revised in proceedings u/s. 263 of the Act, it evaded the service of notice. The assessee however promptly filed appeal against the order u/s. 263 of the Act, giving the very same address at which notices were returned and hence could not be served by the Revenue. In the grounds of appeal, the assessee remains silent as to its correct address for service. It has not been stated by the assessee that it was not carrying on business at the address at which service of notice was effected by affixture. The learned DR pointed out that in several such cases it had come to light that shell companies had been formed for converting unaccounted money into

accounted money and the assessee being a part of such game plan, was trying to playing hide and seek with the Revenue according to its suitability. He argued that the sequence of events and the whole design adopted by the assessee should not be lost sight of while examining the claim of the assessee regarding improper service of notice u/s.263 of the Act. In the assessment proceedings after the order of CIT u/s. 263 also, the assessee did not participate in the proceedings. According to him the circumstances of the case clearly showed that the motive of the assessee was to evade service of notice and therefore service by affixture was the only proper mode of service in the facts and circumstances of the present case.

26.e. In the case of M/s. Tulsi Tradecom Pvt. Ltd., there is similar challenge to the service of notice u/s. 263 of the Act. The circumstances under which order u/s. 263 of the Act was passed by the CIT are identical to the case of Reward Tie-up Pvt. Ltd. (supra), which we have set out in the earlier paragraphs. There are some distinguishing features in this appeal, in so far as service of notice u/s.263 of the Act is

concerned. Shri N.K. Poddar, the learned AR pointed out that show-cause notice was not even served by affixture in this case. He drew our attention to a list of dates and events filed in this case. He drew our attention to the order dated 30.3.2013 passed u/s 263 of the Act in which the CIT has clearly observed that a show cause notice was sent by post for compliance on 22.3.2013 and the same was returned by the postal authorities on 25.3.2013. He brought to our notice that as early as 31.5.2012, the registered office of the assessee was shifted from 2, Raja Woodmunt Street, Kolkata-1 to the address shown in the order u/s 263 of the Act, namely, B-222, 2nd Floor, Okhla Industrial Area, Phase-I, New Delhi – 20. Our attention was also drawn to the fact that the change of registered office from West Bengal to New Delhi was duly intimated to the Department and approved by the Company Law Board. The AO while completing the proceedings u/s 147 read with section 143(3) of the Act was informed by a letter filed in the course of assessment proceedings intimating the change of address accompanied by the order of CLB and the requisite forms filed by the assessee with

the Registrar of Companies. These documents are placed at page nos. 33-36 of the assessee's paper book. According to the learned AR, the show cause notice in these circumstances ought to have been sent at the new address. He pointed out that the CIT issued show-cause notice dated 18.3.2013 and the same was addressed at the old address in Kolkata. Since the order u/s 263 of the Act contained the Delhi address of the assessee, the same was received by the assessee and, thereafter, the assessee obtained copy of the show-cause notice dated 18.3.2013 which is placed at page 11 and 12 of the assessee's paper book from the office of the CIT. According to him, mere return of the postal cover unserved cannot be treated as valid service. It was submitted by him that the CIT did not make even an attempt to effect the service by affixture. Our attention was drawn to the decision of the Hon'ble Bombay High Court in the case of *Balaji Marbles vs. Union of India (2015) 58 Taxmann.com 155 (Bom)*, wherein the Hon'ble Bombay High Court has expressed a view that when the assessee has informed his changed address to the department, service of notice has to be effected at

the changed address. It is only when service of notice at the changed address becomes impossible that notice can be served in a different manner. Our attention was also drawn to the decision of the Hon'ble Delhi High Court in the case of *CIT vs. Eshan Holdings (P) Ltd. (2012) 25 Taxmann.com 99 (Del)*, wherein the Hon'ble Delhi High Court held that service of notice issued u/s 148 at the old address of the assessee, though return of income filed before issue of such notice showed the new address, was not a valid service.

26.f. The facts of Ramshila Enterprises Pvt. Ltd. in which this issue is challenged are almost similar to those of Reward Tie-up Pvt. Ltd. Here also, the ld. AR claimed that the notice was sent at earlier address, whereas the new address was already available on the record of the Department and the change was duly acknowledged by the Department. The ld. AR submitted that report of the IT Inspector who effected service by affixture also indicated the affixture at the old address. It was pointed out that before effecting service of notice by affixture, the IT Inspector was obliged under law to exercise due diligence to find out if

notice could be personally served on the assessee. He pointed out that when the Inspector goes to a wrong address for service of notice, there is complete absence of due diligence on the part of the Inspector. For the proposition that service by affixture was not valid as the same was not in conformity with the provisions of Order-V, Rule 17 of the CPC. In support of this proposition, he relied on certain decisions including *ITO vs. Ashok Glass Works, 125 ITR 491*.

26.g. The ld. DR pointed out that Ramshila Enterprises Pvt. Ltd., has been frequently shifting its office to different places from time to time. In the letter addressed to the AO received by the AO on 6.4.2010, the assessee's address was shown as 14, Prince Street, 3rd Floor, Kolkata – 72. Notice u/s 148 of the Act was served at this address on the assessee in connection with the re-assessment proceedings for the AY 2008-09. He pointed out that this notice was received by the assessee at 4, Clive Road, 4th Floor, Room No.405, Kolkata. The assessee participated in the re-assessment proceedings. Thereafter, the assessee intimated the AO and the CIT by letters received by the AO/CIT on 7.5.2010 and

21.5.2010 respectively, to the effect that it was withdrawing the migration of PAN and, therefore, the assessee had not shifted to a new address. In the light of the above facts, the ld. DR submitted that the service by affixture was proper as the assessee itself wanted service of notice at the old address from 21.5.2010 and as early as 7.5.2010.

26.h. Without prejudice to the above submissions, the ld. DR also submitted that non-service or improper service of notice u/s 263 of the Act will not render the order u/s 263 of the Act a nullity. It could at best be an irregularity capable of curing. In this regard, a copy of decision of the Hon'ble Calcutta High Court dated 10.3.2015 in *Corus Steels Pvt. Ltd.* WP No.6103 of 2015 dated 10.3.2015 was filed before us. In the aforesaid decision, the Hon'ble Calcutta High Court took the view that non-service of show cause notice will not render the order u/s 263 a nullity. Relying on the decision of the Hon'ble Supreme Court in the case of *CIT Vs. Electro House 82 ITR 824(SC)*, it was contended that the law does not require notice u/s 263 to be served at all. In conclusion, it was submitted by him that when the assesse himself had given a

particular address for service of notice and when the notice was served at that address though by affixture, it could not be said that the assessee was not given proper opportunity of being heard.

