

**आयकर अपीलीय अधिकरण, कोलकाता पीठ 'सी', कोलकाता**  
**IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH KOLKATA**

**श्री संजय गर्ग, न्यायिक सदस्य एवं श्री मनीष बोरड, लेखा सदस्य के समक्ष**  
Before Shri Sanjay Garg, Judicial Member and Dr. Manish Borad, Accountant Member

I.T.A. No.35/Kol/2021  
Assessment Year: 2009-10

ITO, Ward-9(1), Kolkata.....Appellant  
vs.

M/s Maharaj Vincom Pvt. Ltd..... Respondent  
69, Jamunalal Bajaj Street,  
Kolkata- 700007.  
[PAN: AAFCM6496E]

C.O. No.6/Kol/2023  
(A/o I.T.A. No.35/Kol/2021)  
Assessment Year: 2009-10

M/s Maharaj Vincom Pvt. Ltd..... Cross-Objector  
69, Jamunalal Bajaj Street,  
Kolkata- 700007.  
[PAN: AAFCM6496E]

Vs

ITO, Ward-9(1), Kolkata .....Respondent

**Appearances by:**

Shri Miraj D. Shah, AR, appeared on behalf of the assessee.

Shri Abhijit Kundu, CIT-DR, appeared on behalf of the department.

Date of concluding the hearing : March 07, 2024

Date of pronouncing the order : May 15, 2024

**आदेश / ORDER**

**संजय गर्ग, न्यायिक सदस्य द्वारा / Per Sanjay Garg, Judicial Member:**

This appeal by the revenue and corresponding cross-objection by the assessee have been preferred against the order dated 08.09.2020 of the Commissioner of Income Tax (Appeals)-7, Kolkata (hereinafter referred to as the 'CIT(A)') passed u/s 250 of the Income Tax Act (hereinafter referred to as the 'Act').

2. The brief facts of the case are that the assessee originally filed its return of income showing total loss of Rs.4047/-. The return was processed u/s 143(1) of the Act. Thereafter, the case was reopened u/s 147 r.w.s. 148 of the Act as the Assessing Officer on account of escapement of income due to oversight of Rs.58250/- towards profit on share dealing and of Rs 3000/- non admissible expenditure incurred on share allotment. the assessment was completed by adding the aforesaid amount. Thereafter, the ld. CIT, Kolkata-II exercised his revision jurisdiction u/s 263 of the Act and held that the reassessment order framed by the Assessing Officer was erroneous and prejudicial to the interest of the revenue for not verifying the subscriptions made by the share applicants. He accordingly set aside the matter to the file of the Assessing Officer for de novo consideration of the issue. Thereafter, in the set aside proceedings, the Assessing Officer vide assessment order dated 29.03.2014 passed u/s 143(3) r.w.s. 263 r.w.s 147/143(3) of the Act, made the addition of Rs.12,61,00,000/- in respect of share capital and share premium received by the assessee during the year under consideration.

3. Being aggrieved by the said order of the Assessing Officer, the assessee preferred appeal before the CIT(A), however, the ld. CIT(A) vide impugned order dated 08.09.2020 has deleted the additions so made by the Assessing Officer.

4. Being aggrieved by the said order of the Ld. CIT(A), the revenue has come with the present appeal before us, whereas, the assessee has filed the corresponding cross objections. The revenue in its appeal has assailed the action of the CIT(A) in deleting the addition of Rs.12,61,00,000/- made by the Assessing Officer by treating the share

application money received by the assessee as income of the assessee from undisclosed source of fund raising contentions on the basis of factual matrix of the case, whereas, the Assessee in its cross objections, has contested the validity of the assessment order on legal/jurisdictional issues.

5. Since, the legal issues raised by the assessee hit at the very jurisdiction/validity of the assessment order itself, therefore the Cross objections of the assessee/legal issues raised by the assessee are taken for adjudication first.

**C.O. No. 6/Kol/2023 :-**

6. At the outset, the ld. counsel for the assessee has submitted that in this case, the reopening of the assessment u/s 147 r.w.s. 148 of the Act was bad in law for want of jurisdiction of the Assessing Officer to reopen the assessment, therefore, the said order passed by the Assessing Officer u/s 147 of the Act was non-est, and hence, the subsequent order passed by the CIT, Kolkata-II u/s 263 of the Act setting aside assessment order passed u/s 147 of the Act for de-novo assessment was also not legally sustainable. The ld. counsel, therefore, has submitted that the subsequent proceedings in relation to order passed u/s 147 of the Act being bad in law, were to be treated as non-est. That, under the circumstances, the additions made by the Assessing Officer were not sustainable in any of the collateral proceedings to the order passed u/s 147 of the Act.

6.1 To stress the contention that the defect in jurisdiction of the Assessing Officer to reopen the assessment and thereby the very validity of the assessment order passed u/s 147 of the Act can be agitated in the

collateral proceedings also, the Ld. Counsel for the assessee, in this respect, has relied upon various case laws.

6.2. The Ld. CIT-DR, has however, contended that the assessee, at this stage, is not entitled to agitate about the validity of the assessment order passed u/s 147 of the Act.

6.3. We find that the issue is squarely covered in favour of the assessee by various case laws. The Coordinate Kolkata Bench of the Tribunal in a recent decision in the case of 'TTO vs. M/s Daniel Commodities Pvt. Ltd' in ITA No.645/Kol/2020 order dated 07.05.2024 has extensively deliberated upon this issue. The relevant part of the said order of the Coordinate Bench of the Tribunal is reproduced as under:

*“7. We have considered the rival submissions and have also gone through the record. So far as the contention of the ld. Counsel for the assessee, that the defect in jurisdiction of the Assessing Officer to reopen the assessment and thereby the very validity of the base assessment order u/s 147 of the Act can be agitated in the collateral proceedings also, the issue is no more res integra in the light of the various case laws relied upon by the Ld. counsel of the assessee as mentioned in his submissions, as noted above. The issue is squarely covered by the various case laws/decisions:*

- i) M/s Westlife Development Ltd vs Pr.CIT (2016) 49 ITR 406 (Mum Trib)*
- ii) Valiant Glass Works vs. ACIT ITA 1612/Mum/2013 dated 27.07.2016*
- iii) Steel Strips Ltd vs ACIT (1995) 53 ITR 553 (Chd Trib)*
- iv) P V Doshi vs CIT (1978) 113 ITR 0022 (Guj HC)*
- v) CIT vs Income Tax Appellate Tribunal & Ors (2012) 78 DTR 113 (Del HC)*
- vi) Mavany Brothers vs CIT Tax Appeal No. 8 of 2007 dated 17.04.2015*

*7.1 The of the Coordinate Mumbai Bench of the Tribunal in the case of Valiant Glass Works Pvt. Ltd. vs. ACIT in ITA No.1612/Mum/2013 dated 27.07.2016 (incidentally the author being the Judicial Member herein),*

wherein, the Coordinate Bench after deliberating upon various case laws, has observed as under:

*“So far as the issue as to whether the assessee could raise the plea before the AO during the fresh assessment proceedings u/s 153A of the Act pursuant to the direction of the learned CIT given in the revision order passed u/s 263 of the Act regarding the validity of initiation of the reopening proceedings u/s 147 of the Act is concerned, we find that various Courts of Law have been unanimous on the proposition that jurisdictional aspect of an order passed in a primary proceedings can be examined in the collateral proceedings also. The validity of an assessment order can be challenged during the appellate proceedings pertaining to examination of validity of the order passed u/s 263 of the Act.*

*11. In a recent decision in the case of the case of “M/s Westlife Development Ltd Vs. Principal Commissioner of Income Tax” [ITA No.688/Mum/2016 decided vide order dated 10-06-2016, the co-ordinate bench of this Tribunal has thoroughly examined the issue as to whether if the initiation of the primary proceedings is invalid without jurisdiction but, the same has not been agitated by way of any appeal or otherwise and thereafter on the basis of those primary proceedings, certain secondary proceedings such as reopening of the assessment u/s 147 of the Act or revision of the assessment u/s 263 of the Act is done, in such circumstances, whether the assessee has a right to challenge the very validity of the primary proceedings in an appeal filed against any order passed in such subsequent/collateral proceedings. The Tribunal has discussed various case laws in this respect. The relevant part of the findings of the Tribunal is reproduced hereunder:-*

*“3. During the course of hearing, the Ld. counsel of the assessee inter-alia stated that in this case the impugned order passed u/s 263 is bad in law on the jurisdictional ground, that is to say that the original assessment order passed u/s 143(3) dated 2440-2013 which has been sought to be revised by the Id.CIT was a nullity in the eyes of law, and therefore an order, which was a nullity in the eyes of law had no existence in the eyes of law and, therefore, the same could not have been revised by the Ld.CIT, thereby giving fresh life to the proceedings which had no legal existence in the eyes of law. In this regard, it has been further explained by the Id. counsel that the original assessment was framed u/s 143(3) upon an erstwhile company, viz. M/s 'Westpoint Leisureparks Pvt Ltd' (hereinafter called WLPL), which had already got amalgamated into another company namely M/s 'Westlife Development Ltd' (hereinafter called WDL) and therefore, on the date of framing of the assessment order, WLPL was not in existence. It was further*

submitted that this fact was brought to the knowledge of the Assessing Officer; despite that, the Assessing Officer framed the assessment upon a non-existing entity. It was submitted by him that framing of an assessment upon a company which has already been amalgamated by way of an order of the High Court is nullity in the eyes of law and in support of his arguments he placed reliance upon the following judgments:

1. Judgment of Delhi High Court in the case of Spice Infotainment Ltd. Vs. Commissioner of Service Tax in ITA 475 & 476 of 2011, dated 03.08.2011
  2. CIT v. Dimension Apparels P. Ltd. [370 ITR 288 (Del)]
  3. I. K. Agencies P. Ltd. v CIT [347 ITR 664 (Cal)]
  4. CIT v Express Newspapers Ltd. [40 ITR 38 (Mad)]
  5. Judgment of Delhi High Court in the case of CIT v Micra India P. Ltd. (2015) 57 Taxmann.com 163 (Del)
  6. Order of the Tribunal Mumbai Bench, in the case of Instant Holdings Ltd. ACIT in ITA no. 4593, 4748/Mum/2011 order dated 09.03.2016.
  7. Order of the Tribunal Kolkata Bench, in the case of Emerald Company Ltd in ITA no. 428/Ko1/2015 order dated 13.01.2016
  8. Judgment of Karnataka High Court in the case of CIT v Intel Techno India P. Ltd. (2015) 57 Taxmann.com 159 (Kar)
  9. Order of the Tribunal Kolkata Bench, in the case of Gestener (India) ACIT in 1TA no. 275/Ko1/2007 "
4. It was further argued by him that the impugned assessment order was non est in the eyes of law and, therefore, the same could not have been revised by the Id.CIT. In this regard, he relied upon the judgment of Hon'ble Delhi High in CIT vs Escorts Farms Pvt Ltd 180 ITR 80 (Del) and upon the decision of the co-ordinate bench in the case of Krishna Kumar Saraf vs CIT ITA No.4562/De1/2011 dated 24-09-32015 and Steel Strips Ltd v ACIT 53 ITD 553 (Chd). He thus requested that the impugned revision order passed by the Id.CIT is illegal on this primary jurisdictional ground itself.
5. Per contra, Ld. Departmental Representative for the Revenue vehemently opposed the arguments of the Id. Counsel. It was submitted by the Id. CIT-DR that even if the original assessment order was framed in the name of an erstwhile company, the same was only a mere irregularity and that does not make the assessment as nullity in the eyes of law. It was submitted that such lapses were protected u/s 292B of the Act.
6. In addition to the above, it was further submitted by him that the issue with regard to illegality in the original assessment order cannot be raised here during the proceedings challenging the order u/s 263. It was further

submitted by him that in any case, the Id.CIT had proper jurisdiction to make revision of the impugned assessment order.

