

आयकर अपीलिय अधीकरण, न्यायपीठ –“B” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH: KOLKATA
[Before Shri J. Sudhakar Reddy, AM and Shri A. T. Varkey, JM]

I.T.A. No. 466/Kol/2020
Assessment Year: 2010-11

ACS Traders Pvt. Ltd. (PAN: AAHCA 0919 L)	Vs.	PCIT-5, Kolkata
Appellant		Respondent

Date of Hearing	12.03.2021
Date of Pronouncement	26.03.2021
For the Appellant	Shri Sanjay Kejriwal, A.R
For the Respondent	Shri Imokaba Jamir, CIT

ORDER

Per Shri A. T. Varkey, JM:

This appeal preferred by the assessee company is against the order of Ld. Principal Commissioner of Income Tax (hereinafter referred to as Ld. PCIT)-5, Kolkata dated 03.06.2020 for AY 2010-11 u/s 263 of the Income Tax Act, 1961 (hereinafter referred to as the Act).

2. The main grievance of the assessee is that the Ld. PCIT did not enjoy the requisite jurisdiction to invoke the revisional power u/s 263 of the Act for AY 2010-11, which is purely a legal issue. So it needs to be adjudicated first.

3. The Ld. A.R Shri Sanjay Kejriwal assailing the action of Ld. PCIT to exercise his revisional jurisdiction u/s 263 of the Act contended that Ld. PCIT without satisfying the essential condition precedent as stipulated by the Statute (*Section 263 of the Act*) could not have invoked the revisional jurisdiction to interfere with the re-assessment order passed by the AO. According to him, before the Ld. PCIT invokes his revisional jurisdiction, first of all he has to satisfy that the AO's re-assessment order which he proposes to interfere with is *erroneous as well as*

prejudicial to the interest of revenue as stipulated in section 263 of the Act. According to Ld. A.R, the Ld. PCIT has miserably failed to bring out in the impugned order/show-cause notice (SCN) as to how the AO's reassessment order u/s 147/143(3) of the Act dated 29.12.2017 for AY 2010-11 is erroneous as well as prejudicial to the revenue. According to Ld. A.R, the Ld. PCIT has expressed his desire to exercise his revisional jurisdiction by issuing show-cause notice (SCN) dated 22.01.2020 which is reproduced as under:

“Related to the Assessment year 2010-11, your case was completed u/s 147/143(3) of the Income Tax Act, 1961 on 29/12/2017 at an assessed income of Rs. 29,420/- against the returned income of Rs. 29,420/-. The assessment order was passed without making any additions.

In order to judge the merit of the order passed by the Assessing Officer, the assessment records were perused. The records available revealed that the Identity, creditworthiness & genuineness of transaction relating to share capital of Rs. 20,00,000/- and share premium amounting to Rs. 80,00,000/- received by your concern were not at all examined by the Assessing Officer while passing the assessment order u/s 147/143(3) of the Income Tax Act, 1961.

In view of the above facts, the order passed u/s 147/143(3) of the Income Tax Act, 1961 on 29/12/2017 for Assessment year 2010-11 appears to be erroneous in so far as it is prejudicial to the interest of revenue on this point.

In order to elicit your reaction, your case has been fixed for hearing u/s 263 of the Income Tax Act, 1961 at my chamber at Aayakar Bhawan Poorva, 6th Floor, Room No. 601 on 31.01.2020 at 04.00 PM.

You are, therefore, requested to appear either in person or through your authorized representative to explain the above case lacuna in the said order with supporting documentary evidence. As the proceeding is getting barred by limitation on 31.03.2020, your failure to respond to this notice will compel the undersigned to take a decision on the merits of the case and the papers available with the department.”

4. According to Ld. A.R, from a perusal of the above SCN issued by the Ld. PCIT, it can be discerned that the issue on which he conveyed his desire to revise the AO's action dated 29.12.2017 was in respect of *the share-capital & share premium of Rs. 20 Lakhs & Rs. 80 Lakhs respectively* collected by the assessee company for AY 2010-11. According to Ld. A.R this issue regarding the share capital & premium collected by the assessee i.e. M/s ACS Traders Pvt. Ltd. had undergone *scrutiny* in the hands of AO and therefore this issue had been thoroughly investigated by the AO, so the Ld. PCIT erred in holding that AO has passed the re-assessment order dated 29.12.2017 without carrying out any enquiries.

5. The Ld. A.R brought to our notice that for this relevant assessment year i.e. AY 2010-11 the assessee had duly filed return of income on 20.09.2010 when the same was processed u/s 143(1) of the Act and declaring Rs. 29,420/-. Thereafter according to Ld. A.R, the AO reopened the original assessment u/s 147 of the Act by issuing notice u/s 148 of the Act dated 21.11.2017 and drew our attention to the order sheet of AO which is placed at page 96 to 97 of the PB. Thereafter the Ld. A.R drew our attention to the reasons recorded for reopening the assessment dated 27.03.2017 which is placed at page 94 & 95 of the PB which read as under:

*Sub: **Reasons for re-opening** the assessment proceedings u/s 147 for the AY 2010-11-Matter regarding*

Ref: Your letter dated 28.04.2017

Please refer to the above.

On the basis of information received from ADIT (Investigation), Unit-2(4), Kolkata it is found that a group led by Shri Kumar Om Prakash and his associates were involved in the business of Real Estates and other related activities in Howrah. As per the information, received from ADIT(Inv) that one of the key persons and entities of the said group is M/s ACS Traders Pvt. Ltd. as 7, Dr. Abani Dutta Road, Howrah-711106. In view of the Income Tax Act, 1961, the group has raised share capital from dubious and shell companies and this capital raised is nothing but unaccounted cash of the group, reported by the Investigation Wing.