26.i. As regards the case of Tulsi Tradcom Pvt. Ltd., the ld. DR stated that change of address was not intimated in a manner known to law and therefore the notice was sent at the old address. It was also submitted that in the light of background facts of the case as explained by the CIT in the impugned order u/s.263 of the Act, the change of address was also part of the design whereby the assessees were trying to mislead the Department. In the circumstances, it was prayed that the service of notice be held to be proper.

26.j. The learned AR in his rejoinder submitted that opportunity of being heard is always contemplated in the provisions where the result is likely to affect the rights of an assessee. Such opportunity of hearing may be specifically enshrined in the provision or in its absence, it has to be inferred. He pointed out that the Hon'ble Supreme Court in the case of *Maneka Gandhi Vs. Union of India 1981 (1) SCC 644 (SC) at page*

709 para 94, relied on the decision of the House of Lords in the case of *Ridge Vs. Baldwin* and held that even where opportunity of being heard is not statutorily required to be given and where the principles of natural justice are violated, then the order passed without affording such opportunity of being heard is to be regarded as void and it is not an irregularity which can be cured by calling upon the authority to afford opportunity of being heard.

26.k. We have given a very careful consideration to the rival submissions in the light of the precedents relied upon. Firstly we will deal with the case of Reward Tie-up Pvt. Ltd. The requirements of order V Rule 17 of CPC is that the process server after using all due and reasonable diligence cannot find the defendant who is absent from his residence at the time when service is sought to be effected on him at the known address and there is no likelihood of his being found at the residence within a reasonable time and there is no agent empowered to accept service of the summons on his behalf nor any other person on whom service can be made. It is only thereafter that the process server

is empowered to effect service by affixture. In the present case two notices were sent to the assessee at the known address. Both the notices could not be served and were returned unserved. It is only thereafter that service of notice was effected by affixture. The learned counsel for the assessee harped on the aspect of absence of due and reasonable diligence to find the assessee before effecting service by affixture. The assessee is a company and its known address is 113, N.S.Road, Kolkatta-700 001. The notices when sent at this address were returned twice as there was none to receive the notices, it has to be reasonably presumed that the requirements of Order V rule 17 CPC did exist to effect proper service of notice. A company is an artificial juridical person. Therefore the requirements of finding availability of the assessee within a reasonable time at the known address cannot be strictly complied with. The fact that the order u/s. 263 of the Act was served at the known address is also not denied. The affixture of notice at the last known address is also not denied by the assessee. The emphasis is only on the absence of due diligence by the process server to find out the

whereabouts of the assessee. This is a fact which the assessee alleges based on surmises. In this regard it is also seen that the reassessment proceedings were initiated only at the instance of the assessee by filing letter before the AO for issue of intimation u/s. 143(1) of the Act. Thereafter, the assessment was reopened and the assessee promptly participated in such proceedings. When the assessment completed u/s. 147 of the Act was sought to be revised in proceedings u/s.263 of the Act, the assessee evaded the service of notice. The assessee, however, promptly filed appeal against the order u/s.263 of the Act, giving the very same address at which notices were returned unserved. There is no allegation that the address at which notice was served by affixture is no longer the address of the assessee for service of notice. As rightly pointed out by the learned DR, the sequence of events prevailing in such companies involved in assisting the conversion of unaccounted moneys into accounted monies, cannot be lost sight of. The circumstances of the case clearly show that the motive of the assessee was to evade service of notice and therefore service by affixture, in our considered opinion,

cannot be held as anything other than a proper service. As such, we are satisfied that the service of notice u/s. 263 of the Act in the given facts and circumstances of the case was proper. The subsequent conduct of the assessee in not participating in assessment proceedings after the order u/s. 263 of the Act, cannot also not be lost sight of. Since on facts we have come to the conclusion that there has been valid service of notice u/s. 263 of the Act, we are of the view that the decisions relied upon by the learned AR do not require consideration. The objection by the assessee in this regard is held to be without any basis.

26.l. As far as the case of Tulsi Tradecom Pvt. Ltd. is concerned, the address given in the return of income was the basis on which notices were sent at the Kolkata Address. There is nothing on record to indicate that the change of address was taken cognizance by the AO. In the circumstances notices were sent at the Kolkata address. The assessee cannot, therefore, have any grievance as will be discussed in the subsequent paragraphs.

26.m. As far as service of notice in the case of Ramshila Enterprises Pvt. Ltd. is concerned, we find that the assessee has been shifting its address from time to time, as has been pointed out by the learned DR. When such frequent change in the address is seen in the background of the factual position as discussed in the earlier part of the order, we cannot resist the conclusion that the service at the last known address by affixture was proper.

26.n. Apart from discussing the proper service of notice on merits of the above cases, we may also add as a legal proposition that there is no requirement of service of notice u/s. 263 of the Act in terms of section 282 of the Act and CPC as has been argued before us. Sub-section (1) of section 263 provides that : `The 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 requirement in this provision is to pass the order `*after giving the assessee an opportunity of being heard.'* It is unlike the language of certain provisions of the Act, including section 148 which expressly contain the requirement of issue of notice, as is evident from sub-section (1) of section 148 which provides that : ` Before making the assessment, reassessment or recomputation under section 147, the Assessing *Officer shall serve on the assessee a notice* requiring him to furnish within such period, as may be specified in the notice, a return of his income .....'. Thus it is evident that whereas section 148 specifically requires serving a notice on the assessee, section 263 simply talks of giving an opportunity of being heard. Section 282 of the Act discusses the *service of notice* generally and not giving opportunity of hearing. Such opportunity of hearing can be given either by means of service of notice in terms of section 282 or otherwise. Clause (b) of sub-section (1) containing the requirement of service `in such manner as provided under

the Code of Civil Procedure, 1908 (5 of 1908) for the purposes of service of summons' can apply only when there is requirement of service of notice in the relevant provision, which would require compliance in terms of section 282. But where a particular provision does not contemplate service of notice and only refers to giving opportunity of hearing, then the strict provisions of section 282 cannot apply. So long as the assessee stands informed of the proceedings against him, there can be no irregularity in this regard. Thus it is clear that unlike provisions of sec. 148 of the Act, sec. 263 of the Act does not require any notice to be strictly issued by the Commissioner in conformity with section 282 of the Act. Once the law does not specifically oblige him to give notice except giving the opportunity of hearing to the assessee, the strict conditions of service of notice as mandated u/s 282 of the Act cannot be imported. All that he is required to do is to give the assessee an opportunity of being heard and make or cause to make such inquiry as he deems necessary. This requirement has nothing to do with the jurisdiction of the Commissioner. It simply

pertains to the region of natural justice. Breach of the principles of natural justice may prejudice the legality of the order made but cannot affect the jurisdiction of the Commissioner. So long as the order passed by the AO is erroneous and prejudicial to the interest of the revenue, the jurisdiction vests with the CIT to revise such an order, of course, subject to the limitation enshrined in the provision. The above is the view of the Hon'ble Supreme Court expressed in the case of *CIT Vs. Electro House 82 ITR 824 (SC).*The decisions relied by the learned ARs taking a contrary view, in our considered opinion, have to be read subject to the decision of the Hon'ble Supreme Court. Therefore, the stringent conditions of service of notice as required u/s. 148 of the Act and in the manner contemplated by sec. 282 of the Act, cannot be read into the provisions of sec. 263 of the Act.