7. We have heard both the parties on this issue and also gone through the orders passed by the lower authorities as well as the judgments relied upon before us. In our view, we need to decide following issues, before we go into any other issues or merits of the impugned order:

1. Whether the assessee can challenge the validity of an assessment order during the appellate proceedings pertaining to examination of validity of order passed u/s 263?
2. Whether the impugned assessment order passed u/s 143(3) dated 24-10-2013 was valid in the eyes of law or a nullity as has been claimed by the assessee?
3. If the impugned assessment order passed u/s 143(3) was illegal or nullity in the eyes of law, then, whether the CIT had a valid jurisdiction to pass the impugned order u/s 263 to revise the non est assessment order?

In our considered view, since these issues are jurisdictional issues and go to the root of the matter, therefore before dealing with any other issue, we shall first deal with all above three issues one by one, as under:

**8. Challenging the jurisdictional defects of assessment order for assailing the jurisdictional validity of the revision order passed u/s 263:**

The first issue that arises for our consideration is - whether the assessee can challenge the jurisdictional validity of order passed u/s 143(3) in the appellate proceedings taken up for challenging the order passed u/s 263? If we analyse the nature of both of these proceedings, which are under consideration before us, we find that the original assessment proceedings can be classified in a way as 'primary proceedings'. These are, in effect, basic / foundational proceedings and akin to a platform upon which any subsequent proceedings connected therewith can rest upon. The proceedings initiated u/s 263 seeking to revise the original assessment order is off shoot of the primary proceedings and therefore, these may be termed as '**collateral proceedings**' in the legal framework. The issue that arises here is whether any illegality/invalidity in the order passed in the 'primary proceedings' can be set up in the 'collateral proceedings' and if yes, then of what nature?

8.1. We have analysed this issue carefully. There is no doubt that after passing of the original assessment order, the primary (i.e. original proceedings) had come to an end and attained finality and, therefore,

outcome of the same cannot be disturbed, and therefore, the original assessment order framed to conclude the primary proceedings had also attained finality and it also cannot be disturbed at the instance of the assessee, except as permitted under the law and by following the due process of law. Under these circumstances, it can be said that effect of the original assessment order cannot be erased or modified subsequently. In other words, whatever tax liability had been determined in the original assessment order that had already become final and that cannot be sought to be disturbed by the assessee. But, the issue that arises here is that if the original assessment order is illegal in terms of its jurisdiction or if the same is null & void in the eyes of law on any jurisdictional grounds, then, whether it can give rise to initiation of further proceedings and whether such subsequent proceedings would be valid under the law as contained in Income Tax Act? It has been vehemently argued before us that the subsequent proceedings (i.e. collateral proceedings) derive strength only from the order passed in the original proceedings (i.e. primary proceedings). Thus, if order passed in the original proceedings is itself illegal, then that cannot give rise to valid revision proceedings. Therefore, as per law, the validity of the order passed in the primary (original) proceedings should be allowed to be examined even at the subsequent stages, only for the limited purpose of examining whether the collateral (subsequent) proceedings have been initiated on a valid legal platform or not and for examining the validity of assumption of jurisdiction to initiate the collateral proceedings. If it is not so allowed, then, it may so happen that though order passed in the original proceedings was illegal and thus order passed in the subsequent proceedings in turn would also be illegal, but in absence of a remedy to contest the same, it may give rise to an 'enforceable' tax liability without authority of law. **Therefore, the Courts have taken this view that jurisdictional aspects of the order passed in the primary proceedings can be examined in the collateral proceedings also.** This issue is not res integra. This issue has been decided in many judgments by various courts, and some of them have been discussed by us in followings paragraphs.

8.2. In a matter that came up before Hon'ble Supreme Court in the case of **Kiran Singh & Ors. v. Chaman Paswan & Ors., [1955] 1 SCR 117** the facts were that the appellant in that case had undervalued the suit at Rs.2,950 and laid it in the court of the Subordinate Judge, Monghyr for recovery of possession of the suit lands and mesne profits. The suit was dismissed and on appeal it was confirmed. In the second appeal in the High Court the Registry raised the objection as to valuation under Section 11. The value of the appeal was fixed at Rs.9,980. A contention then was raised by the plaintiff in the High Court that on account of the valuation fixed by the High Court the appeal against the decree of the court of the Subordinate Judge

did not lie to the District Court, but to the High Court and on that account the decree of the District Court was a nullity. Alternatively, it was contended that it caused prejudice to the appellant. In considering that contention at page 121, a four Judge Bench of Hon'ble Supreme Court speaking through Vankatarama Ayyar, J. held that:

**"it is a fundamental principle well-established that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree and such a defect cannot be cured even by consent of parties."**

8.3. This judgment was subsequently followed by Hon'ble Supreme Court in the landmark case of **Sushil Kumar Mehta vs Gobind Ram Bohra, (1990) 1 SCC 193**, wherein an issue arose whether a decree can be challenged at the stage of execution and whether a decree which remained uncontested operates as res-judicata qua the parties affected by it. Hon'ble apex court, taking support from aforesaid judgment, observed as under:

**"In the light of this position in law the question for determination is whether the impugned decree of the Civil Court can be assailed by the appellant in execution. It is already held that it is the Controller under the Act that has exclusive jurisdiction to order ejectment of a tenant from a building in the urban area leased out by the landlord. Thereby the Civil Court inherently lacks jurisdiction to entertain the suit and pass a decree of ejectment. Therefore, though the decree was passed and the jurisdiction of the Court was gone into in issue Nos. 4 and 5 at the ex-parte trial, the decree there-under is a nullity, and does not bind the appellant. Therefore, it does not operate as a res judicata. The Courts below have committed grave error of law in holding that the decree in the suit operated as res judicata and the appellant cannot raise the same point once again at the execution."**

8.4. Similar view has been taken by Hon'ble Supreme Court by following aforesaid judgments recently in the case of **Indian Bank vs Manual Govindji Khona reported in 2015 (3) SCC 712**. Further, similar view was emphasized by **Hon'ble Bombay High Court (GOA Bench)** in the case of **Mavany Brothers vs CIT** (Tax Appeal No 8 of 2007) in its order dt 17th April, 2015 wherein it was held that an issue of jurisdiction can be raised at any time even in appeal or execution.

**8.5.** The aforesaid principles, enunciated by the Apex Court in the case of **Kiran Singh & Ors. v. Chaman Paswan & Ors, supra** were reiterated by the Apex Court in the cases of **Superintendent of Taxes vs Onkarmal Nathmal Trust (AIR 1975 SC 2065)** and **Dasa Muni Reddy v. Appa Rao (AIR 1974 SC 2089)**. In the first of these decisions it was pointed out that revenue statutes protect the public on the one hand and confer power upon the State on the other, and the fetter on the jurisdiction is one meant to protect the public on the broader ground of public policy and, therefore, jurisdiction to assess or reassess a person can never be waived or created by consent. This decision shows that the basic principle recognized in **Kiran Singh (supra)** is applicable even to revenue statutes such as the Income Tax Act. **Dasa Muni Reddy (supra)** is a judgment where the principle of '**coram non judice**' was applied to rent control law. **It was held that neither the rule of estoppel nor the principle of res judicata can confer the Court jurisdiction where none exists.** Here also the principle that was put into operation was that jurisdiction cannot be conferred by consent or agreement where it did not exist, nor can the lack of jurisdiction be waived.

**8.6.** These judgments were subsequently noticed by **Hon'ble Gujarat High Court in the case of P. V. Doshi 113 ITR 22(Gujrat)**. This case arose under the Income Tax Act with reference to the provisions of Section 147 dealing with re-assessment. The facts were that the assessment was sought to be reopened under Section 147 and notice under section 148 was issued. Validity of reopening was not challenged upto Tribunal and additions were challenged on merits only. The Tribunal restored the matter to the Assessing Officer with some directions to reexamine the issue on merits. When the matter came back to the assessing officer the assessee specifically raised the point of jurisdiction to reopen the assessment, contending that the notice of reopening was prompted by a mere change of opinion. The AO rejected plea of the assessee but the AAC accepted this ground and also held the reassessment to be bad in law on jurisdictional ground. Against the order of the AAC the Revenue went in appeal before the Tribunal and specifically raised the plea that the question of jurisdiction to reopen the assessment having been expressly given up by the assessee in the appeal against the reassessment order in the first round, the assessee was debarred from raising that point again before the AAC and the AAC was equally wrong in permitting the assessee to raise that point which had become final in the first round and in adjudicating upon the same. The plea of the Revenue impressed the Tribunal which took the view that after its earlier order in the first round of proceedings the matter attained finality with regard to the point of jurisdiction which was given up before the AAC and not agitated further and that in the remand proceedings what was open before the

Assessing Officer was only the question whether the addition was justified on merits and the point regarding the jurisdictional aspect was not open before the Assessing Officer. According to the Tribunal, the assessee having raised the point in the first round and having given it up could not revive it in the second round of proceedings where the issue was limited to the merits of the additions. In this view, the Tribunal accepted the Revenues plea. The assessee thereafter carried order of the Tribunal in reference before the Gujarat High Court. The High Court after considering various judgments of the Supreme Court on the point of jurisdiction to reopen the assessment and also after specifically discussing the judgment of the **Supreme Court in Onkarmal Nathmal Trust (supra) and Dasa Muni Reddy (supra)** held that the Tribunal was in error in holding that the question of jurisdiction became final when it passed the earlier remand order. It was held that neither the question of res judicata nor the rule of estoppel could be invoked where the jurisdiction of an authority was under challenge. **According to Hon'ble Gujarat High Court, the rule of res judicata cannot be invoked where the question involved is the competence of the Court to assume jurisdiction, either pecuniary or territorial or over the subject matter of the dispute.** Hon'ble High Court further held that since neither consent nor waiver can confer jurisdiction upon the Assessing Officer where it did not exist, no importance could be attached to the fact that the assessee, in the first round of proceedings, expressly gave up the plea against the erroneous assumption of jurisdiction by the assessing authority. According to the Hon'ble Court, the **"finality or conclusiveness could only arise in respect of orders which are competent orders with jurisdiction and if the proceedings of reassessment are not validly initiated at all, the order would be a void order as per the settled legal position which could never have any finality or conclusiveness. If the original order is without jurisdiction, it would be only a nullity confirmed in further appeals'**. In this view of the matter, Hon'ble High Court finally answered the reference in favour of the assessee.