*M/s ACS Traders having PAN-AAHCA 0919 L during the FY 2009-10 relevant to the AY 2010-11 **raised capital of Rs. 1,00,00,000/-** (as per data base information of shell companies as detailed.) In this regard , further investigation for the creditworthiness/genuineness/proof of identity of such shares capital (transaction of the allottee) would be required as per provision of the Income Tax Act, 1961 in the interest of Revenue.*

The assessee company filed its IT return for the assessment Year 2010-11 on 20.09.2010 showing income of Rs. 29,420/- . Consequently, the assessee capital was raised of Rs. 1,00,00,000/-during the FY 2009-10 which is not commensurate with its return of income. In this situation further investigation for the creditworthiness/genuineness of such shares capital would be required as per provision of the IT Act, 1961.

Further, it is noticed that second allegation raised regarding Sale of Assets and suppression of value of such assets in relation to Stamp duty also through lower value deeds in relation u/s 50C and u/s 43CA regarding Seller Chetan Construction (Firm) and Chaitanya Construction (Prop. Kumar Om Prakash) as per information placed on record.

In view of the above reason recorded as per order sheet, your case has been reopened u/s 147. [Emphasis given by us]

6. Further in order to demonstrate that the AO even during the re-assessment proceeding (*after re-opening*) has conducted fresh investigation into this issue of share-capital & premium, the Ld. A.R , drew our attention to page 96 & 97 of PB which is the order sheet maintained by the AO in respect of the re-assessment proceedings. A perusal of it reveals that the AO had recorded this reason for re-opening (supra) on 21.11.2017 and thereafter had issued the notice u/s 148 of the Act on the same date. It is noted that the hearing in respect of re-opened assessment was conducted by the AO on seven (7) occasions/dates and thereafter has passed the reassessment order dated 29.12.2017 u/s 143(3) read with Section 147 of the Act. Thus according to the Ld. A.R, the AO before the re-assessment order was passed on 29.12.2017, had fixed the matter for hearing on seven (7) occasions/dates; and during the said proceedings, he (AO) had issued notice u/s 143(2) on 21.11.2017 and notice u/s 142(1) notice dated 27.11.2017; and pursuant to the enquiries made by AO the assessee had filed reply dated 29.11.2017 along with the following documents (Page 4 to 63 of PB) to substantiate its claims on the issue of share-capital and premium to seven (7) share applicants i.e. share subscribers identity, creditworthiness and genuineness of the transaction with the assessee company:

- i) Details of Share capital raised along with premium of Rs. 40/- of shares of face value @ Rs. 10:
 - a) Name of applicant along with mailing address
 - b) PAN of the share applicants – (seven)
 - c) Allotment description with copy of share application form
 - d) Board Resolution –(Seven)
 - e) ITR acknowledgement of all the share applicants (seven) (PB-Page 364-376)
 - f) Bank statements reflecting transaction (seven)
 - g) Copy of certificate of incorporation of share applicant (seven)
 - h) Copy of source of fund

i) Copy of audited Financial statement for FY 2009-10 (seven)

7. Still not satisfied by the submission of the aforesaid documents, according to Ld. A.R, further enquiries were made by the AO which was replied by letter dated 12.12.2017 (refer page 64-71) and the assessee filed the following documents also:

- (i) Copy of company master data of all applicants (DIN, CIN, Company status, name of directors)
- (ii) Copy of ledger of sales and purchase and loan and advance.

8. Further it was brought to our notice that AO had issued notice u/s 133(6) of the Act to all the seven (7) share applicants dated 13.12.2017 and (*after receiving their replies refer page 72-74 of PB*) which three (3) replies are found placed in PB and summons were issued by the AO to the assessee company u/s 131 of the Act dated 21.12.2017 and after making enquiries as stated earlier i.e. after seven (7) occasions / hearings with the Ld. A.R of the assessee, the AO has accepted the share capital of Rs. 1 crore from seven (7) share applicants. According to Ld. A.R from a perusal of the reasons recorded by the AO (supra) in order to re-open the intimation u/s 143(1) wherein the AO accepted the return filed by the assessee dated 20.09.2010 itself would reveal that he proposed to reopen the assessment on the basis of an information received on 24.03.2017 from ADIT (Inv), Unit-2(4), Kolkata (Page 95 of PB) that group led by Shri Kumar Om Prakash and his associates were involved in the business of Real Estate and other related activities at Howrah and one of the key persons and entities of the said group is assessee [M/s ACS Traders Pvt. Ltd.] And based on the information, that the said group has raised share capital from dubious shell companies; and that share capital of Rs. 1 crore which the assessee had raised is nothing but unaccounted cash of the company, the AO re-opened the intimation given u/s 143(1) of the Act and further the AO specifically noted that the share capital raised by assessee company of Rs. 1 crores, needs further investigation especially for verifying the creditworthiness, genuineness and proof of identity of the allottees which exercise, he needs to do in the interest of the revenue. And the other reason according to AO, for further investigation was that share capital of Rs. 1 crore is not commensurate to the return of income filed by the assessee. Therefore, keeping