26.o. Sec. 282(1) of the Act as it existed after the substitution by the Finance (No.2) Act, 2009 w.e.f. 1-10-2009 provides that

> "The service of a notice or summon or requisition or order or any other communication under this Act" may be made by delivering or transmitting a copy thereof, to the persons therein named

(a)By post or by such courier services as may be approved by the Board; or
(b) In such manner as provided under the Code of Civil Procedure, 1908 (5 of 1908) for the purposes of service of summons; or
(c)In the form of any electronic record as provided in Chapter IV of the Information Technology Act, 200 (21 of 2000) or
(d) By any other means of transmission of documents as provided by rules made by the Board in this behalf."

26.p. Prior to the amendment, section 282(1) provided as follows:

"A notice or requisition under this Act may be served on the persons therein named either by post or as if it were a summons issued by a Curt under the Code of Civil Procedure, 1908 (5 of 1908)."

26.q. A reading of the provisions of sec. 282(1) prior to and after its amendment w.e.f. 1-10-2009 clearly shows that it is only in respect of a notice that is mandatorily required to be served under the Act that the requirement of serving it strictly in the manner required by the aforesaid provisions is contemplated. The expression "or any other communication under this Act" as appearing in sec. 282(1) of the Act after the amendment w.e.f. 1-10-2009 would cover only cases mentioned in clause (c) and (d) of the amended provisions of sec. 282(1) of the Act.

In other words the requirements of service as required under the code of civil procedure, 1908 is not strictly applicable to a notice u/s. 263 of the Act, though of course, the assessee must be put to notice in a reasonable manner about the proceedings against him.

26.r. In the light of the above discussion, the conclusion which necessarily follows is that the requirement of service of notice u/s. 263 of the Act stands on a different footing and cannot be compared to cases where notice is required by law to be mandatorily served on assessee in terms of section 282 of the Act. Accordingly, the cases cited by the learned AR pertaining to service of notice in different contexts, where the Act mandates service of notice in accordance with section 282, lose their significance.

26.s. Coming back to the language of section 263(1) requiring the passing of order `*after giving the assessee an opportunity of being heard',* it transpires that it refers to giving opportunity of hearing. If despite genuinely giving opportunity of hearing by the CIT, the assessee tries to hoodwink by evading the service of notice as has been done in

the cases before us, then the requirement of giving `*opportunity of hearing'* gets fully satisfied with. As such, we do not find any lack of opportunity of hearing by the ld. CIT in all such cases. This argument fails.

D. Whether order u/s 263 is barred by limitation?

27.a. The learned AR of Linsey Vinimay Pvt. Ltd. submitted that the assessee filed its return of income for the AY 2008-09 on 21.12.2008 and an intimation u/s.143(1) of the Act was issued on 3.8.2009. He then brought our notice the fact that in the reasons recorded for initiating proceedings u/s. 147 of the Act, a copy of which is placed at page 14 of the assessee's paper book, the issue of examination of share capital was not there, which in his opinion was restricted only to share issue expenses being capital or revenue. It was, therefore, pleaded that the period of limitation should be reckoned from the date of intimation u/s. 143(1) of the Act viz., 3.8.2009, in which case the limitation for passing order u/s. 263 of the Act got expired on 31.3.2012. Since the order was passed by the ld. CIT on 30.3.2013, the ld. AR explained that such order

was barred by limitation. To buttress this contention, the learned AR drew our attention to the decision of the Hon'ble Supreme Court in the case of *CIT Vs. Alagendra Finance Ltd. 293 ITR 1 (SC).* He also relied on the decision of the Hon'ble Bombay High Court in the case of *Lark Chemicals 368 ITR 655 (Bom)* wherein similar view has been taken.

27.b. The learned DR on the other hand pointed out that the order sought to be revised u/s. 263 of the Act was the order dated 6.4.2010 passed u/s. 147 r.w.s. 143(3) of the Act and in the said order the issue of receipt of share capital by the assessee was investigated by the AO, even though the assessment was not reopened for that purpose. He pointed out the relevant provisions of Explanation 3 to sec.147 of the Act which provides that once an assessment is validly reopened, the AO is free to go into any other issues relating to income escaping assessment or underassessment and his jurisdiction is not restricted to only such issues on which reassessment proceedings were initiated. He pointed out that in the reassessment proceedings, the AO did go into the question of receipt of share capital at premium and therefore, the said issue was

clearly part of the reassessment proceedings. It was further submitted that while issuing intimation u/s. 143(1) of the Act, the AO could not have gone into the examination of issue of share capital at premium. He argued that that Intimation u/s. 143(1) of the Act is not an assessment order and hence it cannot be said that the issue of receipt of share capital by the assessee was subject matter of any proceedings u/s 143(1).

27.c. He also pointed out that when challenging the order u/s. 263 of the Act on merits, all the assessees have taken a consistent stand that the issue with regard to receipt of share capital by the assessee was thoroughly examined by the AO in the reassessment proceedings u/s. 147 of the Act and, therefore, it was at best a case of inadequate enquiry for which jurisdiction u/s. 263 of the Act cannot be invoked. But, when it comes to the issue of limitation, the assessee takes a stand that the issue with regard to receipt of share capital was never the subject matter of reassessment proceedings u/s. 147 of the Act. It was also brought to our notice that similar argument raised by the assessee was considered and rejected by the Kolkata bench of the Tribunal in identical facts and

circumstances in Riddhi Siddhi Vincom (P) (supra) vide para 11 of its order.