**8.7.** It is further noted that many of these judgments were discussed and followed by the co-ordinate bench of the Tribunal in the case of **Indian Farmers Fertilizers Co-operative Ltd vs KIT 105 ITD 33 (Del)**, wherein a similar issue had arisen. In this case, the issue raised before the bench was whether it is open to the assessee, not having appealed against the reassessment order, **to set up or canvass its correctness in collateral proceedings taken for rectification thereof u/s 154.** The bench minutely analysed law in this regard and applying the principle of **'coram non judice'** and following aforesaid judgments of the supreme court, it was held that **if an assessee seeks to challenge the reassessment proceedings as being without jurisdiction, when action for rectification is sought to be taken on the assumption of the validity of the reassessment order, then the assessee**

**has to step in and protect its interests and the liberty to question even the validity of the reassessment proceedings ought to be given to it....."**  
(emphasis supplied)

**8.8.** Similar view was taken in another decision of the Tribunal in the case of **Dhiraj Suri vs ACIT 98 ITD 87 (Del)**. In the said case, appeal was filed by the assessee before the Tribunal against the levy of penalty. In the appeal challenging the penalty order, the assessee challenged the validity of block assessment order which had determined the tax liability of the assessee on the basis of which penalty was levied subsequently. The revenue objected with respect to the ground of the assessee raising jurisdictional issues of assessment proceedings in the appeal against the penalty order. After analysing the legal position, as clarified by Hon'ble Gujrat High Court in the case of P.V. Doshi, supra and **Hon'ble Bombay High Court in the case of Jainaravan Babulal vs CIT. 170 ITR 399**, the bench held as that **if the block assessment itself is without jurisdiction then there is no question of levy of any penalty u/s. 158BFA(2) and therefore it is open to the assessee to set up the question of validity of the assessment in the appeal against the levy of penalty.**

**8.9.** We also derive support from another judgement of **Hon'ble Bombay High Court** in the case of **Inventors Industrial Corporation Ltd vs CIT 194 ITR 548 (Bombay)** wherein it was held that assessee was entitled to challenge the jurisdiction of the AO to initiate re-assessment proceedings before the CIT(A) in the second round of proceedings, even though he had not raised it in earlier proceedings before the Assessing Officer or in the earlier appeal.

**8.10.** Thus, on the basis of aforesaid discussion we can safely hold that as per law, the assessee should be permitted to challenge the validity of order passed u/s 263 on the ground that the impugned assessment order was non est and we hold accordingly."

*The Tribunal further in para 10 & 11 of the order has observed as under:*

**"10. If the impugned assessment order passed u/s 143(3) was illegal or nullity in the eyes of law, then, whether the CIT had a valid jurisdiction to pass the impugned order u/s 263 to revise the non est assessment order:** Having decided the aforesaid two issues, the next issue that is to be decided by us is about the validity of order passed u/s 263 by the Ld. CIT seeking to revise the assessment order which was nullity in the eyes of law.

**10.1.** We have discussed in detail in earlier part of our order that an invalid order cannot give birth to legally valid proceedings. It is further noticed by us that some of the judgments relied upon by the Ld. Counsel have already addressed this issue. This issue has also been decided by the co-ordinate bench (Delhi Bench of Tribunal) in the case of **Krishna Kumar Saraf vs CIT (supra)**. The relevant part of the order is reproduced below:

"17. There is no quarrel with the proposition advanced by Id. DR that the proceedings u/s 263 are for the benefit of revenue and not for assessee.

18. However, u/s 263 the Id. Commissioner cannot revise a non est order in the eye of law. Since the assessment order was passed in pursuance to the notice U/S 143(2), which was beyond time, therefore, the assessment order passed in pursuance to the barred notice had no legs to stand as the same was non est in the eyes of law. All proceedings subsequent to the said notice are of no consequence. Further, the decision of Hon'ble Madras High Court in the case of CIT Vs. Gitsons Engineering Co. 370 ITR 87 (Mad) clearly holds that the objection in relation to non service of notice could be raised for the first time before the Tribunal as the same was legal, which went to the root of the matter.

**19. While exercising powers u/s 263 Id. Commissioner cannot revise an assessment order which is non est in the eye of law because it would prejudice the right of assessee which has accrued in favour of assessee on account of its income being determined.** If Id. Commissioner revises such an assessment order, then it would imply extending/ granting fresh limitation for passing fresh assessment order. It is settled law that by the action of the authorities the limitation cannot be extended, because the provisions of limitation are provided in the same.

20. In view of above discussion, ground no.3 is allowed and revision order passed u/s 263 is quashed."

**10.2.** It is further noticed by us that similar view has been taken by Chandigarh Bench of the Tribunal in the case of **Steel Strips Ltd (supra)**.

11. Thus, after taking into account all the facts and circumstances of the case, we find that in this case, the original assessment order passed u/s 143(3) dt 24-10-2013 was null & void in the eyes of law as the same was passed upon a non-existing entity and, therefore, the Ld. CIT could not have assumed jurisdiction under the law to make revision of a non est order and, therefore, the impugned

order passed u/s 263 by the Ld.CIT is also nullity in the eyes of law and therefore the same is hereby quashed.”

12. *A perusal of the above order reveals that various Courts of Law including the Hon’ble Supreme Court has held that a defect of jurisdiction whether its pecuniary or territorial or whether it is a subject- matter of the action, strikes at the very validity of the Court to pass any decree and such a defect cannot be cured even by consent of the parties. That a decree passed by a Court without jurisdiction is a nullity and that its invalidity can be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. That the issue of jurisdiction can be raised at any stage even in appellate or execution stage. Neither the Rule of Estoppels nor the Principle of res-judicata can confer the jurisdiction where none exists. The facts in the case of P. B. Doshi (supra) are very much relevant wherein re-assessment proceedings were initiated against assessee and an addition was made to his income. Before AAC, contention about validity of notice for re-assessment was given up by the assessee and on merits appeal was dismissed. On further appeal, Tribunal remanded matter to file of ITO with direction to on re-examine witness and then complete assessment. ITO on remand completed assessment and again made addition. On appeal, assessee re-agitated point of validity of re-assessment proceedings on ground that there was mere change of opinion. AAC found that no reasons were recorded by ITO before issuing notice for re-assessment and, therefore, held that ITO had no jurisdiction to re-open assessment. Tribunal held that in restoring case to file of ITO by earlier order, only point left open was in respect of addition of on merits and that legal or jurisdictional aspect whether re-assessment proceedings were legally initiated was not kept open; It also held that even though this point went to root of jurisdiction and was pure question of law, merely because point was initially raised and not pressed when matter was taken up before AAC, it could be waived and it could not be re-agitated ; The the Hon’ble Gujarat High Court reversing the order of the Tribunal held that if the jurisdiction cannot be conferred by consent, there would be no question of waiver, acquiescence or estoppel or the bar of res judicata being attracted because the order in such cases would lack inherent jurisdiction unless the conditions precedent are fulfilled and it would be a void order or a nullity. The above decision of the Hon’ble Gujrat High Court has also been followed by the co-ordinate bench of the Tribunal in the case of “Indian Farmers Fertilizers Co-operative Ltd vs KIT” ( Supra) as discussed above.*

*Even, the Tribunal in the case of Dhiraj Suri (supra) in an appeal against the penalty order has held that if the assessment order was without jurisdiction, there was no question of levy of penalty, therefore, it was open to the assessee to set up the question of validity of the assessment in the appeal against levy of penalty. The Hon'ble Bombay High Court in the case of investors Industrial Corporation (supra) has held that the assessee was entitled to challenge the jurisdiction of the AO to initiate reopening of assessment proceedings before the CIT (A) in the second round of proceedings even though it has not raised the same before earlier proceedings before the AO or in the earlier appeal.*

*13. In the light of various case laws as cited above, the proposition that is coming out is that the jurisdiction or the legality of the proceedings can be agitated in a subsequent proceedings or even in a collateral proceedings or an execution proceedings also. If, the original order is illegal or without jurisdiction, the subsequent or collateral proceedings arisen out of such orders or proceedings, cannot be held to be valid. “*

6.4. In view of the above referred decisions of the various hon'ble High Courts and of the co-ordinate Benches of the Tribunal, it is accordingly held that the legality/jurisdictional aspect of the base assessment order can be contested in collateral proceedings also.

7. To stress, the point that the order the order passed u/s 147 of the Act was bad in law, the ld. counsel for the assessee has invited our attention to the impugned assessment order dated 31.12.2010 to submit that as noted in the said assessment order itself, the original return of income in this case has been filed by the assessee on 31.08.2009. The ld. counsel has further submitted that as per the 1<sup>st</sup> Proviso to section 143(2) of the Act as applicable for the assessment year under consideration, the Assessing Officer, if intended to scrutinise the return of income of the assessee, could have issued notice u/s 143(2) of the Act up to six months from the end of the financial year in which the return

was furnished. The ld. counsel, therefore, has submitted that the limitation period to issue the notice u/s 143(2) of the Act was available to the Assessing Officer up to 03.09.2010. That, the Assessing Officer, if wanted to make the scrutiny assessment in this case u/s 143(3) of the Act, he should have issued notice u/s 143(2) by 03.09.2010. The ld. counsel has further invited our attention to the copy of the impugned notice u/s 148 of the Act, which is dated 05.04.2010. The ld. counsel for the assessee has submitted that the Hon'ble Supreme Court as well as by the various Hon'ble High Courts of the country, have held that the notice of reassessment u/s 148 of the Act cannot be issued and reassessment proceedings cannot be initiated till the limitation period to carry out original assessment proceedings u/s 143(3) has not expired. The ld. counsel, therefore, has submitted that as per the settled law when there is a time available to the Assessing Officer to issue notice u/s 143(2) of the Act to proceed with the scrutiny assessment proceedings, he was not supposed to proceed u/s 147 r.w.s. 148 of the Act for reopening of the assessment proceedings. He, in this respect, has made the following written submissions along with case laws:

*"2. The assessee relies on the following decisions in support of its contentions:*

*a) In Trustees of H.E.H. The Nizam's Supplemet Family Trust vs. CIT [2000] 242 ITR 381 (SC) wherein the Supreme court held as under: (page 387 of 242 ITR):*

*"It is settled law that unless the return of income already filed is disposed of, notice for reassessments under section 148 could not be issued, i.e., no reassessment proceedings could be initiated so long as the assessment proceedings pending on the basis of the return already filed are not terminated. According to the revenue, it is immaterial whether the order is communicated or not and that the only bar to the reassessment proceedings is that proceedings on the return already filed should have been terminated. In support of this contention, reference was made to certain decisions of the High*

Courts and some observations made by this Court in a case which we note as under :