these reasons/suspicion/allegations in mind, the AO proposed to reopen the assessment / intimation u/s 143(1) of the Act and thereafter conducted further investigation after re-opening. So according to Ld. A.R, when the AO proposed to reopen the assessment/intimation and had conveyed his intention for conducting further investigation in respect of share capital/ premium of Rs. 1 crore collected by the assessee; and having re-opened the assessment; and thereafter having conducted hearings on seven (7) occasions and that too after having independently investigating/confirming by issuing summons u/s 131 dated 21/12/2017 (refer page 97 of PB) and notice u/s 133(6) of the Act dated 01.12.2017 to all the share applicants; and based on all the documents/ materials collected in that process, the AO in the re-assessment order after re-opening the assessment, has accepted the identity, creditworthiness and genuineness of the seven (7) share subscribers and the transaction of share capital & premium to the tune of Rs. 1 crore in the hands of the assessee company for AY 2010-11. In the light of the aforesaid facts, according to Ld. A.R, the Ld. PCIT's finding in the impugned order that no enquiry was conducted by the AO while passing the re-assessment order dated 29/12/2017 is *ex-facie* erroneous and for that he drew our attention to page no. 4 of the Ld. PCIT's impugned order dated 03.06.2020 wherein the Ld. PCIT has made a finding "..... *The claim of the assessee was found to be destitute of merit as the records clearly demonstrated that the AO made assessment u/s 143(3)/147 dated 29.12.2017 without carrying out any inquiries*" Further according to the Ld. A.R, the faults of the AO taken note by the Ld. PCIT to interfere/exercise his revisional jurisdiction u/s 263 is that despite there being specific information from the Investigation Wing of the Department that the assessee had collected share capital plus premium from shell/dubious source, according to him (Ld. PCIT), the AO should have looked into the cash trail and source of the deposit in making the payment from the bank account of the aforesaid company (share subscribers) and second fault according to Ld. PCIT was that notices issued to two share subscribing companies could not be served and other five (5) did not reply. And the assessee had informed with the aid of master data that the non-service of notice was due to change in address and the AO had issued notice to all except M/s Fortune Vincom Pvt. Ltd.

whose address did not change and third fault according to Ld. PCIT was that the AO has not carried out the enquiries at bank after noting that money came in by RTGS and assessee had used it to purchase fixed assets, so the assessee was the beneficiary. Therefore the Ld. PCIT concluded that the order passed by the AO u/s 147/143(3) of the Act dated 29.12.2017 was erroneous as well as it is prejudicial to the interest of the revenue and therefore he cancelled the reassessment order dated 29.12.2017 and directed the AO to conduct de novo assessment and also advised the AO to focus on the cash trail of all the bank accounts involved in the transaction of money from the bank account of the assessee company. Countering the faults pointed out by the Ld. PCIT to interfere with the order passed by the AO, the Ld. A.R, submitted that it needs to be kept in mind that the AO had re-opened the intimation issued u/s 143(1) of the Act on the basis of the information of investigation wing to investigate whether the assessee had received the share-capital and premium from dubious/shell entities and then he thoroughly investigated the same which is discernible from the purpose for which he re-opened on perusal of the '*reasons recorded*' by the AO dated 24.11.2017. So according to Ld. A.R when the AO had reopened the assessment for further investigation keeping in his mind all these grave suspicion and thereafter when he had conducted investigation as discussed supra ; and thereafter, being satisfied with the material collected during investigation, the AO had accepted the identity, creditworthiness and genuineness of the share capital as well as the premium collected by the assessee company. The Ld. A.R, also pointed out that in the relevant assessment year under consideration i.e. AY 2010-11, as per law in force for this assessment year is concerned, the assessee was not required to prove the '**source of source**' of the share capital collected of Rs. 1 crore, which requirement of law was only from the assessment year i.e. AY 2013-14 onwards. And therefore the assessee in this assessment year i.e. AY 2010-11 was not duty bound to ask the "*source of source*" from the share-subscribers about share-capital subscribed by it. According to Ld. A.R, as per the law applicable for AY 2010-11, the assessee had discharged the onus by sharing the documents which revealed the source of the share capital and the AO had examined the truth / veracity of the same by independently verifying it by issue of notice u/s 133(6) and by examining the

replies to it from the share-subscribers and finding nothing dubious/bogus in the transaction (share), the AO has accepted the same. By doing so, according to Ld. A.R, the AO has discharged his duty as an investigator and adjudicator in accordance to law applicable for AY 2010-11. According to him, the Ld. PCIT by issuing SCN on 31.01.20120 has not appreciated the legal position in respect of AY 2010-11 and has found fault with the action of AO as if the assessment year under consideration is that of assessment year i.e. AY 2013-13 or thereafter. So according to Ld. A.R, the Ld. PCIT misdirected himself in law as well as fact, while finding fault with the action of AO in his role as an investigator as well as adjudicator when the relevant assessment year concerned is AY 2010-11. Thus, according to Ld. A.R, the AO's action in accepting the share capital of Rs. 1 crore collected by the assessee was based on the documentary evidence furnished by the assessee in respect of seven (7) share applicants and after thorough investigation, cannot be found fault with and in any case their (*share subscribers*) identity could not be questioned since all the share subscribing companies are filing regularly their respective tax return and their PAN & CIN were duly furnished to the AO (page 64 to 71 of PB and Page 317 of PB) and all the share applicants being assessed to the income tax; and the payments were made through banking channels could not have been doubted, when the fact is that the AO has examined independently the same by issuing summons u/s 131 dated 21.12.2017 and 133(6) dated 01.12.2017 of the Act. And from the perusal of the order sheet entry date 28.12.2017 (refer Page 97 of PB) it is evident that the Director Shri Ashok Kumar Agarwal appeared before the AO pursuant to the summon u/s 131 of the Act issued on 21.12.2017 and the AO had recorded his statement and acknowledged that he produced PAN & Aadhar Card & other documents called for. Therefore according to Ld. A.R, the Ld. PCIT's action of usurping the revisional jurisdiction on the specious plea that no enquiry was conducted by the AO is patently erroneous and based on wrong assumption of facts and law; and thus according to Ld. A.R, the Ld. PCIT could not have invoked revisional jurisdiction u/s 263 of the Act. Therefore, according to the Ld. A.R, the very invocation of Section 263 jurisdiction itself is bad in law and therefore it has to be quashed. *Per contra*, the Ld. CIT D.R Shri Imokaba Jamir supporting the impugned order of Ld. PCIT

vehemently opposed the plea of the Ld. A.R and submitted that the AO in the reassessment proceedings after reopening u/s 147 of the Act has not conducted the exercise as required by the Statute despite incriminating information against the assessee company. According to Ld. CIT D.R, the AO failed to enquire on the issue for which re-opening was made and therefore the order of re-assessment passed by AO was erroneous for want of enquiry; and therefore the Ld. PCIT rightly interfered by invoking his revisional jurisdiction u/s 263 of the Act; and thereafter he drew our attention to page nos. 4, 5 and 6 of the impugned order and contended that the Ld. PCIT had satisfied the condition precedent to invoke the jurisdiction u/s 263 of the Act. Therefore, he prays that this Tribunal should not interfere with the impugned order of Ld. PCIT.