27.d. The ld. AR, representing Tulsi Tradecom Pvt. Ltd., also claimed that the order u/s 263 of the Act was barred by limitation in the same circumstances as discussed above. In support of the contention that scrutiny of share capital was never the subject matter of re-assessment proceedings, the ld. AR brought to our notice the decision of the Hon'ble Punjab & Haryana High Court in the case of *Vipan Khanna vs. CIT, 255 ITR 220 (P&H).* In the aforesaid case, the assessee had filed a return of income and the intimation u/s 143(1)(a) of the Act was issued by the AO. No notice u/s 143(2) was issued to frame an assessment within the time required for framing an assessment u/s 143(3) of the Act. Thereafter, proceedings u/s 147 of the Act were initiated on the ground that the assessee claimed depreciation at a higher rate. The question before the Hon'ble Court in the proceedings u/s 147 of the Act was whether the AO can go into issues other than claim of depreciation at a higher rate. The Hon'ble Punjab &Haryana High Court held that the

issues other than claiming higher depreciation became final because the AO did not issue a notice u/s 143(2) of the Act for framing assessment u/s 143(3) of the Act. The Hon'ble High Court held that jurisdiction u/s 147 of the Act is confined only to such income which has escaped tax or has been under-assessed and does not extend to revising, reopening or re-considering the whole assessment. The decision in the case of *Sun Engineering Works Pvt. Ltd., 198 ITR 297 (SC)* was referred to by the Hon'ble P&H High Court. According to the ld. AR, the issue of examination of share capital could not be said to be the subject matter of re-assessment proceedings and, therefore, it could not be claimed that the said issue was the subject matter of proceedings u/s 147 of the Act. He also submitted that period of limitation needs to be reckoned from the date of intimation u/s 143(1) of the Act. Similar arguments were put for in the case of Ramshila Enterprises Pvt. Ltd. On a specific query from the Bench, it was admitted by all the ld. ARs that if the period of limitation is counted from the date of passing of order u/s 147, then the orders u/s 263 fall within the limitation period of two years.

27.e. Responding to the this, the ld. DR pointed out that the law has since been amended and Explanation 3 to section 147 has been inserted by the Finance Act of 2009 with retrospective effect from 1.4.1989, as per which the AO has jurisdiction not only to assessee or re-assess income in respect of any issue which has escaped assessment, but, also such other issues that come to his notice subsequently in the course of the proceedings u/s 147 notwithstanding that the reasons for such issue have not been included in the reasons recorded u/s 148(2). According to the ld. DR, the decision relied upon by the ld. AR would not be of any use in the light of this amendment.

27.f. We have given a very careful consideration to the rival submissions. The period of limitation for passing an order u/s.263 of the Act in terms of sec. 263(2) of the Act is : `two years from the end of the financial year in which the order sought to be revised was passed'. The orders sought to be revised by the ld. CIT in the present set of cases are the orders u/s 147. Now, if we go by the dates of Intimations, then the orders u/s 263 are barred by limitation, but if we go by the dates of the

orders u/s 147, then all the orders passed u/s. 263 of the Act are admittedly within the limitation period.

27.g. The larger question, thus, is whether the issue of share capital by the assessee during the previous year was subject matter of reassessment proceedings? It is no doubt true that in the reasons recorded for initiating proceedings u/s.147 of the Act, the issue of examination of share capital raised by the assessee during the previous year was not the reason for re-opening of the assessment. It was restricted only to share issue expenses whether capital or revenue expenditure or some other minor disallowances in other cases. Nevertheless in the reassessment proceedings in all the cases, the AOs ventured to issue notices u/s. 133(6) of the Act to some of the shareholders for examining as to whether the ingredients of sec. 68 were satisfied. As to whether such enquiry was adequate or not, is a different issue. The fact remains that by issuing notices u/s. 133(6) of the Act, the AOs tried to examine the question of genuineness of share capital in proceedings u/s 147. It thus follows that by holding that the issue of share capital at premium was

not properly examined by the AOs, the ld. CIT revised the orders u/s 147 and not the Intimation u/s 143(1) of the Act.

27.h. We also find merit in the argument of the learned DR that with the introduction of Explanation 3 to section 147 with retrospective effect from 1.4.1989, the AO acquires jurisdiction not only to assess or re-assess income in respect of which he issued notice u/s 148, but also such other issues that come to his notice subsequently in the course of the proceedings u/s 147, notwithstanding that the reasons for such issue have not been included in the reasons recorded u/s 148(2). Clause 57 of the Finance (No. 2) Bill, 2009 inserting Explanation 3 in section 147 with retrospective effect from 1st April, 1989 provides as under : -

> "for the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue which has escaped assessment and such issue comes to his notice subsequently in the course of the proceedings under the section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section 2 of section 148".

27.i. Notes on Clauses appended to the Finance (No. 2) Bill also state that clause 57 of the Bill seeks to amend section 147 relating to income escaping assessment. It is proposed to insert Explanation 3 to the said section so as to provide that for the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess income in respect of any issue which has escaped assessment and such issue comes to his notice subsequently in the course of proceeding under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148. This amendment has been made effective retrospectively from 1st April, 1989. Further, the Memorandum explaining the provisions of the Finance Bill mentions that it is a clarificatory amendment, as under : -

> "The existing provisions of section 147 provides, *inter alia*, that if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may assess or reassess such income after recording reasons for reopening the assessment. Further, he may also assess or reassess such other income which has escaped assessment and which comes to his notice subsequently in the course of proceedings under this section. Some Courts have held that the Assessing Officer has to

> restrict the reassessment proceedings only to issues in respect of which the reasons have been recorded for reopening the assessment. He is not empowered to touch upon any other issues for which no reasons have been recorded. The above interpretation is contrary to the legislative intent. With a view to further clarifying the legislative intent, it is proposed to insert an Explanation in section 147 to provide that the Assessing Officer may assess or reassess income in respect of any issue which comes to his notice subsequently in the course of proceedings under this section, notwithstanding that the reason for such issue has not been included in the reasons recorded under sub-section (2) of section 148."

27.j. In view of the aforesaid statutory amendment, it is clear that the scope of reassessment is no more confined to the issues referred to in notice u/s 148, but also extends to other issues which come to the notice of the AO during the course of reassessment proceedings indicating the escapement of income. No doubt the issue of share capital at premium was not subject matter of notice u/s 148, nevertheless the AO proceeded to examine this aspect, thereby bringing it within the ambit of the order u/s 147.

27.k. Now we take up the next aspect of this issue, as to whether Intimation u/s 143(1) can at all the characterized as `order' eligible for revision u/s 263. In this regard, we find that the Hon'ble Kerala High

Court in *CIT Vs. K.V. Mankaram & Co. (2000) 245 ITR 353 (Ker)* has held that Intimation u/s 143(1) is an order only for sections 154, 246 and 264 and for all other purposes is only notice of demand. Similarl view has been taken by the Hon'ble Delhi High Court in *MTNL Vs. CBDT (2000) 246 ITR 173 (Del)* holding that Intimation u/s 143(1) is not an assessment order. Since the subject of revision u/s 263 can only be an `order passed.. by the Assessing Officer', we fail to see as to how `Intimation' issued u/s 143(1) in all such cases, which can by no stretch of imagination be treated as an `order' for the purposes of section 263, can be considered for the purposes of limitation.

