

आयकर अपीलीय अधिकरण, चण्डीगढ़ न्यायपीठ “ए”, चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL,
CHANDIGARH BENCH ‘A’, CHANDIGARH

श्रीमती दिवा सिंह, न्यायिक सदस्य एवं, एवं श्रीमती अन्नपूर्णा गुप्ता, लेखा सदस्य
BEFORE: SMT.DIVA SINGH, JM & SMT.ANNAPURNA GUPTA, AM

आयकर अपील सं./ ITA No.1514/Chd/2017

निर्धारण वर्ष / Assessment Year : 2013-14

M/s Colors Textiles Limited, 84, Industrial Area-A, Ludhiana. (Since amalgamated with Lotus Texpark Ltd.) स्थायी लेखा सं./PAN NO: AADC8750B	बनाम	The Income Tax Officer, Ward-6(2), Ludhiana.
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारित की ओर से/Assessee by : Shri Ashwani Kumar, CA
राजस्व की ओर से/ Revenue by : Shri Gulshan Raj, CIT DR

सुनवाई की तारीख/Date of Hearing : 26.09.2018
उदघोषणा की तारीख/Date of Pronouncement : 05.12.2018

आदेश/Order

PER ANNAPURNA GUPTA, A.M. :

The present appeal has been filed by the assessee against the order passed by the Ld. Principal Commissioner of Income Tax-3, Ludhiana, (in short “Pr.CIT”) dated 6.9.2017 passed u/s 263 of the Income Tax Act, 1961 (hereinafter referred to as ‘Act’).

2. The assessee has raised the following grounds before us:

- “1. That order passed u/s 263 of the Income Tax Act, 1961 by the Ld. Principal Commissioner of Income Tax-3, Ludhiana is against law and facts on the file in as much as he was not justified to arbitrarily hold that assessment order dated 05.05.2015 was erroneous in as much as prejudicial to the interest of the Revenue.

2. *That he was not justified to hold that Ld. Assessing Officer did not examine the issue of share premium received by the appellant company."*

3. During the course of hearing before us Ld. Counsel for the assessee pointed out from the order that on perusal of the records of the assessee, the Ld.Pr.CIT found the order passed by the AO to be erroneous and prejudicial to the interest of the revenue, for the reason that the AO had failed to make proper enquiries relating to the share capital of Rs.1.18 crores and the share premium of Rs.9.64 crores received by the assessee from a company namely Pacatolus SPV5, which was a resident of Mauritius. Our attention was drawn to para 2 of the order where the show cause notice issued to the assessee was reproduced as under:

"The case was selected for complete scrutiny through CASS with the following reasons:-

- a) Large share premium received*
- b) Difference in opening stock in current year with the closing stock of the previous year.*
- c) Depreciation claimed at higher rates/Higher additional depreciation claimed.*

4. *Out of the reasons stated above, the issue of share premium has not been examined properly by the AO which has been discussed below along With the facts of the case.*

5. *The assessee company is said to be engaged in manufacturing different types of yarns. The company commenced its production activities on 01.02.2013 i.e. during the previous year under consideration. The assessee company has received during the previous year 2012-13, Foreign Direct Investment (FDI) of Rs.10.82 crores comprising of share capital of Rs.1.18 crore and share premium of Rs.9.64 crores from a company, namely, M/s Pacatolus SPV5, 4" floor, Raffles Tower, 19 Cyber city, Ebene, Mauritius, which is a resident of Mauritius. During the assessment proceedings, the assessee had submitted the following*

information/documents in support of receipt of investment from Mauritius Company;-

- a) Name and address of the investor*
- b) Mode of receipt of share capital and share premium by the assessee company from the Mauritian investor.*
- c) Copy of form No. 2 filed by the assessee company with ROC for allotment of aforesaid equity share capital to Mauritius Investor.*
- d) Copy of share certificate issued to the investor.*
- e) Copy of FIRC issued by the remitting bank i.e. Hong Kong and Shanghai Banking Corporation Ltd. i.e. HSBC Mumbai.*
- f) Copy of FCGPR submitted to RBI regarding the above investment along with its supporting documents*
- g) Copy of certificate of Incorporation of Investor company.*
- h) Copy of Tax Residency Certificate issued by Mauritius revenue authority*
- (i) However, the AO did not ask for the establishment of credibility of the company from the assessee or enquire the same from the Mauritius Taxation Authorities. The AO has not enquired whether the office of the company existed at the address provided by the assessee or not. It was also not tried to ascertain whether the said company is registered/functioning in its country or not.*
- (ii) In the White paper on Black Money' published in May2012, the Finance Ministry has identified various routes through which the black money originated in India is returned to it. The unaccounted money transferred outside India come back to India through various methods such a hawala, mispricing, FDI, through beneficial tax jurisdiction, raising of capital by India Companies through GDRs and investment in India stock market through participatory notes etc. FDI statistics point to the fact that Mauritius constitutes 41.80% of entire FDI received by India. It had been the topmost source of cumulative inflows in India. Mauritius with its small economy, cannot be the source of such huge investment and the investments are routed through these jurisdictions for avoidance of taxes and/ or for concealing the identity from the Revenue Authorities of the ultimate investor, many of whom could be the India residents, who have invested in their own companies through a process known as round-tripping. Thus, the black money generated by India is reinvested in India. In the instant case, it is quite possible that there could be the unaccounted wealth camouflaged under the guise of FDI investment and large amount of money transferred*