9. We have heard both the parties and perused the records. Before we advert to the facts and law involved in this *lis* before us, let us revise the law governing the issue before us. The assessee has challenged in the first place, the very usurpation of jurisdiction by Ld. Principal CIT to invoke his revisional powers enjoyed u/s 263 of the Act. Therefore, first we have to see whether the requisite jurisdiction necessary to assume revisional jurisdiction is there existing before the Ld Pr. CIT to exercise his power. For that, we have to examine as to whether in the first place the order of the Assessing Officer found fault by the Principal CIT *is erroneous as well as prejudicial to the interest of the Revenue*. For that, let us take the guidance of judicial precedence laid down by the Hon'ble Apex Court in *Malabar Industries Ltd. vs. CIT* [2000] 243 ITR 83(SC) wherein their Lordship have held that *twin* conditions needs to be satisfied before exercising revisional jurisdiction u/s 263 of the Act by the CIT. The twin conditions are that the order of the Assessing Officer must be erroneous and so far as prejudicial to the interest of the Revenue. In the following circumstances, the order of the AO can be held to be erroneous order, that is (i) if the Assessing Officer's order was passed on incorrect assumption of fact; or (ii) incorrect application of law; or (iii) Assessing Officer's order is in violation of the principle of natural justice; or (iv) if the order is passed by the Assessing Officer without application of mind; (v) if the AO has not investigated the issue before him;[

because AO has to discharge dual role of an investigator as well as that of an adjudicator]then in aforesaid any event, the order passed by the Assessing Officer can be termed as erroneous order. Coming next to the second limb, what is required to be examined is as to whether the actions of the AO can be termed *as prejudicial to the interest of Revenue*. When this aspect needs to be examined, one has to understand what is prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case of Malabar Industries (supra) held that this phrase i.e. "*prejudicial to the interest of the revenue* " has to be read in conjunction with *an erroneous order* passed by the Assessing Officer. Their Lordship held that it has to be remembered that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. When the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue "unless the view taken by the Assessing Officer is **unsustainable in law**".

10. In the light of the law as discussed, let us examine whether in the facts and circumstances of the case, whether the Ld PCIT had successfully usurped the revisional jurisdiction to interfere with the re-assessment order passed by the AO dated 29.12.2017. In this regard we note that the assessee company was established in the year 2007-08 for trading of Hosiery goods & Katha (Catechu) and it originally filed its return of income for AY 2010-11 on 20.09.2010 declaring Rs. 29,420/- and the return was processed u/s 143(1) of the Act. Thereafter the assessee's case was reopened by the AO u/s 147 of the Act by issuing notice u/s 148 of the Act on 29.03.2017 by recording reasons on 27.03.2017 which fact is noticed from the order sheet placed at page 95 & 96 of PB. It is noted that the reasons for reopening was given to the assessee by the AO vide letter dated 24.11.2017 which is found placed at Page 94 of the PB (supra). From a perusal of the reasons recorded it is discerned that the AO received information that the assessee company has raised share capital of Rs. 1 crore from dubious shell companies which is nothing but assessee's own

money. According to AO, this incriminating fact was discovered after he got the information from ADIT(Investigation) which fact need to be examined by re-opening the assessment and by conducting further investigation. This fact led him to believe that there is escapement of income and therefore he proposed to reopen the assessment by '*recording the reasons*' which has been reproduced supra. Thereafter it is noted that the AO during the re-assessment proceedings has given seven (7) opportunities of hearing to the assessee and thereafter had passed the re-assessment order u/s 147/143(3) of the Act dated 29.12.2017. It is also noted from the order sheet which is placed from 95 to 97 that the AO had issued notices u/s 133(6) to the share applicants as well as summons u/s 131 of the Act to the assessee company and even to the changed addresses of the share subscribers. We note that the statement of the director of assessee company Shri Ashok Kumar Agarwal was recorded on oath by AO on 28.12.2017 u/s 131 of the Act (*refer page 97 of PB*). We note that during the reassessment proceedings the AO had issued 143(2) notice and 143(1) notice to the assessee and summoned various documents to substantiate the identity, creditworthiness and genuineness of the share transaction of Rs. 1 crore. We note that the assessee had filed following documents before the AO in the re-opened / re-assessment round:

- i) Copy of audited financial statements for AY 2010-11
- ii) Details of Share capital raised:
 - a) Name of applicant along with mailing address
 - b) PAN of the share applicants
 - c) Allotment description with copy of share application form
 - d) Board Resolution
 - e) ITR acknowledgement of all the share applicants
 - f) Bank statement reflecting transaction
 - g) Copy of certificate of incorporation of share applicants

11. Thereafter pursuant to the AO calling for certain more details the assessee had filed along with reply dated 12.12.2017 the following more documents:

- i) Copy of bank statement

- ii) Details of nature of business of the company
- iii) Details of directors of company
- iv) Assessee along with address and PAN
- v) Copy of master data of all applicants (CIN, registered addresses, email ID, company status, DIN and name of directors) (refer page 64 to 71 of PB).