**9.** In *M.Ct. Muthuraman v. CIT [1963] 50 ITR 656 (Mad.)*, the assessment proceedings which had commenced with the returns filed by the assessee were lawfully terminated when they were closed with the entry "N.A." (not assessed). The orders terminating the assessment proceedings were not communicated to the assessee. The ITO issued notices under section 34 of the Indian Income-tax Act, 1922 (corresponding to section 147 of the Income-tax Act, 1961). The Court held that the assessment proceedings were lawfully terminated and that (page 660) "the orders terminating the assessment proceedings which were not apparently communicated to the assessee did not affect the legality of those orders or their finality".

b) In *CIT vs. K.M. Pachayappan [2008] 304 ITR 264 (Mad)* wherein the Madras High Court held as under (Page 266 of 304 ITR):

Heard counsel. In this case, return of income was filed under section 139(4) of the Act on March 15, 2000, and notice under section 143(2) for framing assessment under section 143(3) could have been issued up to March 31, 2000. Therefore, a valid return of income was pending as on March 15, 2000. The Assessing Officer issued notice under section 148 on March 15, 2000 when a valid return under section 139(4) was pending. In this case, the return was filed and the same is pending, which means that the proceeding is still pending. In such a situation, the Revenue could not have issued notice for the purpose of reopening under section 147 of the Act. In the case of *Trustees of H. E. H. The Nizam's Supplemental Family Trust v. CIT [2000] 242 ITR 381*, the Supreme Court considered the scope of reopening the assessment and held as follows (pages 387 and 390) :

"It is settled law that unless the return of income already filed is disposed of, notice for reassessment under section 148 cannot be issued, i.e., no reassessment proceedings can be initiated so long as assessment proceedings pending on the basis of the return already filed are not terminated. According to the Revenue, it is immaterial whether the order is communicated or not and the only bar to the reassessment proceedings is that proceedings on the return already filed should have been terminated."

"A mere glance at this note would show that it could not be said that the Income-tax Officer gave finality to the refund since no refund is granted either in the hands of the trust or in the hands of the

beneficiaries. It is an inconclusive note where the Income-tax Officer left the matter at the stage of consideration even with regard to refund in the hands of the beneficiaries. This note was also not communicated to the trustees. When we examine the note dated November 10, 1965, on the file of 1963-64 nothing flows from that as well. In any case if it is an order, it would be appealable under section 249 of the Act. Since the period of limitation starts from the date of intimation of such an order, it is imperative that such an order be communicated to the assessee. Had the Income-tax Officer passed any final order, it would have, been communicated to the assessee within a reasonable period. In any case, what we find is that the note dated November 10, 1965, is merely an internal endorsement on the file without there being an indication if the refund application has been finally rejected. By merely recording that in his opinion, no credit for tax deducted at source is to be allowed, the Income-tax Officer cannot be said to have closed the proceedings finally. The decisions referred to by the Revenue are of no help in the present case. We are, thus, of the opinion that during the pendency of the return filed under section 139 of the Act along with the refund application under section 237 of the Act, action could not have been taken under section 147/148 of the Act. Our answer to the question, therefore, is in the negative, i.e., against the Revenue."

c) *The Hon'ble Madras High Court in CIT vs. Qatalys Software Technologies Ltd. [2009] 308 ITR 249 (Mad) wherein following the decision of the Hon'ble High Court in CIT vs. K. M. Pachayappan in 304 ITR 264 (Mad) held that:*

*"7. Applying the principles enunciated in the judgments of the Supreme Court as well as the Delhi High Court, cited supra, the Tribunal is right in coming to a conclusion that no action could be initiated under Section 147 of the Act, when there is a pendency of the return before the Assessing Officer. The reasons given by the Tribunal are based on valid materials and evidence and we do not find any error or illegality in the order of the tribunal so as to warrant interference."*

d) *In CESC Ltd. vs. DCIT (No.2) [2003] 263 ITR 402 (Cal) wherein the Calcutta High Court held as under (Page 412 of 263 ITR):*

*"It is an admitted proposition that the jurisdiction for assessment of non-residents has been conferred upon the authorities at Mumbai. All non-residents are assessed at Mumbai. The jurisdiction relating to such assessment by the Dy. Commissioner, Mumbai, cannot be questioned. The said proceedings cannot be taken up anywhere else*

in India. In connection with such proceedings, the Dy. Commissioner, Mumbai, has authority to summon or ask for information from any person throughout India in connection with such proceedings. Now it is to be considered whether issue of a notice in connection with a proceeding pending before the Deputy Commissioner of Income Tax, Mumbai would give rise cause of action to such an extent enabling the High Court having territorial jurisdiction where such notices were served to exercise its discretion to assume jurisdiction even if such service of notice is an integral part of the cause of action or even if it prima facie appears to be without jurisdiction.”

e) In *Jhunjhunwala Vanaspati Ltd. vs. ACIT (no. 2) [2004] 266 ITR 664 (All)* wherein the Allahabad High Court held as under (page 666 of 266 ITR):

“12. Be that as it may, there is no dispute that once the CIT (Appeals) passed an order of remand on 15-3-1994, sic the assessment proceedings became pending before the Assessing Officer.

13. It is well settled that notice under section 148 cannot be issued when assessment proceedings are pending vide *CIT v. Ranchhoddas Karsondas [1959] 36 ITR 569 (SC)*, *CIT v. S.RamanChettiar [1965] 55 ITR 630 (SC)*, *N.NaganathaIyer v. CIT [1966] 60 ITR 647 (Mad.)*, *Ram Bilas Kedar Nath v. ITO [1963] 47 ITR 586 (All.)*, *Dr. Onkar Dutta Sharma v. CIT [1967] 65 ITR 359 (All.)*, *Sool Chand Ram Sewak v. CIT [1969] 73 ITR 466 (All.)*, *S.P.Kochhar v. ITO [1984] 145 ITR 255<sup>1</sup> (All.)*

*Trustees of H.E.H. Nizam's Supplemental Family Trust v. CIT [2000] 242 ITR 381<sup>2</sup> (SC)* and *CIT v. M.K.K.R. Muthu Karuppan Chettiar [1970] 78 ITR 69 (SC)*, etc.

14. In the present case the petitioner filed a Supplementary Affidavit stating that against the order of the CIT (Appeals) an appeal was filed before the Income-tax Appellate Tribunal which has been dismissed on 28-1-1997 (vide Annexure-SA 1). Hence the order of the CIT (Appeals) stands confirmed.

In the circumstances it is not necessary for us going into the other points urged by the petitioner.

In view of the above, we are of the opinion that the impugned notice dated March 18, 1994, under Section 148 is invalid and it is hereby quashed. The petition is allowed. No order as to costs.”

f) Same is also the mandate of Hon'ble Delhi High Court in *[2007] 292 ITR 49 KLM Royal Dutch Airlines vs. Assistant Director of Income Tax* wherein

it has been held that where an assessment has not been framed at all, it is not possible to posit that income has escaped assessment. It was held:

*“7. In our opinion section 147/148 cannot be interpreted in isolation of the other provisions of Chapter-XIV of the Income-tax Act which is the fasciculus dealing with the procedure for assessment. Section 139 makes it mandatory for every person whose total income exceeds the maximum amount which is not chargeable to Income-tax, to furnish a return of income by the due date. Section 142 deals with the inquiry before assessment. The first sub-section thereof empowers the Assessing Officer to issue a notice to any person to file a return or to produce its accounts or any documents or to provide any information as the Assessing Officer may require. Sub-section(2) empowers the Assessing Officer to make any inquiry he considers necessary. Sub-section (3) incorporates the audi alteram partem rule of natural justice viz. providing to the affected party an opportunity of being heard. Section 143 deals with the dispatch of intimations specifying the sum payable as tax or interest that has been found by the Assessing Officer to be due on the basis of the return; it deals with refunds payable to the assessee. The neat question which arises before us is whether on the commencement of assessment proceedings must they first be brought to their logical conclusion by framing an assessment before embarking on the proceedings as envisaged in section 147/148 of the Income-tax Act; or more precisely stated, can resort to section 147 be made even whilst the normal assessment proceedings are pending conclusion. To find the answer we must keep in perspective that every return of income filed under section 139 may not result in its active and in-depth perusal or consideration by the Assessing Officer as it may receive an automatic onward passage under section 143(1). However, once an inquiry has been initiated by the Assessing Officer, it cannot but result in either the return being accepted as having been correctly computed by the concerned assessee, or for an assessment being conducted and concluded thereon by the Assessing Officer. The provisions of section 147 would have no role to play at this stage of the proceedings. Once a return of income attracts the attention and scrutiny of the Assessing Officer, it is his bounden duty to delve into every aspect thereof. The Assessing Officer is sufficiently empowered to ask for all information necessary for framing the assessment. The only fetter on the amplitude of his discretion is that the assessment must be framed within the time limit set-down by section 153 which, in substance, is two years from the end of the assessment year in which the income was first assessable or one year from the end of the financial year. A perusal of its second sub-section makes it clear*

that proceedings under section 147 are altogether different to those under section 143. This distinction appears to have escaped the attention of the revenue. Sub-section (2) stipulates that no order under section 147 shall be made after the expiry of one year from the end of the financial year in which notice under section 148 was served.

**8.** Section 147 of the Income-tax Act deals with the powers of the Assessing Officer to 'assess' or reassess the income chargeable to tax which has escaped assessment. Section 148 contemplates making the 'assessment', reassessment or recomputation under section 147. Keeping the factual matrix before us in perspective, it becomes critical to define the word assess since the Assessing Officer is avowedly not reassessing or recomputing the income presented by the assessee for taxation in the form of its return. It is trite that the words assess, reassess or recompute are not synonymous of each other. It seems to us that an assessment must entail a conscious and concerted calculation carried out by the concerned officer with a view to determine the amount of tax payable by any person. The exercise commencing with section 139 and ending at section 145A cannot be interpreted as identical to or overlapping section 147/148/149. They are predicated on different circumstances and operate in disparate dimensions. The Income-tax Act makes it incumbent upon every person whose total income exceeds the maximum amount which is not chargeable to Income-tax to file a return of income in order to kick-start the normal assessment procedure. However, it may happen that a person fails to file a return of income, say for the assessment year 2000-01, even though he is liable to pay tax. It could also happen that a person may file a return of income incorrectly offering for purposes of taxation a sum lower than the correctly calculated income. Both these situations have been obviously kept in view in 2nd Explanation to section 147 and in its clauses (a) and (b). In either event the Assessing Officer would invoke the powers conferred upon him by section 147 of the Income-tax Act culminating with the completion of the assessment. It is also conceivable that the incorrectness of the return may not be detected or noticed within the time period set-down in section 153. In these circumstances if the Assessing Officer has reason to believe, predicated on information received by him, that income chargeable to tax has escaped assessment, he would invoke the powers under section 147. On the other hand, where a return of income has been filed but has been taken at its face value, without any proceedings under section 143(2) and 143(3) having been conducted, no assessment exercise would obviously have been undertaken. After the expiry of the time

period set-down in section 153, this situation can be remedied by the Assessing Officer by invoking section 147. The word 'assessment' has been defined in the Act in a most unsatisfactory manner, merely by stating that it includes reassessment. A more comprehensive definition is readily available in the Australian decision titled *Batagol v. Federal Commissioner of Taxation* (1963) 109 CLR 243 in these words :

" . . . assessment means the completion of the process by which the provisions of the Act relating to liability to tax are given concrete application in a particular case with the consequence that a specified amount of money will become due and payable as the proper tax in that case".