outside India might actually have returned to India through legal channel as Mauritius has been one of the popular tax havens in the world. Hence, there was need of proper investigation and the case of the assessee should have been referred to the FT & TR Division, CBDT, New Delhi for seeking specific information under the provisions of exchange of Information, article of DTAA in order to verify the genuineness of the Mauritian company which has invested in India.

(iii) Last but not the least, the AO failed to ask the assessee to establish the genuineness of the transaction by revealing the ultimate source of this investment (private placement) of shares in the assessee company. "

4. Ld. counsel for the assessee thereafter contended that this contention of the Ld.Pr.CIT was demonstrated before him to be incorrect by pointing out from the records of the assessee that proper enquiries had been conducted by the AO during assessment proceedings. But, it was pointed out, that the Ld.Pr.CIT held that the same was not sufficient since as per the Ld. Pr.CIT, the AO should have inquired into the credibility of the company and also whether the said investor company actually existed or not. Ld.Counsel stated that the reason for the Ld.Pr.CIT holding so was the information in his possession, from the White Paper on Black Money published by the Finance Ministry in May 2012, that black money originated in India was returning through various routes from outside India by hawala, GDRs participatory notes , FDI etc. Our attention was drawn to the findings of the Ld. Pr.CIT at para 4 of the order as under:

"I have carefully considered assessee's submissions which are not acceptable on the issue that Assessing Officer has failed to examine the issue of share premium properly as the "Large Share Premium received" was the one of the reason for selection of assessee's case for scrutiny

through CASS. The assessee company has received during the previous year 2012-13. Foreign Direct Investment (FDI) of Rs.10.82 crores comprising of share capital of Rs.1.18 crore and share premium of Rs.9.64 crores from a company, namely, M/s Pacatolus SPV5, 4th floor, Raffles Tower, 19Cybercity, Ebene, Mauritius, which is a resident of Mauritius. A.O. did not bother to ask for the establishment of credibility of the company from the assessee or enquire the same from the Mauritius Taxation Authorities. A.O. failed to do so. A.O. also failed to enquire whether the office of the company existed at the address provided by the assessee or not. It was also not tried by the A.O. to ascertain whether the said company is registered/functioning in its country or not. It is failure on the part of A.O. in the eyes of law.

In the 'White paper on Black Money' published in May 2012, the Finance Ministry has identified various routes through which the black money originated in India is returned to it. The unaccounted money transferred outside India come back to India through various methods such as hawala, mispricing, FDI, through beneficial tax jurisdiction, raising of capital by India Companies through GDRs and investment in India stock market through participatory notes etc. FDI statistics point to the fact that Mauritius constitutes 41.80% of entire FDI received by India. It had been the topmost source of cumulative inflows in India. Mauritius with its small economy, cannot be the source of such huge investment and the investments are routed through these jurisdictions for avoidance of taxes and/ or for concealing the identity from the Revenue Authorities of the ultimate investor, many of whom could be the India residents, who have invested in their own companies through a process known as round-tripping. Thus, the black money generated by India is reinvested in India. In the instant case, it is quite possible that there could be the unaccounted wealth camouflaged under the guise of FDI investment and large amount of money transferred outside India might actually have returned to India through legal channel as Mauritius has been one of the popular tax havens in the world. A.O. miserably failed to make proper investigation in this regard and also failed to refer the case of the assessee to the FT & TR Division, CBDT, New Delhi for seeking specific information under the provisions of exchange of Information, article of DTAA in order to verify the genuineness of the Mauritian company which has invested in India. This issue completely remained unattended by the A.O. It is evident that the assessment has been completed in this case without application of mind by the A.O. in the assessee company. A.O. did not bother to examine this issue. It was failure on the part of A.O. in the eyes of law.

With regard to the issues discussed above, A.O. has accepted the replies furnished by the assessee without any

verification / investigation / enquiries. It is a failure on his part in the eyes of law. It is evident that the assessment order passed by the A.O. without making inquiries/verifications and investigations. A.O. miserably failed to look into these issues and framed assessment without application of mind. A.O. has simply relied upon whatever submissions have been made by the assessee and accepted them. The A.O. failed to make independent enquiries/verifications/investigations while framing the assessment but he failed to do so and framed assessment without application of mind.”