12. Based on the aforesaid documents filed by the assessee pursuant to notices u/s 142(1) of the Act and the AO conducted further enquiries by issuing summons u/s 131 and notice 133(6) of the Act, to the seven share subscribers and after cross-checking the veracity of the documents filed by the assessee, the AO was pleased to accept the identity, creditworthiness and genuineness of the share capital of Rs.1 crore. It is noted all the seven entities have furnished their respect CIN & DIN numbers, registered addresses, email-ID, and their respective status of these companies are shown as “active” which fact can be seen from a perusal of company Master Data (refer Page 64 to 71 of PB). We find that share subscribers have replied to the AO pursuant to notice issued u/s 133(6) of the Act which is found placed at page 4-71 of PB. From a perusal of the same, the following details along with supporting documents were filed respectively by them directly to the AO (i) PAN (ii) Assessing Ward (iii) details of share (iv) copy of ITR (v) copy of audited Balance sheet and P & L account (vi) copy of bank statement (vii) share allotment advice (viii) Allotment letter of shares specifying distinction numbers of share so allotted. In the light of the aforesaid enquires & documents furnished by them, and after examining the director of assessee company on oath u/s 131 of the Act, the AO had accepted the seven share subscribing companies identity; and the entire transaction has been carried out through the banking channel and since all of them had filed balance sheets as well as all companies had sufficient creditworthiness to subscribe for the share capital of the assessee, the AO accepted creditworthiness and genuineness of the share transaction with the assessee company. The identity of the seven (7) share subscribers can be noted from the following details:

Sl. No.	Name of the Share Applicant Company	CIN	PAN	ITR Filed as in
1	Encord Commercial Private Limited	U51909WB2008PTC123294	AABCE9318D	PB 13, 375 & 376
2	Fortune Vincom Private Limited	U51909DL2008PTC378161	AABCF1964A	PB 21, 373 & 374
3	Loknath Merchants Private Limited	U51109WB2006PTC110591	AABCL4058R	PB 372
4	Jagdamba Dealcom Private Limited	U51109WB2008PTC123292	AABCJ9653Q	PB 370 & 371
5	Natraj Management Private Limited	U51909WB2008PTC120059	AACCN7470J	PB 43, 366 & 367
6	Ramdoot Tradelink Private Limited	U51109WB2008PTC121947	AADCR8724L	PB 53, 368 & 369
7	Indigo Dealers Private Limited	U51909WB2008PTC123197	AABCI8424L	PB 63, 364 & 365

And that notice u/s 133(6) were issued by AO to all share applicants for further verification and the share applicants have complied with, which is discernible from the following details:

Sl. No.	Name of the Share Applicant Company	Notice u/s 133(6) issued	Reply Submitted by Share Applicant
1	Encord Commercial Private Limited	On 01/12/2017 as per order sheet in Paper Book Pg-96	Submitted via Speed Post no. EW025518431IN on 20/12/2017 as per PB 394
2	Fortune Vincom Private Limited		Submitted via Speed Post no. EW025518445IN on 20/12/2017 as per PB-395
3	Loknath Merchants Private Limited		Submitted in the office of ITO on 22/12/2017, forwarding letter in PB – 72
4	Jagdamba Dealcom Private Limited		Submitted in the office of ITO on 22/12/2017, forwarding letter in PB – 73
5	Natraj Management Private Limited		Submitted via Speed Post no. EW025518459IN on 20/12/2017 as per PB-396
6	Ramdoot Tradelink Private Limited		Submitted in the office of ITO on 21/12/2017, forwarding letter in PB – 74
7	Indigo Dealers Private Limited		Submitted via Speed Post no. EW025518462IN on 20/12/2017 as per PB-397

Further it is noted that the AO issued notice u/s 131 dated 21.12.2017 as per PB-97 and the notice u/s 131 was complied with on 28.12.2017 by recording a statement on oath of the assessee's director Shri Ashok Kumar Agarwal (PB-97). Also the assessee produced books of accounts & AO test checked as per noting in order sheet

dated 28.12.2017 (PB-97). Thus, we note that the AO after verification as aforesaid facts has not drawn any adverse opinion or doubted the identity of the share applicants which view of the AO is a plausible view in the light of the documents referred to supra.

13. And coming to the creditworthiness of the shareholders, it is noted from the details given in the balance sheet of the shareholders, the net worth as per balance sheet as on 31.03.2009 & 31.03.2010 as well as the sum invested by them in the assessee is discernible as under:

Sl. No.	Name of the Share Applicant Company	Amount Invested in Assessee's business	Capital & Reserves as on 31.03.2009	Capital & Reserves as on 31.03.2010	Balance Sheet as in
1	Encord Commercial Private Limited	10,00,000	7,88,00,000	7,88,00,000	PB No. 380
2	Fortune Vincom Private Limited	10,00,000	7,66,00,000	7,66,00,000	PB No. 382
3	Loknath Merchants Private Limited	10,00,000	1,95,95,396	2,98,28,860	PB No. 384
4	Jagdamba Dealcom Private Limited	10,00,000	7,66,00,000	7,66,00,000	PB No. 386
5	Natraj Management Private Limited	20,00,000	8,99,00,000	8,99,00,000	PB No. 388
6	Ramdoot Tradelink Private Limited	20,00,000	7,93,70,000	7,93,70,000	PB No. 390
7	Indigo Dealers Private Limited	20,00,000	7,40,00,000	7,40,00,000	PB No. 392

14. It is noted that the relevant assessment year under consideration is AY 2010-11 and in this assessment year as per law applicable to this year is concerned, the assessee is duty bound when called upon by the AO to show him (AO) the evidence of the "source" of the share capital which in this case the assessee had discharged and not 'source of source' which requirement of law came in to existence from assessment year i.e. AY 2013-14 and not in this relevant AY 2010-11. Thus, we find that AO's action of accepting the credit worthiness of the share applicants cannot be faulted. Thus, we find that AO after re-opening the assessment had conducted the aforesaid enquiries as discussed and after recording the statement of the director of assessee company u/s 131 of the Act has accepted the share transaction, which action of AO cannot be termed as a case of no-enquiry as incorrectly held by the Ld.