27.l. Viewed from any angle, it is clear that the subject matter of revision in all the cases under consideration were the orders passed u/s 147 of the Act. Going by the admission of the ld. ARs, if limitation is counted from the date of orders u/s 147, then the orders u/s 263 are within the limitation period. This contention of the ld. ARs, therefore, fails.

E. Territorial jurisdiction of the CIT

28.a. This issue arises in the case of Ramshila Enterprises Pvt. Ltd. The ld. AR submitted that the ld. CIT, Kolkata-II, Kolkata, who passed the impugned order had no territorial jurisdiction to do so. He firstly drew our attention to the order u/s.263 and submitted that the same was passed on 26.3.2013 by the CIT, Kolkata-II, Kolkata. It was also shown that the show-cause notice dated 18.3.2013 u/s. 263 of the Act, which was also issued by the CIT, Kolkata-II, Kolkata. He also invited our attention towards an order dated 3.9.2012 passed u/s. 127(2)(a) of the Act whereby the jurisdiction over the assessee was transferred from ITO, Ward-4(1), Kolkata to ACIT/DCIT, Central Circle XIX, Kolkata with immediate effect. It was, therefore, urged that the CIT, Kolkata-II, Kolkata, who passed the impugned order on 26.3.2013 had no jurisdiction whatsoever on the date of passing the order and therefore the proceedings u/s.263 of the Act deserved to be quashed on this short ground.

28.b. It is not in dispute that the CIT, Kolkata-II, Kolkatta had jurisdiction over cases with ITO, Ward 4(2), Kolkata and CIT, Central

Circle, Kolkata had jurisdiction over cases with ACIT/DCIT, Central Circle-XIX, Kolkata. The argument of the learned AR was that only the CIT, Central Circle, Kolkata could have exercised powers of revision u/s. 263 of the Act on and from 3.9.2012. It is relevant to mention in this regard that the transfer of jurisdiction of the assessee from ITO, Ward-4(1), Kolkata to ACIT/DCIT, Central Circle XIX, Kolkata, happened owing to a search u/s. 132 of the Income Tax Act, 1961 (Act) in "Atha Mines" group of cases on 17.11.2011. The order of assessment which was revised by the CIT u/s. 263 of the Act, which is impugned in this appeal, is an order u/s. 147 r.w.s. 143(3) of the Act dated 21.5.2010 in relation to the AY 2008-09. It is also relevant to mention that the transfer of jurisdiction as per the order dated 3.9.2012 is relating to assessment of income arising out of seized material in the search and inasmuch as request for transfer of jurisdiction was made by the competent authority for facilitating the co-ordinated investigation of search cases. The order specifically mentions that jurisdiction is being

transferred in the interest of revenue for better co-ordination, effective investigation and meaningful assessment.

28.c. The learned DR submitted that CIT, Central, Kolkata, consequent to the search had addressed a letter dated 24.12.2012 to the CIT, Kolkata-II, Kolkata, requesting for transfer of jurisdiction from ITO, Ward 4(1), Kolkata to ACIT, Central Circle-19, Kolkata. The ld. DR filed before us copy of the request of CIT, Central Circle, Kolkata to CIT, Kolkata-II, Kolkata dated 24.12.2012. This letter mentions about the search in the case of "Atha Mines" group and, further, makes a reference to the interests of the revenue, administrative convenience and coordinated investigation, and, on that ground, request was made to pass necessary order u/s 127 transferring the jurisdiction in the case to DCIT, Central Circle-19, Kolkata. The ld. DR brought to our notice a letter dated 11.7.2013 which is placed at page 4 of the Revenue's paper book, in which the assessee wrote to the ITO, Ward 4(1), Kolkata, the fact that the jurisdiction had not been changed despite the order dated 3.9.2012. The ld. DR also pointed out that it is only on 29.7.2013 that the ITO,

Ward 4(1), Kolkata physically transferred all the files to the DCIT, Central Circle 19, Kolkata. Copy of the forwarding letter of ITO, Ward 4(1), Kolkata dated 29.7.2013 which was received by the DCIT, Central Circle-19 on 5.8.2013 was filed before us. The Ld. DR further submitted that even in the worst scenario, the proceedings cannot be held to be null and void and it is at best an irregularity which can be cured.

28.d. We have considered the rival submissions in the light of material placed before us and precedents relied upon. The question is as to whether the jurisdiction in respect of the order of assessment passed u/s. 147 r.w.s. 143(3) of the Act on 21.5.2010 in relation to AY 2008-09, much prior to even the making of request by the competent authority for transfer of cases for co-ordinated investigation and that too, for search matters, could also be said to have been transferred to ACIT/DCIT, Central Circle-XIX, Kolkata? Before answering this question, we consider it expedient to take note of the contention of the ld. AR about Explanation below sec.127, which reads as under :

> "Explanation - In section 120 and this section, the word "case" , in relation to any person whose name is specified in any order or direction issued thereunder, means all proceedings under this Act in respect of any year which may be pending on the date of such order or direction or which may have been completed on or before such date, and includes also all proceedings under this Act which may be commenced after the date of such order or direction in respect of any year. "

28.e. As per the ld. AR, the provisions of sec.127 of the Act refer to only "transfer any case". The expression "case" has been defined to mean "all proceedings under this Act in respect of any year which may be pending on the date of such order or direction or which may have been completed on or before such date, and includes also all proceedings under this Act which may be commenced after the date of such order or direction in respect of any year". According to him, the assessment proceedings completed u/s. 147 r.w.s. 143(3) of the Act by order dated 21.5.2010 which was sought to be revised in proceedings u/s. 263 of the Act would fall within the category of " all proceedings in this Act in respect of any year which may have been completed before the date of order u/s.127(2)(a) of the Act". He also placed reliance on the decision

of the jurisdictional high court rendered in the case of *ITO Vs. Ashoka Glass Works reported in 125 ITR 491 (Cal)* to support his contentions in this regard. In the aforesaid case the assessee was assessed for the AY 1962-63 by the ITO "A" Ward, District Howrah. He initiated penalty proceedings and referred the penalty proceedings to IAC, Range XX, under sec. 274(2) of the Act. Pending these proceedings, the CIT passed an order u/s. 123(1) transferring the jurisdiction to the IAC, Range XXII, who was given exclusive jurisdiction. Thereafter, the IAC, Range XXII, called upon the respondent to appear before him to show cause why penalty should not be imposed on him u/s.271(1) (c) of the Act. The question before the Court was as to whether IAC, Range XXII had valid jurisdiction over the case. The Hon'ble Calcutta High Court held that consequent to the order u/s. 127(1) of the Act transferring jurisdiction, the IAC, Range-XX was completely divested of jurisdiction and it was only the IAC, Range XXII who would have jurisdiction in the case. Taking support from this judgment, it was claimed by the ld. AR that the entire jurisdiction of the assessee got vested only with CIT Central

Circle and CIT Kolkata – II, Kolkata was practically divested of his jurisdiction over the case of the appellant pursuant to transfer of jurisdiction order passed by him on 3.9.2012 u/s 127(2)(a) of the Act.