**9.** A 'clearance' or notice or intimation under section 143(1) of the Act clearly falls beyond the parameters of this definition. In *Punjab Tractors Ltd. v. Jt. CIT* [2002] 254 ITR 242 (Punj. & Har.) it was opined that it is not necessary that assessment should have been finalised under section 143(3) before it can be 'reopened' under section 147, since an intimation under section 143(1) operates an order of assessment unless the Assessing Officer proceeds to give notice under section 143(2) and passes an order under section 143(3) . This very understanding of the law has been articulated by the Division Bench of the Allahabad High Court in *Pradeep Kumar Har Saran Lal v. Assessing Officer* [1998] 229 ITR 46 which, in turn, followed the view of the Calcutta High Court in *Jorawar Singh Baid v. Asstt. CIT* [1992] 198 ITR 47 wherein it has been observed that - "the power that can be exercised under section 143(2) to correct the assessment made under section 143(1) does not exclude the power of the Assessing Officer to reopen the assessment under section 147 if the ingredients of section 147 are satisfied. It is open to the Assessing Officer to invoke the jurisdiction under section 147, notwithstanding the fact that there are other remedies open to him under the Act. It cannot, therefore, be accepted that the reassessment under section 147 is vitiated because the Assessing Officer failed to invoke his power to correct the assessment already completed under section 143(1) by issuing a notice under section 143(2) of the Act". However, in the present case since inquiries had been initiated under section 143(2), it became mandatory that they should have culminated in an order under section 143(3).

**10.** In *Trustees of H. E. H. the Nizam's Supplemental Family Trust v. CIT* [2000] 242 ITR 381 the Apex Court has observed that it is "settled law that unless the return of income already filed is disposed of, notice for reassessment under section 148 of the

*Income-tax Act, 1961, cannot be issued, i. e. , no reassessment proceedings can be initiated so long as assessment proceedings pending on the basis of the return already filed are not terminated. According to the revenue it is immaterial whether the order is communicated or not and the only bar to the reassessment proceedings is that proceedings on the return already filed should have been terminated". The following concluding passage from the said judgment is self-explanatory:-*

*"A return of income filed in the form prescribed along with an application for refund under section 237 of the Act is a valid return. There is no stopping the Income-tax Officer to complete the assessment on the basis of the return so filed. It may be that the Income-tax Officer may limit the scope of examination of the return to satisfy himself regarding the correctness of the amount claimed as refund. For that purpose, he will examine if the tax paid by the assessee exceeds the amount of tax with which he is chargeable. If it is found that the income was "nil", he will direct that refund be granted to the assessee of any amount of tax paid. That will certainly be assessment. The filing of a return in the form prescribed under section 139 of the Act along with the application for refund is not an empty formality. It assumes importance if such return had not been filed earlier. We have reproduced the note/order dated 10-11-1965, on the file pertaining to the assessment year 1963-64. In the file for the assessment year 1962-63 there is another note which is as under:-*

*'Please see my note in 1963-64 file. Refund to be considered in the hands of the beneficiaries'.*

*A mere glance at this note would show that it could not be said that the Income-tax Officer gave finality to the refund since no refund is granted either in the hands of the trust or in the hands of the beneficiaries. It is an inconclusive note where the Income-tax Officer left the matter at the stage of consideration even with regard to refund in the hands of the beneficiaries. This note was also not communicated to the trustees. When we examine the note dated 10-11-1965, on the file of 1963-64 nothing flows from that as well. In any case if it is an order, it would be appealable under section 249 of the Act. Since the period of limitation starts from the date of intimation of such an order, it is imperative that such an order be communicated to the assessee. Had the Income-tax Officer passed any final order, it would have been communicated to the assessee within a reasonable period. In any case, what we find is that the note dated 10-11-1965, is merely an internal endorsement on the*

*file without there being an indication if the refund application has been finally rejected. By merely recording that in his opinion, no credit for tax deducted at source is to be allowed, the Income-tax Officer cannot be said to have closed the proceedings finally. The decisions referred to by the revenue are of no help in the present case. We are, thus, of the opinion that during the pendency of the return filed under section 139 of the Act along with the refund application under section 237 of the Act, action could not have been taken under section 147/148 of the Act. Our answer to the question, therefore, is in the negative, i. e. , against the revenue. " (p. 390)*

**11.** *We would arrive at this very destination even if we were to traverse along a different dialectic, namely, if we were to analyse the circumstances in which section 147 of the Income-tax Act could be invoked. There is plenitude of precedents on this aspect of the law; hence only some of them shall be discussed. The question that had arisen before the Bombay High Court in *Western Outdoor Interactive (P.) Ltd. v. A. K. Phute, ITO [2006] 286 ITR 620* was whether, upon the rectification being set aside by the Commissioner (Appeals), notice for reassessment on the same grounds could validly be initiated; there was no failure on the part of the assessee to disclose material facts and no fresh information had been received by the Assessing Officer. At best, it was possible to say that two views were available and in such a situation it was held that the said provision was not available. In particular, the Bench noted the following enunciation of the law in *Indian Oil Corpn. v. ITO [1986] 159 ITR 956 (SC)* :*

*"The principles on this branch of law are well-settled.*

*To confer jurisdiction under clause (a) of section 147 of the Act beyond the period of four years but within a period of eight years from the end of the relevant year under section 148, . . . two conditions were required to be fulfilled: the first is that the Income-tax Officer must have reason to believe that the income, profits or gains chargeable to tax had been underassessed or escaped assessment; the second is that he must have reason to believe that such escapement or underassessment was occasioned by reason, so far as relevant for the present purpose, to disclose fully and truly all material facts necessary for the assessment of that year. Both these conditions are conditions precedent to be satisfied. See, in this connection, the observations of this court in *Calcutta Discount Co. Ltd. v. ITO [1961] 41 ITR 191* .*

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*As is well-settled now by the several authorities of this court and of several High Courts, there must be materials to come to the conclusion that there was 'omission or failure to disclose fully and truly all material facts necessary for the assessment of the year'. It postulates a duty on every assessee to disclose fully and truly all material facts necessary for the assessment. Therefore, an obligation is to disclose facts; secondly, those which are material; thirdly, the disclosure must be full and fourthly, true. What facts are material and necessary for assessment will differ from case to case. In every assessment proceeding, for computing or determining the proper tax due from the assessee, it is necessary to know all the facts which help the assessing authority in coming to the correct conclusion. From the primary facts in his possession, whether on disclosure by the assessee, or discovered by him on the basis of the facts disclosed, or otherwise, the assessing authority has to draw inferences as to certain other facts. But on the primary facts, it is for the taxing authority to draw inferences. It is not necessary for the assessee to draw inferences for him. See, in this connection, the observations in *Calcutta Discount Ltd. 's case (supra)*. " (p. 967)*

**12.** *The Full Bench of this Court in *CIT v. Kelvinator of India Ltd.* [2002] 256 ITR 1 had opined that the amendments introduced into section 147 with effect from 1-4-1989 have not altered the position that a mere change of opinion of the Assessing Officer was not sufficient ground for embarking on a reassessment. *Calcutta Discount* was duly considered and applied by the Full Bench. The Full Bench further observed that an order of assessment must be presumed to have been passed by the Assessing Officer concerned after due and proper application of mind. In these circumstances the decision of the Division Bench in *Consolidated Photo & Finvest Ltd. v. Asstt. CIT* [2006] 281 ITR 394 (Delhi), inasmuch as it is irreconcilable with the views of the Full Bench, must be held not to lay down the correct law. This is especially so since the assessment proceedings had not come to an end under the first sub-section of section 143, but under the third sub-section. A Division Bench of a particular High Court is fully bound by the view preferred by a larger Bench of that Court, regardless of the fact that another High Court prefers a different view [in this case that of the Gujarat High Court as in *Gruh Finance Ltd. v. Jt. CIT* [2000] 243 ITR 482, *Praful Chunilal Patel v. M. J. Makwana, Asstt. CIT* [1999] 236 ITR 832 (Guj.) and *Garden Silk Mills Ltd. v. Dy. CIT (No. 1)* [1996] 222 ITR 27 (Guj.). The Full Bench of this Court has taken into consideration both *Praful Chunilal Patel's case (supra)* as well as *Garden Silk Mills Ltd. 's case (supra)*. In *Kelvinator of India's Ltd. 's case (supra)* the Full Bench had also*

analysed the earlier Division Bench decisions, namely, *Jindal Photo Films Ltd. v. Dy. CIT [1998] 234 ITR 170 (Delhi)* presided over by R. C. Lahoti, J. (as learned Chief Justice of India then was) and *Bawa Abhai Singh v. Dy. CIT [2002] 253 ITR 83 (Delhi)* comprising Arijit Pasayat and D. K. Jain (as their Lordships then were). It is quite possible that had the Court in Consolidated Photo been made aware of the consistent opinion of this Court in *Jindal Photo Films Ltd.* 's case (supra) and *Bawa Abhai Singh's* case (supra), their conclusion may have been totally different, notwithstanding alternative view of the Gujarat High Court.

**13.** It also needs to be clarified that in *Mahanagar Telephone Nigam Ltd. v. Chairman, CBDT [2000] 246 ITR 173* the Division Bench of this Court opined that an intimation under section 143(1) (a) cannot be treated to be an order of assessment. Therefore, although the assessment had been completed under section 143(1) (a), recourse could be taken to section 147. In that case while finalising assessment for the assessment year 1996-97 under section 143 it was found that the claim of license fee made by the assessee was erroneous and should have been disallowed.

**14.** The diametrically opposite position had arisen in *CIT v. Sun Engg. Works (P.) Ltd. [1992] 198 ITR 297 (SC)*. It was held that "in the reassessment proceedings, it is not open to an assessee to seek a review of the concluded item, unconnected with the escapement of income, for the purpose of computation of the income escaping assessment; and, therefore, the Tribunal was right in holding that the respondent was not entitled to reagitate the question of the set-off of losses in the reassessment proceedings". In other words, reassessment must invariably be preceded by conclusion of the original proceedings. The decision of the Supreme Court in *Esthuri Aswathiah v. ITO [1961] 41 ITR 539* was applied by the Division Bench of the Madras High Court in *M. Ct. Muthuraman v. CIT [1963] 50 ITR 656* in reaching the conclusion that for the assessment years 1953-54 and 1954-55 the proceedings were lawfully terminated by the remark "N. A. " on the assessment file and notices under section 34 of the Indian Income-tax Act, 1922 were not invalid. With regard to the assessment years 1950-51 and 1951-52 the assessment proceedings have not been closed in any manner and as they were pending, the notices under section 34 were invalid. Finally, the notice for assessment year 1952-53 was invalid as the notice was issued before the date on which the appeal in respect of that year was disposed of.