5. Ld. Counsel for the assessee thereafter demonstrated before us that due and proper inquiries were conducted by the AO regarding the impugned issue. Our attention was drawn to the queries and notices issued during assessment proceedings and the replies filed thereto as under:

Notice dated 23-12- 2014

“ 18. In regard to share premium received, you are required to supply the following information as per the table below:-

Reply filed dated 10-02-15

5 .Detail of share premium received in the desired format is as under:-

Sr.No.	Name of Investor	PAN & Address of the Investor	No. of shares issued	Amount received against each share	Total amount received.	Amount received as share premium	Mode of payment
1.	Pecatolus SPV5	Tax Account No.- 27193558, 4 th Floor, Raffles Tower, 19 Cybercity, Ebene, Mauritius	1182513	91.50	108200000	96374810	Through Banking Channel

Notice dated 06-04-15

5. You are required to submit the copy of application from the subscribers) to the share capital issued and alongwith share certificates issued during the year under assessment alongwith complete addresses of the application.

Reply dated 13-04-15

5. The address of Pacatolus i.e. the subscribers to the share capital has already been submitted vide our reply No.CTL/IT/2015/3 dated-10.02.2015. However, ' the same is again submitted is as under :-

Pacatolus SPV5
Tax Account No.27193558
4th Floor Raffles Tower,
19, Cybercity, Ebene,
Mauritius.

Further copy of Form No,2 filed with the Registrar of Companies. Chandigarh for allotment of 1182513 equity shares to Pacatokis, Mau enclosed herewith.

As desired copy of share certificate for allotment of 1182512 equity s/ issued to the subscribers is enclosed herewith.

Letter dated 21-04-15

Further as desired by your goodself as per the discussion on the last date of hearing regarding the addition to Share Capital (FDI) , we are giving herein below a detailed explanation with respect to the Foreign

Direct Investment of Rs.10.82cr. received by the company during the year under consideration. It may be kindly be noted that this investment has been received under Foreign Direct Investment guidelines of Government of India duly governed by Reserve Bank of India. The process of receiving Foreign Direct Investment in India and the related formalities is explained as under:-

First of all a Certificate of Foreign Inward Remittance (FIRC) is issued by the remitting bank which in our case is Hongkong and Shanghai Banking Corporation Limited (HSBC), Mumbai. A copy of this certificate is enclosed as per Annexure A.

A perusal of this certificate shows that it has full details about the remitter and the recipient which includes:-

- (a) Name of the both party
- (b) Their address
- (c) Amount remitted
- (d) Bank account details of both the parties
- (e) Purpose for which this money has been remitted

Subsequent to the receipt of this certificate the recipient i.e Colors Textiles Limited (assessee company) had a statutory obligation to file full details of the remittance to Reserve Bank of India in duly prescribed annexure V & VI along with the copy of FIRC This form also has all the details of investor. A copy of the letter along with all the annexures and supports, filed with Reserve Bank of India is placed on record as per Annexure B. On receipt of this letter Reserve Bank of India gives a certificate and assigns a DIN (Unique Identification Number) to a particular investor. The copy of the certificate is enclosed as Annexure C. This completes the process of Regulatory requirements of a particular investment. After going

through all the evidence, details and above submissions we hope that the process of the Foreign Direct Investment stands duly explained and established, All the above documents in original referred to in the process of Foreign Direct investment are being produced herewith for your verification.

Also submitted that the copy of share certificate issued to pecatouls SPV5 and copy of form-2 filed with Registrar of companies has already been filed vide reply no. 7 dated 13.04.2017 and now the below mentioned documents are enclosed herewith for your kind consideration:-

- (i) Copy of Certificate of Incorporation of Pecatolus SPV 5*
- (ii) Copy of Tax Residence Certificate (TRC) of Pecatolus SPV 5 issued by Mauritius Revenue Authority,*
- (iii) Copy of Form - FCGPR submitted to Reserve Bank of India (RBI) through receiving bank i.e Canara Bank*
- (iv) Copy of Valuation Report.*

Hope your honor will find the above in order and in case any other document/information is required by your honour, the same may please be asked

Letter dated 30-04-15

1. Certificate from CA with complete computation of fair market value of the shares at the time of issuance of shares to the company M/s Pecatolus has already been submitted to your honour vide our reply no. 8 dated 21.04.2015

6. Referring to the above, Ld. Counsel for the assessee contended that necessary queries had been raised by the AO and due reply alongwith evidences had been filed to substantiate the genuineness of the investment received by the assessee from the Mauritius company. Ld.Counsel pointed out that admittedly the following information/documents had been filed to the AO:

- Name and address of the investor
- Mode of receipt of share capital and share premium by the assessee company from the Mauritian investor.