28.f. In our considered opinion, the order dated 3.9.2012 u/s. 127(2)(a) of the Act only transferred jurisdiction with reference to assessment of income in the hands of the assessee consequent to seized material in the course of search on "Athna Mines" group of cases. This is clear from the order which specifically refers to the transfer keeping in mind "interest of revenue for better co-ordination, effective investigation and meaningful assessment". That does not mean that the jurisdiction of ITO, Ward-4(1) Kolkata and that of CIT, Kolkata-II, Kolkata, was completely transferred even in respect of other matters, more specifically the orders which already stood passed by him on such date. The facts of the case decided by the Hon"ble Calcutta High Court in the case of *Ashoka Glass works (Supra)* are clearly distinguishable in as much as that case related to transfer of jurisdiction in a specific case and such transfer did not arise consequent to a search in any group case as in

the present case. There was, therefore, no necessity for better co-ordination, effective investigation and meaningful assessment. The definition of `case' for the purpose of sec.127 of the Act as given in the Explanation below sec. 127 does not debar the Commissioner from transferring only a particular case, more so when the request for transfer was made in specific circumstances, such as proper co-ordination of search cases. The Commissioner transferring jurisdiction has power to transfer all proceedings under the Act, which are pending, completed or which may be commenced after the date of transfer, but that does not mean that he does not have powers to restrict his order of transfer only to a particular case for which request was made, thereby, leaving the jurisdiction in respect of other cases pertaining to an assessee to be exercised by the AO/CIT who already had it. The power to do a particular act also includes a power to restrict the exercise of power partly. It cannot be said that the power should be exercised either as a whole or not at all. Such an argument is fallacious and defeats the very purpose of conferring a larger power. As the actual transfer of the files

from the incumbent AO to the new AO had taken place only on 29.7.2013 and further the order sought to be revised by the ld. CIT u/s 263 was passed much prior to the even making of request for transfer of jurisdiction in respect of search matters, we have absolutely no doubt in our mind that only the CIT Kolkata II, Kolkata had the jurisdiction to revise the assessment order passed u/s 147 as has been done in this case. The contention of the learned AR in this regard is held to be without substance and not unacceptable.

28.g. The issue of territorial jurisdiction has also been raised by the assessee in Satabdi Vincome Pvt. Ltd. In this case there is no dispute that the CIT, Kolkata-II, Kolkata, who passed the order u/s. 263 of the Act had jurisdiction over the assessee. There is no order transferring jurisdiction from ITO, Ward 6(1), Kolkata under CIT, Kolkata-II, Kolkata. The ld. AR, however contended that PAN data in the public domain showed that the assessee's jurisdiction at the relevant time was with ITO, Ward 8(2), Kolkata, who was under the jurisdiction of CIT, Kolkata-III, Kolkata.

28.h. In our view this objection is frivolous. In the absence of any actual transfer of jurisdiction, the argument is without any force. The jurisdiction as per PAN data in public domain may inadvertently show a wrong feature, but that would not amount to transferring the jurisdiction, which is there in reality. The objection is rejected.

F. Whether an addition in the hands of a company can be made u/s 68 in its first year of incorporation ?

29.a. Shri Subhash Aggarwal, the ld. AR of Madhuban Vyapar Pvt. Ltd. submitted that this company was formed only during the previous year relevant to the assessment year under consideration. Placing reliance on the decision of the Hon'ble Supreme Court in the case of *Bharat Engineering, 83 ITR 197 (SC)*, he submitted that it cannot be possible for a newly incorporated to earn undisclosed income of such a magnitude in the very first year of its formation. It was further submitted that though the aforesaid decision relates to a case of a partnership firm, but its *ratio* will equally apply to a private limited company also. A view was canvassed that in case of any doubt about

the share capital in the first year, the addition u/s 69 could be considered only in the hands of promoters and not the company u/s 68 of the Act. The ld. DR opposed this contention.

29.b. We have considered the rival submissions. The decision in *Bharat Engineering (supra)*, has been rendered by the Hon'ble Supreme Court in the case of a partnership firm and not a private limited company. There is a fundamental difference between a company *vis-a-vis* shareholders on one hand and a firm *vis-a-vis* partners on the other. Whereas a company is a separate legal entity distinct from its shareholders or directors, it is not so in the case of partnership firm. The Hon'ble Supreme Court in *Malabar Fisheries Company Vs. CIT (1979) 120 ITR 49 (SC)* has held that partners and firm are one and the same thing and a firm is nothing but a compendious name given to partners. Similar view has been reiterated in *Third ITO Vs Arunagiri Chettiar (1996) 220 ITR 232 (SC)* in which it has been held that tax arrears of firm can be recovered from a person who was a partner thereof in the relevant accounting year under s. 25 of the Partnership Act. In view of

the above precedents, it becomes manifest that the *ratio* laid down in *Bharat Engineering (supra)* cannot be applied to the facts of the present case, which is a company. The contention is rejected.

G. Effect of order passed u/s 263 in the case of amalgamating company after amalgamation,

30.a. Sh. Subhash Agarwal, the learned AR representing Madhuban Vyapar Pvt. Ltd., stated that the assessee ceased to exist on the date of passing of the revisional order u/s 263 as it got amalgamated with another company prior to that. Referring to the scheme of arrangement which was sanctioned by the Hon'ble High Court, he pointed out that the date of transfer as per the scheme of amalgamation was 10.10.2007. It was stated that on the Hon'ble High Court accepting the scheme of amalgamation, the assessee as a separate entity, ceased to exist and hence no proceedings could have been taken in the name of the amalgamating company, which in the instant case is the assessee, Madhuban Vyapar Pvt. Ltd. To support his contention, he placed

reliance on *Saraswati Industrial Syndicate Vs. CIT 186 ITR 278 (SC)* and *R.C. Jain Vs. CIT 273 ITR 384 (Del)*.

30.b. We do not dispute the general proposition that once a company gets amalgamated with another, it loses its original identity and no proceedings can be taken in its earlier name. Such proceedings have to continue in the name of the amalgamated company and order can also be passed in the new name. However, this general position can have no application, where the Revenue is kept in dark and is not informed about such amalgamation. The position becomes more critical where, even after such amalgamation, the amalgamating company launches proceedings in its old name. In such circumstances, it cannot be allowed on turn around later and claim that though it wrongly initiated the proceedings in wrong name, but the court should have taken cognizance of the reality of amalgamation. No assessee can be allowed to derive benefit from its own fraudulent practices.