**15.** *Applying this line of decisions to the facts of the present case, the inescapable conclusion that would have to be reached is that while assessment proceedings remain inchoate, no 'fresh evidence or material' could possibly be unearthed. If any such material or evidence is available, there would be no restrictions or constraints on its being taken into consideration by the Assessing Officer for framing the then current assessment. If the assessment is not framed before the expiry of the period of limitation for a particular assessment year, it would have to be assumed that since proceedings had not been opened under section 143(2), the return had been accepted as correct. It may be argued that thereafter recourse could be taken to section 147, provided fresh material had been received by the Assessing Officer after the expiry of limitation fixed for framing the original assessment. So far as the present case is concerned we are of the view that it is evident that, faced with severe paucity of time, the Assessing Officer had attempted to travel the path of section 147 in the vain attempt to enlarge the time available for framing the assessment. This is not permissible in law."*

*3. In view of the above settled law and the facts of the case the notice u/s 148 of the Act and the assessment order should be quashed.*

7.1. The ld. DR has not pointed out any contrary case law to the aforesaid legal proposition canvassed by the ld. AR.

7.2. In view of the above, the issue is squarely covered by the above referred to decisions of Hon'ble Supreme Court and that of various high courts, hence, respectfully following the same, it is held that the reassessment framed in this case was not legally valid, and hence, the subsequent order passed by the Ld. CIT-II Kolkata u/s 263 of the Act would have no legs to stand. Therefore, the consequential assessment order passed by the Assessing Officer u/s 143(3) r.w.s. 263 of the Act is also not legally sustainable.

8. Now coming to the appeal of Revenue on merits.

**ITA No.35/Kol/2021 -**

8.1. Coming to the merits of the case, the Assessing Officer has made the impugned additions observing that the assessee had failed to prove the identity and creditworthiness of the share subscribers and genuineness of the transaction. A perusal of the assessment order dated 29.03.2014 along with the documents filed in paper book would reveal that the Assessment order is a nonspeaking order without any discussions on the factual merits of the case. The Assessing Officer in this case has made general observation without discussing anything relating to the identity, creditworthiness, financials etc. of the share subscribers. Even, the name of the share subscribers has not been mentioned in the assessment order, what to say of further enquiry. On the other hand, the assessee has produced various documents showing that the notices issued u/s 133(6) were duly complied with by the share subscribers and necessary details and confirmations filed. Even reply was also sent to the Assessing Officer in response to the notices issued u/s 131 of the Act. However, the assessing officer, without going through any of the evidences furnished by the assessee and the relevant details/confirmations sent by the share subscribers, simply made the impugned additions solely on the ground that Director of the company did not appear personally before him in compliance of the summons issued u/s 131 of the Act.

9. Before the CIT(A), the assessee again furnished the relevant details and evidences to prove the identity and creditworthiness of the share subscribers and genuineness of the transaction and made detailed submissions, which have been reproduced in the impugned order of the CIT(A). The ld. CIT(A), after considering all the details and evidences on

the file and submissions of the assessee, deleted the addition, so made by the Assessing Officer, observing as under:

*“5.1 I have considered the issue in the assessment order framed by the AO in light of the arguments made by the appellant. The short issue for my consideration is that whether the ‘share application monies’ in the sum of Rs. 12,61,00,000/- disclosed by the appellant invite the mischief of the provisions of Section 68 of the Act or not. The provision of Section 68 of the Act deals with cash credit which reads as under:*

*“68. 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.”*

*According to this section, if identity, creditworthiness of the creditor and genuineness of the transaction is not proved and the explanation offered by the assessee is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income tax as income of the assessee of that previous year. It was argued by the AR of the appellant that the Assessing Officer never pointed out any defect in any of the explanations or evidences filed either by the appellant or by the share applicants and hence the AO was predetermined to make addition of the entire amount of share capital along with share premium amounting to Rs12,61,00,000/-.*

*5.2 It was argued by the AR that the addition was made with the predetermined mindset that share application monies received by the appellant is not genuine as Identity and creditworthiness of the shareholders were bogus in nature as they did not exist and the transactions were an eyewash only for converting its black money into white without paying any tax to the revenue. For better appreciation of facts, it is relevant to consider that during the previous year 2008-09 relevant to the assessment year under appeal, the appellant had raised share capital in the aggregate sum of 12,61,00,000/- by issuing 1,00,000 equity shares at par to the subscriber of Memorandum and 12,60,000 equity shares of the face value of 1/- each at a premium of Rs.99/- per share. It is found that 8 corporate shareholders subscribed to the aforesaid share capital raised by the appellant and all payments were made by each of them through a/c payee cheques drawn on their*

respective bankers. Each of the subscriber companies is regularly assessed to income tax and copies of scrutiny assessment orders have been filed before me in many cases; and the investments made by each of them are duly and fully reflected in their audited books of accounts as well as their income tax return. The appellant filed its return of total income u/s. 139 of the Act in respect of the assessment year 2009-10 on 31.03.2009 declaring a loss of Rs.4,407. The said return was accepted and processed by the AO u/s. 143(1) of the said Act. Subsequently, the AO issued a notice u/s. 148 of the Income Tax Act, 1961 requiring the appellant to file a fresh return of its total income for the assessment year under appeal, on the ground that the income assessable to tax of the appellant, for the said year, had escaped assessment within the meaning of sec. 147 of the said Act. In compliance with such notice, the appellant wrote a letter requesting the AO to treat the return originally filed on 31.03.2009 as having been filed in response to the said notice issued u/s. 148 of the Act. In the course of the said proceedings u/s 147 of the Act, the appellant in response to the requisitions made by the AO, from time to time, produced its audited books of accounts, filed copies of its audited annual accounts including various details and other documents as desired by the AO. The details and documents so produced and filed with the AO included, inter alia, full details of each of the 7 share applicant companies, which had subscribed to the aggregate share capital in the sum of Rs.12,61,00,000/- raised by the appellant during the assessment year under appeal. The AO on receipt of the aforesaid details from the appellant, issued notices u/s. 133(6) of the Act to the share subscribers on test check basis, who had subscribed to the share capital raised by the appellant; and on being satisfied with the replies received in response thereto by him from such share applicants, he had accepted the genuineness of the said share capital and accordingly, the AO framed the assessment order u/s. 143(3)/147 of the Act on 31.12.2010 and computed the total income of the appellant in the sum of Rs.57,203/- in respect of the assessment year under appeal. Subsequently, the Ld. C.I.T., Kolkata-II, Kolkata was of the opinion that the assessment so framed u/s. 143(3)/147 of the Income Tax Act 1961 is erroneous and prejudicial to the interest of the revenue and an order dated 25.03.2013 was passed u/s 263 of the Act setting aside the said assessment order dated 31.12.2010 with the direction as under:

i) Examine the genuineness and source of sham capital [not on a test check basis, but in respect of each and every shareholder by conducting independent enquiry not through the assessee. The bank account for the entire period should be examined in the course of verification to find out the money trail of the share capital

ii) Further the AO. should examine the directors as well as examine the circumstances which necessitated the change in directorship if applicable. He should examine them, on oath to verify their credentials as director and reach a logical conclusion regarding the controlling interest,

iii) The A.O, is directed examine the source of realization from the liquidation of assets shown in the balance sheet after the change of Directors; if any.”

The AO in the impugned assessment proceedings took steps to frame the fresh assessment order in respect of the assessment year under appeal. It is observed that that the AO had issued notices u/s. 133(6) of the Act, to each of the share Subscribers again. Such notices were duly served upon the respective share applicants at their respective addresses on the records of the appellant. Service of such notices u/s. 133(6) of the Act to each of the share applicants at their respective known addresses proves their respective identities. It is observed that each of the share applicants are registered under the Companies Act, 1956 and are on the records of Registrar of Companies functioning under Ministry of Corporate Affairs, Government of India. In fact, each of the share applicants has responded to the statutory notices issued to them u/s. 133(6) of the Act. In their respective replies, the share applicants had disclosed, inter alia, their Permanent Account Numbers along with the acknowledgment of their return of income and furnished audit report and financial statements which in my opinion proves their identities to the hilt. It is also observed that each of the share applicants maintained bank accounts; and copies of their respective bank accounts from which they made payments to the appellant for subscribing to the shares issued to them, was filed by each of them before the AO. Further, each of the share applicants accepted the fact that they had subscribed to the shares issued by the appellant; and that such transactions were duly reflected in their respective books of accounts, as well as in their audited Balance Sheets. These facts, in my opinion, clearly prove the genuineness of the transactions.

5.3. It is also observed that each of the share applicants explained the source of funds, from which they made payments to the appellant for subscribing to the share capital. It is imperative to consider the replies filed the share applicants before the AO in seriatim as under:

a. In the case of Adonis Marketing (P) Ltd. regarding the source of money mentioned at point no. (g) it was stated that:

*"Share Application Money received by the company from M/s Highlight Suppliers (P) Ltd. of 15- B, Clive Row, Kolkata-1 (PAN: AAHCA1676J)."*

*b. In the case of Debdaru Suppliers (P) Ltd. regarding the source of money mentioned at point no.(f) it was stated that:*

*"The source of investment was amount received from M/s Highlight Distributors (P) Ltd (PAN: AACCH0876N) pf P-27, Princep Street, Kolkata."*

*c. In the case of Dikson Trading & Finance Co. Ltd. regarding the source of money mentioned at point no. () it was stated that:*

*"The source of investment was fund received by company towards share application money."*

*d. In the case of Landscape Vinimay (P) Ltd. regarding the source of money mentioned at point no. (d) it was stated that:*

*"The Source of investment was fund credited towards share application money received from Adonis Marketing (P) Ltd of 63, Radha Bazar, Kolkata (AAHCA1673P). "*

*e. In the case of Mainak Suppliers P. Ltd. regarding the source of money mentioned at point number (c) it was stated that:*

*"Share Application Money received by the Company from M/s Highlight Distributors (P) Ltd of P-27, Princep Street, Kolkata (AACCH0876N)"*

*f. In the case of Olympus Vinimay P. Ltd. regarding the source of money mentioned at point number (g) it was stated that:*

*"Share Application Money received by the Company from M/s Highlight Distributors (P) Ltd of P-27, Princep Street, Kolkata (AACCH0876N)"*

*g. In the case of Omega Retails P. Ltd. regarding the source of money mentioned at point number (f) it was stated that:*

*"The Source of above investment was amount received from M/s Adonis Marketing (P) Ltd (PAN No AAHCA1673P)"*

*h. In the case of Viewpoint Marketing (P) Ltd. regarding the source of money mentioned at point number (3) it was stated that:*

*"The said amount was invested from amount received by the Company as share application money from M/s Highlight Distributors (P) Ltd of P-27, Princep Street, Kolkata (PAN No. AACCHO876N)"*

*These facts borne on record by the share applicants, in my opinion, clearly prove their source of funds, and their capacity for making such payments and accordingly. the criteria of their creditworthiness is proved. The AO has not found any defect and/or deficiency in the source of funds explained by the share applicants through their replies to the statutory notices issued u/s. 133(6) of the Act to them. It is also observed that every share applicant in their respective replies to the statutory notices issued u/s. 133(6) of the Act, furnished copies of their income tax acknowledgments evidencing filing of income tax returns by each of them, copies of their audited accounts including Balance Sheets wherein such investments made by each of them in the subscription of share capital issued by the appellant are duly reflected as also copies of their bank statements for the relevant period from which such subscription monies were paid by them respectively and copy of the allotment advise received by them from the appellant in respect of shares allotted to them. The return of allotment as well as the annual return for the relevant year filed by the appellant with the Registrar of Companies, Ministry of Corporate Affairs, further proves the fact of allotment of shares to the share applicants. It is further observed that the net worth of the each of the share applicants, as disclosed in their audited Balance Sheets, far exceeded the amount of investments made by them in the shares of the appellant. It is observed that funds held on account of shareholders disclosed in the balance sheets of Adonis Marketing Pvt. Ltd. is in a sum of Rs.14,40,92,776/- as on the 31.03.2009 and only a sum of Rs.2,20,00,000/- was invested as share application money with the appellant, Debdaru Suppliers Pvt. Ltd. is in a sum of 14,00,98,531/- as on the 31.03.2009 and only a sum of Rs.1,20,00,000/-/- was invested as share application money with the appellant, Dikson Trading & Finance Co. Ltd. is in a sum of Rs.14,27,08,877/- as on the 31.03.2009 and only a sum of 2,00,00,000/-/- was invested as share application money with the appellant, Landscape Vinimay Pvt. Ltd. is in a sum of Rs.24,00,98,849/- as on the 31.03.2009 and only a sum of 1,00,00,000/- was invested as share application money with the appellant, Mainak Suppliers Pvt. Ltd. is in a sum of Rs.21,07,97,189/- as on the 31.03.2009 and only a sum of Rs.1,00,00,000/- was invested as share application money with the appellant. Olympus Vinimay Pvt. Ltd. is in a sum of Rs.12,91,98,283/- as on the 31.03.2009 and only a sum of 1,00,00,000/- was invested as share application money with the appellant, Omega Retails Pvt. Ltd. is in a sum of 12,60,95,790/- as on the 31.03.2009 and only a sum of*

*Rs.2,20,00,000/- was invested as share application money with the appellant, Viewpoint Marketing Pvt. Ltd. is in a sum of Rs.20,02,96,891/- as on the 31.03.2009 and only a sum of Rs.2,00,00,000/- was invested as share application money with the appellant. It is accordingly observed that these facts adequately prove their credit worthiness to make investment in capital of the appellant company. The aforesaid facts underlined by evidences clearly prove the identity of the share applicants, their capacity and source of funds of the share applicants, as well as the genuineness of the transactions in relation to the share capital issued by the appellant, which was subscribed to by each of them. Thus, it is proved beyond any doubt or dispute that the share applicants are actually found to have subscribed to the share capital issued by the appellant, in the impugned previous year relevant to the assessment year under appeal, as clearly evident not only from their respective books of accounts, but also from their audited accounts filed with the income tax authorities in relation to their own income tax assessments, and the sources of such funds are also explained by each of the share applicants in their replies addressed to the AO. However, the AO had not brought these indisputable facts on record but acted on her whims and fancies. It is observed that the burden which lay on the appellant, in relation to s. 68 of the Act, has been duly discharged by it and nothing further remains to be proved by it on the issue.*

*5.4 In this respect it is relevant to refer to the decision of the Jurisdictional High Court In the case of CIT vs Sagun Commercial P. Ltd. [ITA No.54 of 2001 dated 17.02.2011 wherein it was held as under -*

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

*We, therefore, find no reason to interfere with the decision passed by the - Commissioner of Income-tax (Appeals) and the Tribunal below and answer the question formulated by the Division Bench in the affirmative and against the Revenue. The appeal is, thus, dismissed.”*

*Further, the Hon'ble Jurisdictional High Court in the case of CIT vs. Gayatri Portfolio Fund Pvt. Ltd. [ITA No. 664 of 2004 dated 25.08.2014], it was observed as under:*

*We find that the. Learned Tribunal has confirmed the order passed by the CIT who had overturned the order of the Assessing Officer by making the following observation:*

*“...We find that the identity of the 5 parties investing in the share capital is not in doubt They are body corporates and their complete addressees are on record. This is the very first assessment in the life of the assessee company. The amounts were deposited by these 5 corporates per account payee cheques. These parties were not shareholders of the assessee company at the time when the case was reopened under section 147 or when the summons were issued to them. We find that the assessee has filed before the A O. copies of share application forms duly signed along with the complete addresses of the investors along with their IT. Me numbers, account payee cheque numbers and the assessee's bank statements disclosing the deposits of these amounts. In these facts we find that the assessee has discharged its initial onus to prove the identity of the investors as well as their creditworthiness. It is not the case of the Revenue that the investor parties did not exist or that the money was not invested by them through banking channels.”*

*Having found such, the Tribunal had relied on the judgement in Hindusthan Tea Trading Co. Ltd. v, CIT(Cali): 263 ITR 289 (Cal) to uphold the order of the CIT. In view of the findings above note, no substantial*

*question of law arises and therefore, the appeal and the application am dismissed.”*

*Again, the Hon’ble Jurisdictional High Court In the case of CIT vs. Sanchati Projects P. Ltd. ITAT 140 of 2011 dated 08.06.2011] it was observed as under: -*

*“It appears from record that the assessee company during the relevant assessment year under appeal raised Ms share capital by way of receiving share application money against 1,64,000 equity shares aggregating to Rs.82,00,000/- from 8 different parties. The Assessing Officer, however, treated the share application money of Rs.45,00,000/- received from five different persons as unexplained cash credit the hands of the assessee.*

*According to the Assessing Officer; those parties had the same addresses as that of the assessee and they had no fixed assets and utilised their capitals in share application of the assessee company. The Assessing Officer; therefore, was of the view that the money ultimately went to the beneficiary through these companies and there was no advertisement even published by the assessee company inviting share application and no Registrar was engaged for such raising of share capital.*

*Being dissatisfied the assessee preferred an appeal before the Commissioner of Income-tax (Appeals). The Commissioner of Income-tax (Appeals), however, set aside the said order of assessment and came to the conclusion that all the share applicant/companies were assessed to the tax and their PAN and acknowledgement of IT. returns along with their audited balance sheets, bank statements showing transactions etc. were made available to the Assessing Officer. It was pointed out that there was no legal bar of more than one company being registered at the same address and, thus, according to the Commissioner of Income-tax (Appeals), the doubt raised by the Assessing Officer about all those companies at the same address did not hold good.*

*Being dissatisfied; the Revenue preferred an appeal before the Tribunal below and by the order impugned herein, the said Tribunal has affirmed the order passed by the Commissioner of Income-tax (Appeals),*

*After hearing Mr. Nizamuddin, learned advocate appearing on behalf of the appellant and after going through the aforesaid materials, we agree with the Tribunal below that the Assessing Officer failed to establish that the share applicants did not have the means to make investment and that such investment actually emanated from the coffers of the assessee company. The receipt of sham capital money had been duly recorded in the books of the assessee company and the payment of share application money was also duly recorded in the audited account of each of the sham applicants.*

*We, thus, find that both the authorities below on the basis of the aforesaid materials on record were quite justified in deleting the aforesaid addition of Rs.45,00,000/- done by the Assessing Officer, we are of the view that the order, impugned does not suffer from any defect whatsoever and no question of substantial error, of law arises justifying our interference.*

*The appeal is, thus, summarily dismissed. ”*

*There is no evidence on record to show that the identities of the share applicants are not proved and/or that the introduction of share capital by them was not genuine and/or its source of investment was not fully explained to the satisfaction of the AO. Further, the Hon'ble Jurisdictional High Court in the case of CIT vs. Dataware Private Ltd. [ITAT No.263 of 2011 dated 21.09.2011] wherein while examining the issue of addition of share application money received by the assessee company therein u/s. 68 of the Act, the Hon'ble Jurisdictional High Court held that after getting the PAN number and getting the information that the creditor is assessed under the Act, the Assessing Officer should enquire, from the Assessing Officer of the creditor as to the genuineness of the transaction and whether such transaction has been accepted by the assessing officer of the creditor but instead of adopting such course, the Assessing Officer himself could not enter into the return of the creditor and brand the same as unworthy of credence. The Hon'ble High Court further held that so long as it is not established that the return submitted by the creditor*

*(subscriber shareholder) has been rejected by its Assessing Officer, the Assessing Officer of the assessee is bound to accept the same as genuine when the identity of the creditor and the genuineness of transaction through account payee cheque has been established. In the present case also, no evidence was adduced on record that the investments made with the appellant in the shape of share application monies disclosed in the returns of the share applicants were rejected by their respective Assessing Authorities and accordingly, the issue is set to rest by the decision of the jurisdictional High Court on the issue.*

6. In this respect, the AR relied on plethora of decision of various High Courts (1) CIT vs. Kamdhenu Steels and Alloys Ltd. [2014] 361 ITR 220 (Del); (2) CIT vs. Gangeshwari Metal Pvt. Ltd. [2014] 361 ITR 10 (Del); (3) CIT vs. Aradhana Textiles Pvt. Ltd. [2011] 333 ITR 116 (Kar); (4) CIT vs. Oasis Hospitalities Pvt. Ltd. [2011] 333 ITR 119 (Del); which were rendered on the facts and circumstances identical to those of the appellant in the instant appeal. The Ld. A.R placed reliance upon the decision of Jurisdictional Tribunal in the case of Baba Bhootnath Trade & Commerce Ltd. bearing ITA No. 1494/Kol/2017 dated 05/04.2019; Savitri Share & Securities Pvt. Ltd. bearing ITA No. 1703/Kol/2016 dated 01/05/2019 and Panchsheel Commotrade Pvt. Ltd. bearing ITA No.1182/Kol/2015 dated 01/02/2019. For better appreciation, the relevant observation of the Hon'ble Karnataka High Court in the case of CIT vs. STL Extrusion P Ltd. [2011] 333 ITR 269 (Kar) is reproduced as under:

*“The assessee having duly furnished the names, age, address, date of filing the application of share, number of shares of each subscriber there was no justification for the Assessing Officer for making the impugned addition because once the existence of the investors/share subscribers was proved, onus shift to the revenue to establish that either the share applicants were bogus or the impugned money belonged to the assessee itself.”*

6.1. The instant case is also supported by the decision of Hon'ble Madras High Court in the case of CIT vs. Creative World Telefilms Pvt. Ltd. [2011] 333 ITR 100 (Bom), wherein their Lordship have held as under:

*“In the case in hand, it was not disputed that the assessee had given the details of name and address of the shareholder, their PAN/GIR number and had also given the cheque number, name of the bank. It was expected on the part of the Assessing Officer to make proper investigation and reach the shareholders. The*

*Assessing Officer did nothing except issuing summons which were ultimately returned back with an endorsement 'not traceable'. The Assessing Officer ought to have found out their details through PAN cards, bank account details or from their bankers so as to reach the shareholders since all the relevant material details and particulars were given by the assessee to the Assessing Officer. In the above circumstances, the view taken by the Tribunal could not be faulted. No substantial question of law was involved in the appeal."*

6.2 *The instant case is supported by the decision of Hon'ble Madras High Court in the case of CIT vs. Pranav Foundations Ltd. [2015] 229 Taxman 58 (Mad) wherein their Lordship have held as under:*

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

6.3 *The instant case is further supported by the decision of Hon'ble Allahabad High Court in the case of CIT vs. Vacmet Packaging (India) (P) Ltd. [2014] 367 ITR 217 (All), wherein their Lordship have held as under:*

*"That apart, as regards genuineness of the transaction, the view which has been taken by the Tribunal is at least a possible view to take on the basis of the material on the record. The assessee undoubtedly had to discharge the onus of establishing the identity and creditworthiness of the applicant companies and of the genuineness of the transaction. In this regard, both the Commissioner (Appeals) and the Tribunal had noted that the assessee had established all the three aspects by producing, during the course of the assessment, necessary documentary material such as the share application forms, copies of bank accounts, income tax returns and balance sheets. The view which was taken*

*by the Commissioner (Appeals) and which was sustained by the Tribunal would thus have to be regarded as being, at least, a possible view to take in the circumstances of the case.*

*In the present case the assessee had discharged the onus of establishing the identity, creditworthiness and genuineness of the transactions which had formed the basis of the addition that was made under section 68. Ultimately, whether the documentary materials which had been produced by the assessee were sufficient to displace the onus is a matter to be decided upon the facts of each case. Both the Commissioner (Appeals) and the Tribunal having held that the assessee had duly discharged the onus, no substantial question of law would arise.”*

6.4. *The instant case is further supported by the decision of Hon’ble Gujarat High Court in the case of CIT vs. Namastey Chemicals (P) Ltd., [2013] 217 TAXMAN 25 (Guj) wherein their Lordship have held as under:*

*“Where in respect of share application money received by assessee, it was apparent from records that large number of subscribers had responded to letters issued by Assessing Officer and submitted their affidavits, Tribunal was justified in deleting impugned addition made in respect of said amount.”*

7. *The doubts expressed in the reasoning of the AO in the instant case is based on the premise of “non-appearance by the Directors” of the appellant in response to summons issued u/s.131 of the said Act In this respect, it is observed that there is no ground to draw any adverse inference against the appellant, in relation to the provisions contained in sec. 68 of the said Act since the appellant had adduced all possible evidence in support of the share capital raised by it and there was nothing more for the directions to state in that respect.*

7.1. *It is also a fact that during the previous year relevant to the assessment year 2009-10, the appellant had received share application monies from 7 share applicants. In course of assessment proceedings, all the share applicants provided evidence by proving their identity and creditworthiness and also the genuineness of the transactions and accordingly, the same was accepted by the AO in the assessment order framed u/s. 147 of the Act dated 31.12.2010. Therefore, following the rule*

*of consistency as enunciated in the case of Radhasoami Satsang vs. CIT [Supra] the appellant is liable to succeed.*

8. *Therefore, considering the totality of the facts and circumstances of the case, I find substance in the argument of the AR that the appellant has made its case that the identity of the share applicants are established beyond doubt and on enquiries made by the AO there is no adverse finding reached in this aspect. The fact that all the share applicants are existing tax assessees and some of them were subject to scrutiny assessment during the same period establish the identity and authenticity of the share applicants. About the genuineness of the transactions there is neither any adverse finding in the assessment order nor which is subversive to the facts brought on record by the appellant during the course of assessment proceeding. The creditworthiness of the share applicants as regards their subscription to the share capital is proved by submission of their return, audited annual accounts, their bank statement and replies to notice u/s. 133(6) of the Act as depicted hereinabove. The net worth of such subscribers are in excess of the amount invested by each of them as explained hereinabove. The addition made by AO is based on extraneous parameters not germane for deciding the issue. The AO had not dealt with the issue judiciously and consistently with the evidence adduced during the course of the assessment proceedings by the appellant and the replies of the share applicants in respect of the share capital to warrant the inference that such share application monies received is unaccounted cash credit. The main premise of A.O is that the appellant has failed to summons issued u/s 131 of the Act. The AR has submitted several judicial pronouncements to the effect that mere non-appearance of the share applicant is no basis for invoking provisions of section 68 which includes the decision of the Supreme Court in the case of CIT vs. Orissa Corporation (P) Ltd. [1986] 159 ITR 78 (SC) wherein it was held as under:*

*“In this case the assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income-tax assessees. Their index number was in the file of the Revenue. The Revenue, apart from issuing notices under [section 131](#) at the instance of the assessee, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they were credit-worthy or were such who could advance the alleged loans. There was no effort made to pursue the so called alleged creditors. In those circumstances, the assessee could not do any further. In the premises, if the Tribunal came to the conclusion that the assessee had discharged the burden that lay on him then it could not be said that such a conclusion was unreasonable or perverse or*

*based on no evidence. If the conclusion is based on some evidence on which a conclusion could be arrived at, no question of law as such could arise.*

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

8.1 *Basically the law requires documentary evidences on record in dealing with the issue of authenticity. It is not the case of the AO that necessary documentary evidences are not on record but the only major reliance placed on his action is based on non-attendance of the directors of the appellant company along with directors of Subscriber companies before him u/s 131 of the Act. It is no longer res integra that such non-attendance should be considered as a factor which should be used by the AO in coming to an adverse conclusion against the appellant. On an overall analysis of the issue, I find that the AO has not made out his case with cogent material on record that the appellant could come under the purview of section 68 of the Act with regard to share capital as reflected in the balance sheet when there is no finding with any cogent material evidence that the same was actually bogus in nature. It is accordingly observed that creditworthiness of the share subscribers to make investment in the share capital of the appellant company cannot be a disputed matter as per material facts on record. The aforesaid facts underlined by evidences clearly prove the identity of the share applicants, their creditworthiness and source of funds, as well as the genuineness of the transactions being investments in the share capital issued by the appellant, which was subscribed to by each of them. Thus, it is proved beyond any doubt or dispute that the share applicants are actually found to have subscribed to the share capital issued by the appellant during the year under consideration as clearly evident not only from their respective books of accounts but also from their audited accounts filed with the income tax authorities in relation to their own income tax assessments and the sources of such funds are also explained by each of the share applicants in their replies addressed to the AO. However, the AO had not brought these indisputable facts on record but acted on his whims and fancies. It is observed that the burden which lay on the appellant, in relation to section 68 of the Act, has been duly discharged by it and nothing further remains to be proved by it on the issue. Hence, I am inclined to accept the arguments tendered by the AR of the appellant in this respect. In view of the above, I have no hesitation to hold that the impugned addition made by invoking the provisions of s. 68 by the AO is not justified in the circumstances and accordingly, direct him to delete such addition of Rs.12,61,00,000/- made on this account. Thus, these grounds of the appeal are allowed.”*

9.1. It has been noted by the Id. CIT(A) that the assessee had duly furnished all the details and evidences to prove the identity and creditworthiness of the share subscribers and genuineness of the transaction. The Id. CIT(A) has categorically noted that the Assessing Officer never pointed out any defect or discrepancy in any of the explanations or evidences furnished by the assessee or by the share applicants. The Id. CIT(A) has duly appreciated the facts on the file that during the year under consideration, the assessee had raised share capital including share premium of Rs.12,61,00,000/- by issuing 1,00,000 equity shares. That seven corporate shareholders subscribed to the share capital raised by the assessee and all payments were made by each of them through account payee cheques. That all the share subscriber companies were regularly assessed to Income Tax and even copies of scrutiny assessment orders have been filed before the CIT(A). That the investments made by each of them were duly and fully reflected in their audited books of account as well as their Income Tax Returns. The Id. CIT(A) has noted that all the notices issued by the Assessing Officer u/s 133(6) of the Act were delivered to the share subscribers at their known address, which proved their identities. All the share subscribers duly replied to the said notices and confirmed the transactions. Each of the share subscriber companies were registered under Companies Act 1956 and were on the record of Registrar of Companies. All the share subscribers also filed their financial statements to prove their creditworthiness, wherein, the share subscribers had duly explained the source of funds from which the payments were made for subscribing to the share capital. The Id. CIT(A) had discussed the respective replies of each of the share applicant filed before the Assessing

Officer. The Id. CIT(A) after considering the financials of each of the share subscriber noted that they had sufficient net worth to subscribe to the shares of the assessee company. The net worth of each of the share subscriber has been specifically and separately discussed by the Id. CIT(A) in the impugned order. The Id. CIT(A) considered the details of evidences on the file including financial statements and also considered that all the share subscribers were assessed to Income Tax and some of them were subjected to scrutiny assessment during the same period and observed that this fact established the identity and authenticity of the share applicants. The Id. CIT(A) has categorically noted that regarding the genuineness of the transaction, there was not any adverse finding given by the Assessing Officer in the assessment order. The Id. CIT(A) considering the overall facts and circumstances of the case and also by referring to various case laws concluded that it was proved beyond any doubt or dispute that the share applicants were actually found to have subscribed to the share capital issued by the assessee and was clearly evident not only from their respective books of accounts but also from their audited accounts filed with the income tax authorities in relation to their own income tax assessments and the source of such funds was also explained by each of the share applicants in their replies addressed to the Assessing Officer. The Id. CIT(A) has noted that the Assessing Officer, however, had not brought these undisputable facts on record but acted on his whims and fancies. The Id. CIT(A) in view of the detailed discussion of facts and law had deleted the impugned additions made by the Assessing Officer.

9.2. After hearing the ld. DR, we do not find any reason to interfere with the aforesaid well-reasoned order of the CIT(A) and the same is accordingly upheld. The appeal of the revenue stands dismissed.

10. In the result, the appeal of the revenue stands dismissed and the C.O. of the assessee stands allowed.

***Kolkata, the 15<sup>th</sup> May, 2024.***

Sd/-

**[डॉक्टर मनीष बोराड /Dr. Manish Borad]**

**लेखा सदस्य /Accountant Member**

Sd/-

**[संजय गर्ग /Sanjay Garg]**

**न्यायिक सदस्य /Judicial Member**

Dated: 15.05.2024.

RS

*Copy of the order forwarded to:*

- 1 ITO, Ward-9(1), Kolkata
2. M/s Maharaj Vincom Pvt. Ltd
3. CIT(A)-
4. CIT- ,
5. CIT(DR),

//True copy//

By order

Assistant Registrar, Kolkata Benches