PCIT. To sum up we find that after processing the return of income of the assessee u/s 143(1) of the Act the AO re-opened the same by recording the reason (supra) and it is noted from the *reason to re-open* was precisely for the same reason i.e. [on which issue the *Ld. PCIT in the impugned order concluded that the AO failed to enquire on the issue i.e. share capital Rs. 1 crore*]. The AO in the '*reasons recorded*' had expressed his desire to re-open on the very same issue i.e. share capital of Rs. 1 crore and which was the factual basis for forming a belief about the escapement of income, which fact is clearly discernible for '*reasons recorded*' to re-open (supra) itself. And we find that after re-opening, the AO has enquired by issuing notice u/s 133(6) directly to the seven share applicants which were replied by them directly to AO; and on summons u/s 131 of the Act, the assessee company's director had appeared before the AO and his statement was recorded under oath by AO u/s 131 of the Act. And all the seven share subscriber are Income Tax assessee's and their entire details as discussed (supra) has been filed before the AO pursuant to his notices and the AO being satisfied with their identity, creditworthiness & genuinity have accepted after enquiry, the share capital of Rs. 1 crore which is a plausible view as far as law was applicable for AY 2010-11 is concerned. So the *Ld. PCIT* erred in finding that no enquiry was conducted. The *Ld. PCIT's* action to interfere exercise the revisional jurisdiction by terming the AO's action as a fall out of no enquiry is perverse; and his finding fault with the AO for not going behind the cash-trail is also erroneous, for the simple reason that as per the law in force during AY 2010-11, the assessee had discharged the onus of share capital by adducing evidence of the "source" of money and the AO has found it to be satisfying and so he accepted it after enquiry. So we find that the AO had discharged the role of an investigator as far as law was applicable for AY 2010-11 is concerned. And since the documents/material collected by the AO during the re-assessment proceedings are in the assessment folder of the assessee and which could have been before the *Ld. PCIT*, so before finding fault with the AO in respect of enquiry, the *Ld. PCIT* should have brought out as to where or how, the AO faulted in his enquiry, and for that he (*Ld PCIT*) should himself have conducted enquiry and brought out any deficiency/infirmity in the documents/material collected by the AO, which the *Ld.*

PCIT has not done. So the impugned action of Ld. PCIT cannot be countenanced. According to us, there should be finality of 'lis' or else there will never be any end to the disputes. And as we discussed in the facts & circumstances of the case the AO's view on share capital & premium was a plausible view as far as law was applicable for AY 2010-11 is concerned since it is in line with the decision of number of judicial precedents which are as under:

15. In the case of CITv. S. Kamaljeet Singh [2005] 147 Taxman 18(All.) their lordships, on the issue of discharge of assessee's onus in relation to a cash credit appearing in his books of account, has observed and held as under:-

"4. The Tribunal has recorded a finding that the assessee has discharged the onus which was on him to explain the nature and source of cash credit in question. The assessee discharged the onus by placing (i) confirmation letters of the cash creditors; (ii) their affidavits; (iii) their full addresses and GIR numbers and permanent account numbers. It has found that the assessee's burden stood discharged and so, no addition to his total income on account of cash credit was called for. In view of this finding, we find that the Tribunal was right in reversing the order of the AA C, setting aside the assessment order."

16. Our attention was also drawn to the decision of the Hon'ble Supreme Court while dismissing SLP in the case of Lovely Exports as has been reported as judgment delivered by the CTR at 216 CTR 295:

"Can the amount of share money be regarded as undisclosed income under section 68 of the Income tax Act, 1961? We find no merit in this special leave petition for the simple reason that if the share application money is received by the assessee-company from alleged bogus shareholders, whose names are given to the AO, then the Department is free to proceed to reopen their individual assessments in accordance with law. Hence, we find no infirmity with the impugned judgment."

17. Our attention was also drawn to the decision of the Hon'ble Calcutta High Court while relying on the case of Lovely Exports, in the appeal of COMMISSIONER OF INCOME TAX, KOLKATA-IV Vs ROSEBERRY MERCANTILE (P) LTD., ITAT No. 241 of 2010 dated 10-01-2011 has held:

"On the facts and in the circumstances of the case, Ld. CIT(A) ought to have upheld the assessment order as the transaction entered into by the assessee was a scheme for laundering black money into white money or accounted money and the Ld. CIT (A)

ought to have held that the assessee had not established the genuineness of the transaction. "

It appears from the record that in the assessment proceedings it was noticed that the assessee company during the year under consideration had brought Rs. 4, 00, 000/- and Rs.20,00,000/- towards share capital and share premium respectively amounting to Rs.24,00, 000/- from four shareholders being private limited companies. The Assessing Officer on his part called for the details from the assessee and also from the share applicants and analyzed the facts and ultimately observed certain abnormal features, which were mentioned in the assessment order. The Assessing Officer, therefore, concluded that nature and source of such money was questionable and evidence produced was unsatisfactory. Consequently, the Assessing Officer invoked the provisions under Section 68/69 of the Income Tax Act and made addition of Rs.24,00,000/-.

On appeal the Learned CIT (A) by following the decision of the Supreme Court in the case of Cl. T. vs. M/s. Lovely Exports Pvt. Ltd., reported in (2008) 216 CTR 195 allowed the appeal by holding -that share capital/premium of Rs. 24,00,000/- received from the investors was not liable to be treated under Section 68 as unexplained credits and it should not be taxed in the hands of the appellant company.

As indicated earlier, the Tribunal below dismissed the appeal filed by the Revenue.