30.c. It is observed in the instant case despite its amalgamation, the assessee chose to file its return of income after the date of

amalgamation, in its earlier name and that is how the assessment got completed u/s 147 in the same name. It is obvious that in such circumstances, the assessee cannot be allowed to take advantage of its own manipulation. It is further interesting to note that the assessee also allowed the proceedings u/s 147 to complete in its earlier name, but is now seeking to object to the order of the ld. CIT on this aspect of the matter. Law does not permit a person to both approbate and reprobate. This contention is therefore, rejected.

H. Whether order u/s 263 becomes invalid for being passed on a closed day?

31.a. Sh. Surana, the ld. AR of Shatabdi Vincom Pvt. Ltd. submitted that the order passed by the CIT u/s 263 of the Act on 30.3.2013 was null and void. In this regard, he pointed out that 29th March, 2013 was Good Friday, 30th March, 2013 was Saturday and the 31st March, 2013 was Sunday. All these three days were closed days. It was brought to our notice that the CBDT issued an instruction to the AOs for keeping the offices open on 30th and 31st March, 2013, which did not require the

office of the CIT also to remain open on such date. According to him, the CBDT instruction which derive its validity from the provisions of section 119 of the Act, cannot extend to declaring a gazetted holiday as a full-fledged working day for the income-tax offices. It was thus pleaded that since the impugned order was passed on a holiday, the same should be held as a nullity. In this regard, he placed reliance on the following decisions:-

i)Kuldip Oil Industries Ltd. Vs. Ch.Pratap Singh AIR1957 505(All);

ii) ITO vs. ShivnathViswanath&Ors.19 TTJ 450 (All); and

iii)B & Brothers Engineering Works &Anr.vs. UOI153 Taxmann 405 (Guj).

31.b. We have gone through all the decisions relied by the ld. AR. A common thread running through all these cases is that the proceedings were fixed on a holiday, which has been held to be improper. In contrast, we are confronted with a situation in which the proceedings were fixed for last hearing on 28.3.2013, which was working day. It is only that the ld. CIT, after concluding the proceedings, passed the impugned order on a holiday. The bar in not working on the holidays extends only *qua* the

taking up of the proceedings involving participation from outsiders. It cannot be said that the Government servants, having completed the hearing of the proceedings on a working day, cannot work on holidays to clear their work without the involvement of public at large. It is a common knowledge that the Officers of the Income-tax Department work around the clock close to various limitation periods, so as to facilitate the completion of their work in time. It is a cause to appreciate and not to deprecate. The situation would have been different if the ld. CIT had fixed the hearing of the case on a holiday and also passed the order on such holiday. That would have rendered the proceedings improper. Instantly, we are concerned with a situation in which the proceedings for final hearing were rightly taken up by the ld. CIT on a working day and it is only that the order has been passed on a holiday after conclusion of such proceedings on a working day. In our considered opinion, no illegality can be traced from the passing of the impugned order on a holiday.

31.c. Be that as it may, it is noted that from the above decision rendered by the Hon'ble Allahabad High Court in the case of *Kuldip Oil Industries Ltd. (supra)*, that in case of urgency, a trial can be conducted even on a closed holiday. In the present case, the time limit for passing the order u/s. 263 of the Act was expiring on 31.3.2013 and therefore, there was an urgency to pass the order before that date. The objection of the assessee deserves to be and is hereby rejected.

I. Whether the order u/s 263 can be declared as a nullity for the notice having not been signed by the CIT ?

32.a. The ld. AR in Paramani Commercial Pvt. Ltd. brought to our notice that the show cause notice u/s 263 was not signed. According to him, the order u/s 263 flowing from such unsigned notice be declared as void.

32.b. In our considered opinion this objection is again unsustainable. We have noticed above that there is no requirement under the law for giving a notice for the proceedings u/s 263 in conformity with the provisions of section 282 of the Act. It has been noticed that the assessee

should be given an opportunity of hearing and once this is done, the proceedings cannot be challenged on this score. When an assessee is made aware of the proceedings u/s 263, no such objection can be allowed to be taken. As the assessee in the instant case was afforded opportunity of hearing that would suffice compliance with the requirements of *"audi alterm partem"* contemplated by the provisions of sec. 263 of the Act. The objection raised by the assessee in this regard, to say the least, is frivolous.

J. Consequences of refusal by the Revenue to accept the written submissions of the assessee

33.a. The ld. ARs in Radha Krishna Tradcom Pvt. Ltd. and some other cases have brought to our notice that the replies sent by the assessees to the show cause notice u/s 263 of the Act were returned as 'Refused' by the ld. CIT. It was submitted that since the objections of the assessee have not been considered as contained in those letters, the impugned orders be held as void because of lack of adequate opportunity to the assessee.

33.b. We do not approve the way in which the office of the CIT has refused to accept the written submissions made on behalf of various assessees. It is impermissible for any Government office to refuse to accept any letter or communication. It is only after receiving the letter or communication, that the authority can decide about taking or not taking its cognizance.

33.c. Coming to the facts of the instant cases, the fact remains that such replies were sent by these assesses when the ld. CIT had given last opportunities and such opportunities were not availed by them. That apart, not giving a proper opportunity of hearing can be no reason for declaring the order *void ab initio*. The Hon'ble Supreme Court in several judgments including *Guduthur Brothers Vs. ITO (1960) 40 ITR 298 (SC), CIT Vs. Jai Prakash Singh (1996) 219 ITR 737 (SC)* and *Kapurchand Shreemal Vs. CIT (1981) 131 ITR 451 (SC)* has held that lack of opportunity is simply an irregularity which does not render the order passed a nullity. In our considered opinion, it is at best an irregularity which will not affect the jurisdiction of the CIT u/s. 263 of

the Act. We hold accordingly and dismiss the plea raised by the assessees on this issue.