Copy of form No. 2 filed by the assessee company with ROC for allotment of aforesaid equity share capital to Mauritius Investor.

- Copy of share certificate issued to the investor.

- Copy of FIRC issued by the remitting bank i.e. Hong Kong and Shanghai Banking Corporation Ltd. i.e. HSBC Mumbai.
- Copy of FCGPR submitted to RBI regarding the above investment along with its supporting documents.
- Copy of certificate of Incorporation of Investor company.
- Copy of Tax Residency Certificate issued by Mauritius revenue authority
- Copy of certificate issued by Chartered Accountant certifying the fair value of shares /premium at which shares were issued to the Mauritian Company

It was contended that the above adequately proved the genuineness of the transaction and the AO had duly considered/ examined and being satisfied with the same had made no further enquiries.

7. Ld.Counsel for the assessee contended that the view of the AO was plausible also since in the case of Lotus Integrated Texpark Limited, a company with which the assessee company got subsequently amalgamated, addition on account of share capital issued to a Mauritian company for identical reasons of not establishing its credibility and identity, was made in the preceding years, i.e. A.Y. 2010-11 & 2011-12, which was deleted by the ITAT. It was pointed out that identical documents were filed in that case also by the assessee in discharge of onus to establish the genuineness of the transaction, which were found sufficient by the ITAT for establishing the same .Copy of High court order approving the scheme of amalgamation of the assessee company with Lotus Integrated was filed. Copy of the order of ITAT in the case of Lotus Integrated was also filed and our attention was drawn to the fact of the case and the

relevant finding in the order deleting the addition made on account of share capital received from Mauritian Company as under:

“10. We have considered the rival submissions. It is not in dispute that the assessee has allocated 740000 shares to M/s Glacis Investment Limited at premium. The Assessing Officer has not disputed the shares issued to this company at premium value. No investments have been made in this regard. The Id. DR also admitted that the reasons for issuing the shares to the subscriber company at paid up value and at premium have not been investigated by the Assessing Officer at assessment stage. The assessee has filed copy of the certificate of incorporation of M/s Glacis Investment Limited which is a registered company in Republic of Mauritius. The Id. CIT(Appeals) considering the subscriber company to be a company being legal entity held that the identity of the shareholder is proved. The assessee also filed copy of the Tax Residence Certificate issued by Mauritius Revenue authorities, certifying that M/s Glacis Investment Limited incorporated in Mauritius is a company resident in Mauritius for income tax purposes under the Income Tax Act. The assessee also produced the certificate of Reserve Bank of India in which the Reserve Bank of India by referring to letter of the assessee has referred to the transaction held between assessee and M/s Glacis Investment Limited, Mauritius for issuing the shares at paid up value and premium for 740000 equity shares were recorded by the Reserve Bank of India in their records. The Id. DR submitted that the name of M/s Glacis Investment Limited is wrongly recorded in the Reserve Bank of India certificate. It appears to be typographical error and is not having much significance on the same because the assessee has issued 740000 equity shares to the shareholder company which is the same and only transaction carried out between the assessee and the shareholder company. The assessee also filed copy of the share certificate to show that actual share certificates 740000 in number have been issued to the shareholder company. The shareholder company has also issued a confirmatory letter in favour of the assessee certifying that M/s Glacis Investment Limited has invested Rs. 3,70,00,000/- for allotment of 740000 equity shares in assessment year under appeal. The Republic of Mauritius also certified that Global Business License under Financial Services Act have been granted to M/s Glacis Investment Limited. The balance sheet of the shareholder company M/s Glacis Investment Limited is also filed on record which is admitted as additional evidence which proved that the principal activity of this company is that of investment holding and was having the sufficient funds/assets to make investment in assessee company and that the investment made in assessee company have

been certified in the balance sheet. The bank statement of the assessee is also filed on record which support the contention of the assessee that Rs. 3,70,00,000/- have been invested by shareholder company in assessee company through transfer entries i.e. banking channels. The decisions relied upon by Id. counsel for the assessee clearly support the contention of the assessee that assessee has proved the credit worthiness of the shareholder company and genuineness of the transaction in the matter. The documentary evidences produced on record also support the contention of assessee that the shareholder company M/s Glacis Investment Limited, Mauritius has made investment in assessee company in 740000 equity shares by investing Rs.3,70,00,000/-. The shareholder company also filed confirmation to that effect which is supported by Tax Residence Certificate, allotment of share certificates and Global Business License granted by Republic of Mauritius and the bank statement of the assessee.

12. In the present case, assessee company had received money on allotment of shares from M/s Glacis Investment Limited through banking channel and furnished complete details of the shareholder, no addition would be made under section 68 of the Act, in the absence of any positive material or evidence to indicate that the shareholder company was benamidar or fictitious company or that any part of the share capital represented the assessee's own income from undisclosed sources. The assessee on the basis of the documentary evidence on record has been able to prove that Non Resident Company i.e. M/s Glacis Investment Limited was an existing company and that the shareholder company made investment in the assessee company would prove that assessee received genuine share application money from this non-resident company. Thus, assessee had established the identity of the shareholder company and that transaction was genuine. The assessee has also proved the credit worthiness of the shareholder company, therefore, authorities below were not justified in making the huge addition against the assessee.

Considering the totality of the facts and circumstances on the basis of the evidences on record and in the light of the judicial pronouncements noted above, we are of the view that assessee has been able to prove the identity of the creditor which is not in dispute, credit worthiness of the shareholder company and genuineness of the transaction in the matter. Therefore, addition of Rs. 3.70 Cr under section 68 of the Act is wholly unjustified. We, accordingly, set aside the orders of authorities below and delete addition of Rs. 3.70 Cr. In the result, ground No. 1 of appeal of the assessee is allowed.”

8. Ld. counsel for the assessee therefore contended that the enquiry conducted by the AO and the reply filed by the

assessee alongwith evidences was sufficient to satisfy about the genuineness of the transaction and the Ld.Pr.CIT had erred in stating that proper and adequate enquiries had not been conducted in the present case. Ld. counsel for the assessee stated that in the above facts & circumstances the order passed by the AO could not be held to be erroneous so as to cause prejudice to the Revenue and the assumption of jurisdiction by the Ld.Pr.CIT, u/s 263 of the Act to revise the order of the AO was therefore not as per law. Reliance was placed by the Ld. counsel for the assessee on the following case laws in support of the above contention:

1. *Commissioner of Income Tax vs Hindustan Marketing & Advertising Co. Ltd. (2012) 341 ITR 180(Delhi)*
2. *Commissioner of Income Tax vs Anil Kumar Sharma (2011) 335 ITR 83(Delhi)*
3. *Commissioner of Income Tax vs Sunbeam Auto Limited (2011) 332 ITR 167(Delhi)*
4. *Commissioner of Income Tax vs Deepak Mittal (2010) 324 ITR 411(Punjab and Haryana)*

It was also contended that in the present case the Ld.Pr. CIT had only expressed the view that the AO should have conducted the inquiry in a particular manner ,without himself conducting any inquiry in order to show that the order passed by the AO was erroneous. Therefore also ,it was contended, that the assumption of jurisdiction u/s 263 in the present case was bad in law. Reliance was placed on the following case law in support of the above contention:

CIT vs Sunbeam Auto Ltd.(2011)332 ITR 167

9. Ld. counsel for the assessee further contended that the Ld.Pr.CIT had stated that the facts of the case was squarely covered by Explanatio-2 to section 263 as per which an order passed by the assessing officer is deemed to be erroneous in so far as prejudicial to the interest of the revenue if it is passed without making enquiries or verification which should have been made. Ld. counsel for the assessee contended that the said explanation was not attracted in the present case since sufficient enquiries had been conducted and the Ld. Pr.CIT himself had not conducted any inquiries pointing out the error in the order of the AO. Reliance was placed on the following case laws in support of the above contention.

1. Narayan Tatu Rane vs Income Tax Officer (2016) 70 Taxmann com 227(Mum)
2. Amira Foods Pvt. Ltd. vs The Pr.CIT (2018) 63 ITR(Trib)355(Del)

Our attention was specifically drawn to the relevant portion of the order as under:

“18. The learned counsel for the assessee submitted that even though there has been an amendment in the provisions of section 263 of the Act by which Explanation 2 is inserted with effect from June 1, 2015 but the same does not give unfettered powers to the Commissioner to assume the jurisdiction under section 263 of the Act to revise every order of the Assessing Officer to re-examine the issues already examined during the course of assessment proceedings. The Hon'ble Mumbai Income-tax Appellate Tribunal has dealt with Explanation 2 as inserted by the Finance Act, 2015 in the case of Narayan Tatu Rane v. ITO (2016) 70 TAXmann.com 227 to hold that the said Explanation cannot be said to have overridden the law as interpreted by the Hon'ble Delhi High Court, according to which the Commissioner has to conduct an enquiry and verification to establish

and show that the assessment order is unsustainable in law. The Tribunal has further held that the intention of the Legislature could not have been to enable the learned Principal company of Income-tax to find fault with each and every assessment order, without conducting any enquiry or verification in order to establish that the A.O. is not sustainable in law since such an interpretation will lead to unending litigation and there would not be any point of finality in the legal proceedings. The opinion of the Commissioner referred to in section 263 of the Act has to be understood as legal and judicious opinion and not arbitrary opinion.