After hearing the learned counsel for the appellant and after going through the decision of the Supreme Court in the case of Cl. T. vs. M/s. Lovely Exports Pvt. Ltd. [supra], we are at one with the Tribunal below that the point involved in this appeal is covered by the said Supreme Court decision in favour of the assessee and thus, no substantial question of law is involved in this appeal. The appeal is devoid of any substance and is dismissed.

18. Our attention was drawn to the decision of the Hon'ble High Court, Calcutta in the case of Commissioner Of Income Tax vs M/s. Nishan Indo Commerce Ltd dated 2 December, 2013 in INCOME TAX APPEALNO.52 OF 2001 wherein the Court held as follows:

"The Assessing Officer was of the view that the increase in share capital by RS.52,03,500/- was nothing but the introduction of the assessee's own undisclosed funds/income into the books of accounts of the assessee company. The Assessing Officer accordingly treated the investment as unexplained credit under Section 68 of the Income Tax Act and added the same to the income of the assessee.

Being aggrieved, the assessee filed an appeal before the Commissioner of Income Tax (Appeals) being the First Appellate Authority and contended that the Assessing Officer had no material to show that the share capital was the income of the assessee company and as such the addition made by the Assessing Officer under Section 68 of the Act was wrong.

The learned Commissioner of Income Tax (Appeals) after hearing the department and the Assessee Company deleted the addition of Rs. 52, 03,500/- to the income of the assessee company during the Assessment Year in question. The learned Commissioner of Income Tax Appeals found that there were as many as 2155 allottees, whose names, addresses and respective shares allocation had been disclosed.

The Commissioner of Income Tax Appeals, further found that the Assessee Company received the applications through bankers to the issue, who had been appointed under the guidelines of the Stock Exchange and the Assessee Company had been allotted shares on the basis of allotment approved by the Stock Exchange. The Assessee Company had duly filed the return of allotment with the Registrar of Companies, giving complete particulars of the allottees.

The Commissioner of Income Tax (Appeals) found that inquires had confirmed the existence of most of the shareholders at the addresses intimated to the Assessing Officer, but the Assessing Officer took the view that their investment in the Assessee Company was not genuine, on the basis of some extraneous reasons. The Commissioner of Income Tax (Appeals) took note of the observation of the Assessing Officer that enquiry conducted by the Income Tax Inspector had revealed that nine persons making applications for 900 shares were not available at the given address and rightly concluded that the total share capital issued by the Assessee Company could not be added as unexplained cash credit under 'Section 68 of the Income Tax Act. Moreover, if the nature and source of investment by any shareholder, in shares of the Assessee Company remained unexplained, liability could not be foisted on the company. The concerned shareholders would have to explain the source of their fund.

The learned Commissioner on considering the submissions of the, respective parties and considering the materials, found that the Assessing Officer had applied the provisions of Section 68 of the Income Tax Act arbitrarily and illegally and in any case without giving the assessee adequate opportunity of representation and/or hearing.

Learned Tribunal agreed with the factual findings of the learned Commissioner and accordingly the learned Tribunal dismissed the appeal of the Revenue and affirmed the decision of the learned Commissioner.

Mr. Dutta appearing on behalf of the petitioners cited judgment of the Division Bench of this Court in Commissioner of Income Tax Vs. Ruby Traders and Exporters Limited reported in 236 (2003) ITR 3000 where a Division Bench of this Court held that when Section 68 is resorted to, it is incumbent on the assessee company to prove and establish the identity of the subscribers, their credit worthiness and the genuineness of the transaction.

The aforesaid judgment was rendered in the context of the factual background of the aforesaid case where, despite several opportunities being given to the assessee, nothing was disclosed about the identity of the shareholders. In the instant case, the assessee disclosed the identity and address and particulars of share allocation of the shareholders. It was also found on the facts that all the shareholders were in existence. Only nine shareholders subscribing to about 900 shares out of 6, 12,000 shares were not found available at their addresses, and that too, in course of assessment proceedings in the year 1994, i.e., almost 3 years after the allotment.

By an order dated 2nd May, 2001, this Court admitted the appeal on three questions which essentially centre around the question of whether the Appellate Commissioner erred in law in deleting the addition of Rs. 52, 03, 500/- to the income of the assessee as made by the Assessing Officer. We are of the view that there is no question of law involved in this appeal far less any substantial question of law.

The learned Tribunal has concurred with the learned Commissioner on facts and found that there were materials to show that the assessee had disclosed the particulars of the shareholders. The factual findings cannot be interfered with, in

appeal. We are of the view that once the identity and other relevant particulars of shareholders are disclosed, it is for those shareholders to explain the source of their funds and not for the assessee company to show wherefrom these shareholders obtained funds.”

19. Further, our attention was drawn to the decision of the Hon'ble High Court, Calcutta in the case of Commissioner of Income Tax vs M/s.Leonard Commercial (P) Ltd on 13 June, 2011 in ITAT NO 114 of 2011 wherein the Court held as follows:

“The only question raised in this appeal is whether the Commissioner of Income-tax (Appeals) and the Tribunal below erred in law in deleting the addition of Rs.8,52,000/-, Rs. 91,50,000/- and Rs. 13,00,000/- made by the Assessing Officer on account of share capital, share application money and investment in HTCCCL respectively.

After hearing Md. Nizamuddin, learned Advocate appearing on behalf of the appellant and after going through the materials on record, we find that all such application money were received by the assessee by way of account payee cheques and the assessee also disclosed the complete list of shareholders with their complete addresses and GIR Numbers for the relevant assessment years in which share application was contributed. It further appears that all the payments were made by the applicants by account payee cheques.

It appears from the Assessing Officers order that his grievance was that the assessee was not willing to produce the parties who had allegedly advanced the fund.