K. Search proceedings and revision of abated order u/s 263

34.a. The ld. AR appearing for M/s Hebiscus Commotrade Pvt. Ltd. stated that consequent to a search u/s.132 of the Act in the case of some other assessee and discovery of material belonging to the assessee in such search, proceedings u/s.153C of the Act were initiated against the assessee. A notice was issued for filing return in respect of six years including the year for which the assessee is before us. It was contended that once the proceedings u/s.153C of the Act were initiated, the CIT could not have invoked the powers u/s. 263 of the Act for revising an order of assessment already passed by the Assessing authority under u/s. 147 of the Act in respect of an assessment year which is comprised in the period of six assessment years covered by the first proviso to sec. 153A of the Act. His submission was that the CIT u/s. 263 of the Act has to examine the records of assessment for exercising jurisdiction. The records of assessment for the purpose of section 263 of the Act

would include the records as on the date of issue of show cause notice. He stated that the ld. CIT had full knowledge of the fact of proceedings u/s. 153C of the Act having been initiated against the assessee on 15.11.2012 and as such he could not have revised the order passed u/s 147, which was abated. He drew our attention to the provisions of sec.153A of the Act, for contending that whenever a search is conducted after 31.5.2003, then the AO has no other option but to issue notice u/s.153A of the Act and then assess or reassess total income for the six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted. According to him, similar would be the position even in the case of proceedings u/s. 153C of the Act. His further submission was that the expression "assess or reassess" used in sec.153A(1)(b) of the Act has not been defined and therefore has to be understood by keeping in mind the second proviso to sec.153A(1) of the Act, which lays down that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in sec. 153A(1)((b) of the Act,

which is pending on the date of initiation of search u/s.132 of the Act, shall abate. If an assessment for any of the Assessment years falling within the six assessment years referred to in sec.153A(1)(b) of the Act is already completed before the date of initiation of search u/s.132 of the Act, then assessment of total income for such year u/s.153A of the Act can only be "reassessed" and not "assessed". The expression "reassessed" would include reassessment pursuant to order u/s.153A of the Act. He submitted that the purpose of the second proviso to sec. 153A(1) of the Act is to ensure that there are no multiple assessments for the same Assessment year. In this regard our attention was drawn to the decision of the Hon'ble Delhi High Court in *CIT Vs. Anil Kumar Bhatia 211 Taxman 453 (Delhi)* wherein it has been held in para 21 as under : -

> 21. Now there can be cases where at the time when the search is initiated or requisition is made, the assessment or reassessment proceedings relating to any assessment year falling within the period of the six assessment years mentioned above, may be pending. In such a case, the second proviso to sub section (1) of Section 153A says that such proceedings "shall abate". The reason is not far to seek. Under Section 153A, there is no room for multiple assessment orders in respect of any of the six assessment years under consideration. That is because the Assessing Officer

has to determine not merely the undisclosed income of the assessee, but also the 'total income' of the assessee in whose case a search or requisition has been initiated. Obviously there cannot be several orders for the same assessment year determining the total income of the assessee. In order to ensure this state of affairs namely, that in respect of the six assessment years preceding the assessment year relevant to the year in which the search took place there is only one determination of the total income, it has been provided in the second proviso of sub Section (1) of Section 153A that any proceedings for assessment or reassessment of the assessee which are pending on the date of initiation of the search or making requisition "shall abate". Once those proceedings abate, the decks are cleared, for the Assessing Officer to pass assessment orders for each of those six years determining the total income of the assessee which would include both the income declared in the returns, if any, furnished by the assessee as well as the undisclosed income, if any, unearthed during the search or requisition.

34.b. The learned AR submitted that assessment in the case of the assessee u/s. 147 of the Act for the AY 2010-11 was completed on 21.2.2012 and the proceedings u/s.153C of the Act were initiated on 5.11.2012. The crux of his argument was that there can be no revision of an abated assessment order. In support of his stand, the learned AR relied on *Canara Housing Development Compnay Vs. DCIT (2014) 114 DTR 162 (Karn).* The submission of the learned DR on the other hand

was that such an assessment can be validly revised in exercise of powers u/s. 263 of the Act, even after the initiation of search u/s.132 of the Act.

34.c. We have considered the rival submissions. We shall first consider the scope of assessment u/s.153A of the Act. The Special Bench of the tribunal in *Allcargo Global Logistics Ltd. (2012) 16 ITR (Trib.) 380 (Mum)(SB)* had the occasion to consider the following question: -

> "1. Whether, on the facts and in law, the scope of assessment u/s 153A encompasses additions, not based on any incriminating material found, during the course of search"?"

The Special Bench answered the question by holding that:

> "(a) In so far as pending assessments are concerned, the jurisdiction to make original assessment and assessment u/s 153A merge into one and only one assessment for each assessment year shall be made separately on the basis of the findings of the search and any other material existing or brought on the record of the AO,
>
> (b) in respect of non-abated assessments, the assessment will be made on the basis of books of account or other documents not produced in the course of original assessment but found in the course of search, and undisclosed income or undisclosed property discovered in the course of search"

34.d. In the light of the above ruling of the Special Bench, it is clear that if an assessment is completed prior to initiation of search u/s.132 of the Act and if no incriminating material is found regarding a particular item of income during the course of search, then no addition can be made in the assessment of such year u/s. 153A of the Act. If we accept the contention of the ld. AR, then the Revenue would be left without any remedy if such an order passed by the AO is found to be erroneous and prejudicial to the interest of the revenue. In our considered view, in such cases it would be open to the Revenue to explore remedies open to it in law u/s. 263 of the Act, subject to satisfaction of the conditions precedent for exercise of jurisdiction under that provision, even after the initiation of search u/s.132 of the Act. In such circumstances, we are of the view that the plea put forth by the assessee cannot be accepted. The question of the assessee having to face multiple proceedings, in the present case, cannot be the basis to hold that jurisdiction u/s.263 of the Act cannot be invoked. The argument raised by the assessee on this count is not acceptable.

34.e. It is no doubt true that the Hon'ble Karnataka High Court in the case of Canara Housing (supra) has not accepted the ruling of the Special Bench in the case of *Allcargo logistics (supra)*. However, the Hon'ble Bombay High Court in the case of *CIT Vs. Continental Warehousing Corporation ITA No.523/2013* vide its judgment dated 21.4.2015, after referring to the decision of the Hon'ble Delhi High Court in the case of *Anil Kumar Bhatia (supra)* and that of the Hon'ble Karnataka High Court in *Canara Housing (supra)* has taken a view that the decision rendered by the Special Bench is to be followed. No decision of the Hon'ble Calcutta High Court on the point has been brought to our notice. We are of the opinion that the view expressed by the Hon'ble Bombay High Court, which is in tune with the decision rendered by the Special Bench in the case of *Allcargo Logistics (supra),* should to be followed. It is, therefore, held that the proceedings u/s. 263 of the Act to revise the order dated 21.2.2013 passed by the AO u/s. 147 of the Act, are valid and cannot held to be without jurisdiction. Accordingly, this issue is also decided against the assessee.

35. Before parting with this order, we want to make it clear that all the decisions cited by both the sides have been duly taken into consideration while drawing our conclusions on the points under consideration. Specific reference to some of the decisions cited in the order has been avoided either due to their repetitive nature or to relieve the order from unnecessary repetitions.

36. In the result, all the appeals are dismissed.

The order pronounced in the open court on 30.07.2015.

Sd/-	Sd/-
[N.V. VASUDEVAN]	[R.S. SYAL]
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated,30th July, 2015.

dk

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT (A)
5. DR, ITAT

AR, ITAT, NEW DELHI.