3. Indian Farmers & Fertilizers Cooperative Limited vs The Pr.CIT-11 in ITA No.2487/Del/2016.

10. Our attention was specifically drawn to the relevant portion of the order of the Hon'ble High Court affirming the findings of the Tribunal that where it has been found that detailed inquiries have been held by the AO, the order cannot be held to be erroneous or prejudicial to the interest of the Revenue under Explanation 2 to section 263 of the Act, as under:

“17. Before concluding we would also like to deal with the recent insertion of Explanation 2 to Section 263 of the Act. We have already held above that in respect of both the issues i.e. allowing credit of deemed taxes paid on dividend in Oman as well as capitalization of interest u/s 36(1)(iii) detailed enquiries as well verification have been made by the AO. Further it is also not the case of the Ld. Pr.CIT that the order is not in accordance with any instruction/direction issued by the Board or is not in accordance with any decision of Hon'ble Delhi High Court or the Apex Court of India. Accordingly the order passed by the AO cannot be regarded as deemed to be erroneous or prejudicial to the interest of the Revenue under Explanation 2 of the Act.”

11. Ld. counsel for the assessee further contended that the Ld.Pr.CIT had held the order of the AO to be erroneous since he had not enquired into the source of the source of

investment made by the Mauritius company. Ld.Counsel for the assessee contended that as per the amended provisions of section 68 of the Act, the investor company, being a non-resident, the source of source was not required to be explained by the assessee. Ld. counsel for the assessee drew our attention to the amended provisions of section 68 which were applicable in the present case as under:

“68.Where any sum is found credited in the books of an assessee maintained for any previous year, and 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:

Provided that where the assessee is a company, (not being a company in which the public are substantially interested) and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless—

(a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and

(b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:

Provided further that nothing contained in the first proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB) of section 10.]

(emphasis supplied)

12. Ld.Counsel pointed out that it was only in the case of credits received from residents that the source of source was required to be explained and since in the present case the same had been received from a non-resident company the onus was not on the assessee to explain the source of

the source. Therefore Ld. counsel for the assessee contended that the Ld.Pr.CIT had erred in holding the order of the AO erroneous on account of the fact that he had not looked into the source of source of the investment made by the Mauritius company. Ld. DR on the other hand pointed out from the order of the Ld.Pr. CIT itself that the case was selected for scrutiny through CASS for the reasons which included large share premium received by the assessee. Ld. DR pointed out that the Ld. Pr. CIT had adequately pointed out how sufficient and proper enquiries had not been made by the AO in this regard and therefore the order passed by the AO had been rightly held to be erroneous so as to cause prejudice to the interest of the revenue. Ld.DR also drew our attention to the findings of the Ld.Pr.CIT with regard to the White Paper on black money published in May 2012 by the Finance Ministry identifying various routes through which black money originated in India is returned to India and which included Mauritius as one of the source of routing such black money.

13. Ld.DR stated that in this alarming situation the Ld.Pr. CIT at para 7 of the order had held that the AO had failed to examine the issue of shares issued at premium to the Mauritius company. Ld.DR pointed out that the creditworthiness of the Mauritius company and the existence of the company had also not been examined by the AO. Ld.DR contended that the AO had accepted the reply filed by the assessee without making any enquiry or

investigation or even without applying his mind. Ld.DR supported the order of the Ld.Pr.CIT for the above reasons and relied on the following case laws in support of his contentions:

1. Malabar Industrial Co. Ltd. Vs CIT [2000] 109 Taxman 66 (SC)/[2000] 243 ITR 83 (SC)/[2000] 159 CTR 1(SC)
2. Rajmandir Estates (P.) Ltd. Vs PCIT [70 taxmann.com 124 (Calcutta)/[2016] 240 Taxman 306 (Calcutta)/[2016] 386 ITR 162 (Calcutta)/[2016] 287 CTR 512
3. Rajmandir Estates (P.) Ltd. Vs PCIT [2017] 77 taxmann.com 285 (SC)/[2017] 245 Taxman 127 (SC)
- 4.U Deniel Merchants Pvt Ltd Vs ITO (SC)

14. Ld.DR further distinguished the case laws relied upon by the Ld. counsel for the assessee stating that they had been passed with reference to clause© and (d) of Explanation to section 263, while in the present case it was clause(a) of the explanation to section 263 which had been attracted. He further drew our attention to the KYC paper of the investor company pointing out that it carried no date, no stamp and no place and hence could not be relied upon or taken cognizance of.

15. We have heard the rival contentions carefully. We find merit in the contentions of the Ld. Counsel for the assessee that the power exercised by the Ld Pr CIT in the present case to revise the order of the AO u/s 263 of the act was not as per law. As per the provisions of the section 263 the revisionary powers can be exercised by the Commissioner on being satisfied of the existence of the twin condition of

there being (a) an error in the order of the AO and (b) such error causing prejudice to the interest of the revenue. The said section clarifies that where in a situation an assessment order is passed without making necessary enquiries it shall be an order erroneous and prejudicial to the interests of the revenue. In the present case we find the Ld.Pr. CIT has found the order passed by the AO to be erroneous for the above reason only. But considering the facts of the case and the discussion by the Ld.Pr.CIT in the order, we are not convinced that the inquiry conducted by the AO was inadequate.

16. As per the Ld. Pr CIT the issue of share capital introduced during the year from a company M/s. Pacatolus SPV 5, MAURITIUS comprising of share capital 1.18 crores and share premium of 9.6 crores was not sufficiently/adequately examined by the AO. The specific charge against the AO viz-a-viz the inadequacy of enquiry was that the AO did not bother to ask the assessee for establishing the credibility of the company nor did he make enquiry of the same from the Mauritius Taxation authority and further that the AO failed to enquiry whether the said company actually existed or not.

Admittedly, the following documents/information viz-a-viz the share capital so introduced during the year had been filed by the assessee before the AO:

- Name and address of the investor

- Mode of receipt of share capital and share premium by the assessee company from the Mauritian investor.

Copy of form No. 2 filed by the assessee company with ROC for allotment of aforesaid equity share capital to Mauritius Investor.

- Copy of share certificate issued to the investor.
- Copy of FIRC issued by the remitting bank i.e. Hong Kong and Shanghai Banking Corporation Ltd. i.e. HSBC Mumbai.
- Copy of FCGPR submitted to RBI regarding the above investment along with its supporting documents.
- Copy of certificate of Incorporation of Investor company.
- Copy of Tax Residency Certificate issued by Mauritius revenue authority
- Copy of certificate issued by Chartered Accountant certifying the fair value of shares /premium at which shares were issued to the Mauritian Company

17. Clearly, the identity of the investor company, is duly proved by the Certificate of Incorporation issued as per the laws of the country and the Tax Residency certificate issued by the Mauritian Revenue authorities, giving the name and address of the investor company and certifying that it is a company incorporated in Mauritius as per its laws and is a resident of Mauritius for Income Tax purposes. The genuineness of the transaction, that share capital was received from the said investor company can be sufficiently gathered from the copy of return filed to the Registrar of Companies in form No.2, submitting the said fact of receipt of share capital from the investor company and also from the copy of share certificates issued to it. That money was genuinely received on account of share capital from the said investor is evidenced by the copy of documents submitted by the remitting and accepting bank to RBI as per the FDI

norms governing the impugned transaction i.e. FIRC issued by the bank remitting the money from Mauritius to India i.e. HSBC, Hong Kong-Shanghai Banking Corporate Limited, and copy of the FCGPR submitted to RBI by Canara Bank, the accepting bank. The letter issued by RBI allocating a unique Identification number to the transaction, thus confirming that the transaction is taken on record, further corroborates the genuineness of the transaction. Moreover the certificate of the chartered accountant certifying the manner of determining the fair market value of share of Assessee Company, justifies the premium also received. Therefore, the documents filed before the AO sufficiently establishes the identity of the investor, that it is a company incorporated in Mauritius and also a tax resident of Mauritius, the genuineness of the transaction, that it had invested in share capital of the assessee company and also the justification for the premium. No infirmity has been pointed out in the above documents by the Ld.Pr.CIT. With all the above documents found to be in order, the AO, we hold, was rightly satisfied with the genuineness of the share capital received and we do not find any reason for the AO to have made any further inquiry regarding the investor company. As pointed out by the Ld.Counsel for the assessee, the ITAT had held identical documents filed as sufficient for establishing genuineness of share application money received by Lotus Integrated Taxpark Ltd., a company with which the assessee company got amalgamated subsequently, from a Mauritius company in preceding

years, and deleted addition made on account of share capital for identical reasons that its identity and credibility was not adequately established. The view taken by the AO, in being sufficiently satisfied about the genuineness of the share capital received from the Mauritian company, can without any doubt therefore be said to be a plausible view. The Ld.Pr.CIT, we find, in the present case has sought to therefore impose his view regarding the inadequacy of the inquiry conducted by exercising his powers under section 263 ,which cannot be done. The reliance placed by the Ld.Counsel for the assessee on the decision of the Hon,ble Delhi High Court in the case of Sun Beam Auto(supra) is apt wherein it has been held that if there was an inquiry, even if inadequate, that would by itself not give an occasion to the Commissioner to pass an order u/s 263 of the Act, merely because he has a different opinion in the matter.

18. Moreover, the premises on which the Ld. Pr.CIT has rested his case for more investigation on the issue of share capital received by the assessee from the Mauritian company, is based on general information in the form of White Paper issued by the Ministry of Finance in 2012, regarding unaccounted wealth generated in India, being routed back to the country through FDIs, GDRs, etc. from outside the country. There is no specific information in the possession of the Ld. Pr.CIT either vis-à-vis Mauritius companies adopting such modes in general or even vis-à-vis the specific investor company involved in the present case

i.e. M/s Pacatolus SPV5 . This, general information in his possession logically called for enquiry regarding genuineness of such transaction. And this is what has specifically been done in the present case, with the assessee's case being selected for scrutiny solely for the purpose of verifying the genuineness of the share capital received by the assessee from the Mauritius company, which as we have held above the assessee duly established.

18. Moreover, we find, that from this general information, the Ld.Pr.CIT has made his own derivations that money coming through Mauritius is largely tainted, on the reasoning that 48% of the FDI in India is from Mauritius, which being a small economy cannot be the source of such huge investment. Thus it is merely suspicion of the Ld. Pr.CIT that the money received in the present case by way of share capital is the unaccounted income of the assessee itself. This is evident from the fact that the Ld.Pr.CIT himself states *"In the instant case it is quite possible that there could be unaccounted wealth camouflaged under the guise of FDI investment and large amount of money transferred outside India might actually have returned to India through legal channel as Mauritius has been one of the popular tax havens of the world"* Mere suspicion cannot be the basis for rejecting the information and documents filed by the assessee and holding them to be insufficient for establishing the genuineness of the transaction. The inquiry conducted by the AO cannot be termed inadequate merely

because the Ld.Pr.CIT suspected the transaction to be tainted. It is settled law that jurisdiction u/s 263 for revising order of the AO cannot be assumed for making further inquiries. There has to be a definite finding of error based on material evidences and not on suspicion. The Ld. Pr.CIT has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary inquiries, if required and necessary, before the order u/s 263 is passed. The Commissioner cannot remand the matter to the AO to decide whether the findings recorded are erroneous.

19. Further, since we have held that adequate inquiries were conducted by the AO regarding the share capital received from the Mauritius company, the order cannot be said to be erroneous even as per Explanation 2 to section 263. Also, as rightly pointed out by the Ld.Counsel for the assessee, the ITAT, in the case of Narayan Tatu Rane(supra) has held that the said explanation does not override the requirement of law that there has to be a definite finding of error in the order of the AO, by the CIT, for assuming jurisdiction u/s 263 of the Act, and merely expressing the view that the inquiry of the AO was inadequate, without the CIT himself conducting necessary inquiries to show the finding of the AO as erroneous, cannot be the interpretation of the Explanation.

20. Further the specific charge, vis a vis, inadequacy of inquiry conducted by the AO, is with regard to no inquiry being made regarding the credibility of the investor

company. In this regard, we agree with the Ld Counsel for the assessee, that the credit standing in the name of the investor who is a non resident, the onus to explain the source of the source did not lay with the assessee, as per section 68 of the Act. Therefore the AO on being satisfied with the genuineness of the transaction, being carried out through banking channels, was not required to inquire into the source of the source and therefore the inquiry could not be said to be inadequate on this count.

21. In view of the above, we hold that the satisfaction of the Assessing Officer regarding the genuineness of the share capital received by the assessee from the Mauritian company was reasonable considering the documents filed and more importantly considering the fact that on the basis of identical documentation the I.T.A.T. had held identical transaction to be genuine in the case of a company which the assessee company was subsequently was amalgamated with. The Ld. Pr.CIT has not pointed out why any further enquiry was required to be made. It is not a case where any infirmity has been pointed out in the documents submitted by the assessee or for that matter, the huge share premium has not been justified. If that be the case then of course, the satisfaction of the Assessing Officer could not said to be reasonable and definitely in such a case the enquiry of the Assessing Officer would have been clearly deficient. That exactly is the fact and situation in which the Hon'ble Apex Court and various other courts have upheld the order passed

u/s 263 of the Pr. CIT in various cases cited by the Revenue before us. But in the present case, the identity, the genuineness and even the share premium received has been established and justified. No reason remains for doubting the transaction. The Ld.Pr.CIT has rested his case for more inquiry in the matter, merely on the basis of suspicion that the transaction may be tainted. This we hold, cannot be the basis for holding the enquiry conducted by the AO as insufficient and the order consequently passed as erroneous for the purpose of assuming jurisdiction u/s 263 of the Act.

We therefore set aside the order of the Ld.Pr.CIT.

22. In the result, the appeal of the assessee is allowed.

Order pronounced in the Open Court.

Sd/-

दिवा सिंह

(DIVA SINGH)

न्यायिक सदस्य/ Judicial Member

Member

दिनांक /Dated: 5th December, 2018

रती

Sd/-

अन्नपूर्णा गुप्ता

(ANNAPURNA GUPTA)

लेखा सदस्य/ Accountant

आदेश की प्रतिलिपि अग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,
सहायक पंजीकार/ Assistant Registrar

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