In our opinion, both the Commissioner of Income-tax (Appeals) and the Tribunal below were justified in holding that after disclosure of the full particulars indicated above, the initial onus of the assessee was shifted and it was the duty of the Assessing Officer to enquire whether those particulars were correct or not and if the Assessing Officer was of the view that the particulars supplied were insufficient to detect the real share applicants, to ask for further particulars.

The Assessing Officer has not adopted either of the aforesaid courses but has simply blamed the assessee for not producing those share applicants.

In our view, in the case before us so long the Assessing Officer was unable to arrive at a finding that the particulars given by the assessee were false, there was no scope of adding those money under section 68 of the Income- tax Act and the Tribunal below rightly held that the onus was validly discharged.

We, thus, find that both the authorities below, on consideration of the materials on record, rightly applied the correct law which are required to be applied in the facts of the present case and, thus, we do not find any reason to interfere with the concurrent findings of fact based on materials on record.

The appeal is, thus, devoid of any substance and is dismissed summarily as it does not involve any substantial question of law.

20. As noted from the judicial precedents cited above, where any sum is found credited in the books of an assessee then there is a duty casted upon the assessee to explain the nature and source of credit found in his books, when called upon by the AO to do so. In the instant case, the credit is in the form of receipt of share capital with premium from share applicants. The nature of receipt towards share capital is seen from the entries passed in the respective balance sheets of the companies as share capital and investments. In respect of source of credit, the assessee has to prove the three necessary ingredients i.e. identity of share applicants, genuineness of transactions and creditworthiness of share applicants. For proving the identity of share applicants, the assessee furnished the name, address, PAN of share applicants together with the copies of balance sheets and Income Tax Returns. With regard to the creditworthiness of share applicants, a perusal of their respective balance sheets reveals that these Companies are having enough capital and the investment made in the appellant company is only a small part of their capital. These transactions are also duly reflected in the balance sheets of the share applicants, so creditworthiness is proved. Even if there was any doubt if any regarding the creditworthiness of the share applicants was still subsisting, then AO should have made enquiries from the AO of the share subscribers as held by Hon'ble jurisdictional High Court in CIT vs DATAWARE (supra) which has not been done, so no adverse view could have been drawn. Third ingredient is genuineness of the transactions, for which we note that the monies have been directly paid to the assessee company by account payee cheques out of sufficient bank balances available in their bank accounts on behalf of the share applicants. The share applicants have confirmed the share application in response to the notice u/s 133(6) of the Act and have also confirmed the payments which are duly corroborated with their respective bank statements and all the payments are by account payee cheques. Thus the assessee has discharged the onus on it; and the AO enquired about it during the reassessment after reopening proceeding for this issue and it has been thoroughly enquired as discussed supra and the view taken by AO is a plausible view in line with the judicial precedence supra and so it cannot be called erroneous. So the Ld PCIT erred in holding the AO's re-assessment order as erroneous.

21. In the light of the aforesaid judicial precedents and in the light of fact that AO has conducted enquiries in respect of share capital collected by the assessee company before accepting the share subscribers identity, creditworthiness and genuineness of the transaction and being satisfied did not find it necessary to make any addition u/s 68 of the Act, which action could not have been interfered by the Ld. PCIT u/s 263 of the Act since the jurisdictional condition precedent for invoking the same is not satisfied in the facts of this case as discussed supra. However in case still if he (Ld. PCIT) wanted to exercise his jurisdiction despite the AO making enquiries as found by us (supra), then he (Ld. PCIT) should have himself conducted preliminary enquiry and should have been able to show that AO's enquiry was not correctly made by finding deficiency/infirmity in the documents/ material collected by the AO or even able to disprove the transaction of share capital by bringing material to suggest that the share transaction of assessee was an eye wash. This exercise the Ld. PCIT has not carried out. So according to us, in the light of the enquiries conducted by the AO in respect of share transaction, the Ld. PCIT could not have found the action of AO to be erroneous for want of no enquiry. And the view taken by the AO in respect of share transaction is a plausible view; and at any rate cannot be termed as unsustainable view. We note that the Ld. PCIT proceeded on wrong, assumption of facts and law. Since the Ld. PCIT has interfered by invoking 263 jurisdiction without satisfying the condition precedent i.e. AO's order to be erroneous as well as prejudicial to the Revenue, the issuance of SCN and consequent impugned action is null in the eyes of law. Therefore, the assumption of revisional jurisdiction is bad in law and so quashed.

22. The assessee had also raised additional ground of appeal which is as under:

1. That on the facts and in the circumstances of the case, proceedings initiated by the Ld. PCIT u/s 263 and the impugned order is not valid for this reason also that the Ld. PCIT wants to revise the reassessment order passed u/s 147 but that order itself is not valid because of various jurisdictional defects such as no satisfaction recorded of the Ld. AO, reopening only for verification, mechanical sanction by higher authorities, borrowed satisfaction, reasons recorded are scanty and vague, reopening for fishing and roving inquiries and hence the impugned order u/s 263 should be set aside as void.

2. That the appellant craves leave to add, amend, modify, rescind, supplement, or alter the Ground stated herein above, either before or at the time of hearing of this appeal.

23. Since we have already allowed the legal issue raised by the assessee that the Ld. PCIT lacked jurisdiction to invoke section 263 of the Act, and therefore the impugned action itself is *ab-initio* void therefore we have quashed it. Therefore, we are not inclined to adjudicate the additional ground of appeal (supra) since it has become academic and is left open.

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

Order is pronounced in the open court on 26th March, 2021.

Sd/-
(J.S. Reddy)
Accountant Member

Sd/-
(A. T. Varkey)
Judicial Member

Dated: 26.03.2021

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- ACS Traders Pvt. Ltd. ,7, Dr. Abani Dutta Road, Howrah, West Bengal-711106.
2. Respondent – PCIT-5, Kolkata
3. The Pr.CIT-5, Kolkata
4. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata

