

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH : D : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER  
AND  
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No.3287/Del/2017  
Assessment Year: 2010-11

Kalinga Conduits Electricables (P) Vs Pr. CIT-9,  
Ltd., New Delhi.  
81/41, Punjabi Bagh West,  
New Delhi.

PAN : AACCK5784H

(Appellant)		(Respondent)
Assessee by	:	Shri Gautam Jain, Advocate; Shri Rajiv Sabharwal, CA; & Shri Lalit Mohan, CA.
Revenue by	:	Mrs. Aashna Paul, CIT-DR
Date of Hearing	:	18.02.2021
Date of Pronouncement	:	24.03.2021

ORDER

PER R.K. PANDA, AM:

This appeal filed by the assessee is directed against the order dated 23<sup>rd</sup> March, 2017 passed u/s 263 of the IT Act, 1961 by the PCIT, New Delhi, relating to the assessment year 2010-11.

2. Facts of the case, in brief, are that the assessee is a company and filed its return of income on 30<sup>th</sup> September, 2010 declaring an income of Rs.5,940/-. The said return was processed u/s 143(1) of the Act. Subsequently, the CIT-II, New

Delhi, vide his letter No. File 148/2012-13/2817 dated 15<sup>th</sup> March, 2013, forwarded the letter of Investigation II, Delhi, vide F. No.DIT (Inv.)-II/u/s 148/2012-13/197 dated 12<sup>th</sup> March, 2013 giving information about an accommodation entry of Rs.40 lakhs received by the assessee from M/s Victory Software Pvt. Ltd., Zenith Automotive Pvt. Ltd. and Humtum Marketing Pvt. Ltd. Based on the above, the AO issued notice u/s 148 after recording the reasons.

3. Subsequently, the AO issued notice u/s 143(2)/142(1) of the Act to which the assessee filed the requisite details. Thereafter, the AO completed the assessment u/s 147/143(3) of the Act on 20<sup>th</sup> February, 2015 accepting the income returned therein.

4. The AO made a proposal u/s 263 of the Act for revising the assessment order dated 22<sup>nd</sup> February, 2015 stating that certain facts have emerged which were not available on record at the time of assessment u/s 147 of the Act. The AO held the order as erroneous and prejudicial to the interest of the Revenue. According to the AO, the enquiries of the Investigation Wing, Delhi have unearthed huge accommodation entry racket being operated by accommodation entry operator Jain brothers by way of more than 100 companies/firms, etc. The Investigation Wing has compiled a report and data of the beneficiaries of such entries. The name of the assessee company figures in the list of beneficiaries of share capital, premium/loan. On the basis of the proposal given by the AO, the Id. CIT issued a show cause notice asking the assessee to explain as to why the order passed by the

AO should not be set aside since the same is both erroneous as well as prejudicial to the interest of the Revenue. The assessee filed the reply stating that the AO had conducted proper enquiries before framing the assessment. The allegation that the AO has not conducted the enquiries in the manner indicated by the PCIT in his notice is based on no material but assumptions, presumptions, surmises, conjectures and suspicion. It was reiterated that the AO had made all necessary enquiries provided in law and, thereafter alone had accepted the claim of the assessee. Therefore, by no justification, it could be alleged that the order of assessment framed by the AO is erroneous within the meaning of section 263 of the Act and, as such, the notice is without jurisdiction. Relying on various decisions, it was argued that the order passed by the AO is correct and does not call for initiation of proceedings u/s 263 of the Act.

5. However, the Id. PCIT was not satisfied with the arguments advanced by the assessee. Observing that various case laws cited by the assessee are not applicable to the facts of the present case and that the AO failed to apply his mind to the case in all perspective, he held that the order passed by him was erroneous as well as prejudicial to the interest of the Revenue. The Department has conclusively proved beyond doubt by conducting detailed investigations, trailing the events that these funds have been brought by way of accommodation entry in an orchestrated, coordinated, synchronized and collusive manner. He, therefore, set aside the order of the AO and directed him to re-examine the issue as proposed u/s 263 of the Act

and pass the necessary order after giving due opportunity of being heard to the assessee.

6. Aggrieved with such order of the PCIT, the assessee is in appeal before the Tribunal by raising the following grounds:-

õ1. That order dated 23.3.2017 u/s 263 of the Act by learned Principal Commissioner of Income Tax-5, New Delhi has been made without satisfying the statutory preconditions contained in the Act and is therefore without jurisdiction and thus, deserves to be quashed as such.

1.1 That learned Principal Commissioner of Income Tax has erred both in law and on facts in holding that assessment u/s 147 of the Act has been without taking into account the fact that Jain Brothers have provided the accommodation entries in lieu of certain commission charged from the beneficiary parties from various companies/firms, which are being controlled by Jain Brothers. The finding is factually incorrect, legally misconceived, contrary to record and untenable.

1.2 That further the learned Principal Commissioner of Income Tax has failed to appreciate that the voluminous documentary evidence had been led to discharge the onus on the appellant u/s 68 of the Act and therefore the order of assessment could not be regarded as an order having been framed without application of mind and thus the impugned order is based on surmiseful, whimsical and fanciful assumptions and presumptions hence is not in accordance with law.

1.3 That further more the learned Principal Commissioner of Income Tax has proceeded to set aside the order on mere speculation, generalized observations, theoretical allegations and assertions, without there being any supporting evidence and is therefore not in accordance with law.

1.4 That the learned Principal Commissioner of Income Tax while framing the impugned order has failed to appreciate that in absence of any source of income of the appellant or any evidence to show that money originated from the coffers of the appellant observations made are apparently untenable, particularly when none of the parties have denied investment in the appellant company.

1.5 That impugned order is based on premeditated and preconceived supposition assumption and perception and not on objective appreciation of facts and evidence gathered during the course of revision and hence the illegal action be held to be vitiated and coloured by an arbitrary approach which finds

no sanction in law.

1.6 That the learned Principal Commissioner of Income Tax has failed to appreciate that once the learned Assessing Officer on examination of the facts on record and after making all possible enquiries had accepted claim of the appellant then such an order of assessment could not be regarded as erroneous in as much as prejudicial to the interest of revenue merely because the learned Commissioner of Income Tax had a different opinion and that too, without having established in any manner that, view adopted by the learned Assessing Officer was an impossible view.

1.7 That the finding that department has proved conclusively beyond doubt by conducting detailed investigations, trailing the funds that these funds have been brought by the way of accommodation entries in a orchestrated, coordinated, synchronized, collusive manner is not based on correct appreciation of facts and law and in any case could not made a ground to invoke the provisions of section 263 as substitution of opinion is not impermissible u/s 263 of the Act.

1.8 That further reliance placed by the learned Principal Commissioner of Income Tax on Explanation to section 263 of the Act by suggesting that AO has erred in passing the order and the assessment was done without making inquires or verification which should have been made thus order passed by him was erroneous is also misconceived, misplaced and untenable.

2. That even otherwise notice u/s 148 of the Act was illegal and without jurisdiction therefore both the order of assessment dated 22.2.2015 u/s 147/143(3) of the Act and also the impugned order are consequently void-ab-initio.

2.1 That since the notice u/s 148 of the Act had been issued mechanically without application of mind much less independent application of mind and without having any tangible, relevant credible material to form a reason to believe that income of the appellant has escaped assessment therefore the order of assessment u/s 147/143(3) of the Act was without jurisdiction and as such the impugned order is also without jurisdiction.

3. That the learned Principal Commissioner of Income Tax has also failed to appreciate that, u/s 263 of the Act, an order of assessment cannot be set-aside to simply to make further enquiries and thereafter pass fresh order of assessment and as such, impugned order is contrary to law and hence, unsustainable.

It is therefore prayed that, impugned order made under section 263 of the Act dated 23.3.2017 be held to be without jurisdiction and, therefore be quashed and appeal of the appellant be allowed.ö

7. The Id. Counsel for the assessee strongly challenged the order of the Id. PCIT invoking the provisions of section 263 of the Act. Referring to page 6 of the paper book, which is the balance sheet of the assessee company as on 31.03.2010, he drew the attention of the Bench to the share capital which has gone up to Rs.5 lakhs as on 31.03.2010 from Rs.1,00,000/- as on 31.03.2009. Referring to page 11 of the paper book, he drew the attention of the Bench to the notice issued u/s 148 of the Act dated 9<sup>th</sup> April, 2013. Referring to page 24 and 25 of the paper book, he drew the attention of the Bench to the reasons recorded for issue of notice u/s 148 wherein the AO has reopened the assessment on the basis of the information obtained from the Investigation Wing which was forwarded by the CIT-II, New Delhi according to which the assessee has accepted accommodation entry of Rs.40 lakhs from companies controlled and managed by Shri Surender Kumar Jain group of cases. Referring to page 26 and 27 of the paper book, the Id. Counsel drew the attention of the Bench to the reply dated 03.06.2014 given by the assessee in response to notice u/s 143(2)/142(1) wherein the assessee had given various details while discharging the onus cast on it u/s 68 of the Act in respect of the share application money received by it. Referring to page 31 of the paper book, he drew the attention of the Bench to the letter issued by the AO dated 26<sup>th</sup> June, 2014 wherein the AO had asked the assessee to produce the directors of the companies named M/s Victory Software Pvt. Ltd. and Zenith Automotive Pvt. Ltd. Referring to page 33 of the paper book, the Id. Counsel for the assessee drew the attention of the Bench to the letter issued by the AO dated 10<sup>th</sup> July, 2014 wherein he has asked

the assessee to produce the directors of the three companies along with below-mentioned documents:-

1. Copy of ledger Account from 01.04.2009 to 31.03.2010
  2. Copy of bills/invoices issued/received during the above period.
  3. Attested copy of bank statement of company/Firm/concern reflecting the transaction held with M/s Kalinga Conduits & Electricables Pvt. Ltd (PAN: AACCK5284H) for Asstt. Year 2010-11,
  4. Copy of acknowledge for filing of ITR in the name of company along with Audit report, B/s, P&L A/c and other annexure for A.Y. 2009-10,2010-11 and 2011-12
  5. Complete Books of Accounts for F.Y.2009-10.
  6. Proof of Identity and proof of being Principal Officer
8. Referring to page 39-40 of the assessment order, he drew the attention of the Bench to the assessment order passed u/s 153C/153A of the IT act dated 28<sup>th</sup> March, 2013 in case of M/s Victory Software Pvt. Ltd., for the assessment year 2010-11. Referring to page 41 and 42 of the paper book, he drew the attention of the Bench to the order passed u/s 153C/153A on 28<sup>th</sup> March, 2013 in respect of M/s Humtum Marketing Pvt. Ltd. for A.Y. 2009-10. Referring to page 44 of the paper book, he drew the attention of the Bench to the reply given by M/s Victory Software Pvt. Ltd. to the AO in response to notice u/s 133(6) of the Act in the case of M/s Kalinga Conduits Electricables (P) Ltd. Referring to page 45 of the paper book, he drew the attention of the Bench to the reply given by Humtum Marketing Pvt. Ltd. in response to the notice u/s 133(6) in respect of M/s Kalinga Conduits

Electricables (P) Ltd. Referring to page 46 of the paper book, the Id. Counsel for the assessee drew the attention to the reply given by Zenith Automotive Pvt. Ltd., in response to the notice u/s 133(6) in the case of M/s Kalinga Conduits Electricables (P) Ltd. Referring to page 47-59 of the paper book, the Id. Counsel for the assessee drew the attention of the Bench to the various other details filed by the assessee explaining the share capital/share premium received from the above three companies.

8.1 Referring to page 60 of the paper book, the Id. Counsel for the assessee drew the attention of the Bench to the order passed u/s 147/143(3) of the Act for A.Y. 2010-11 in case of the assessee which is subject matter of revision u/s 263. He submitted that there was a long gap between the date of reopening of the assessment and date of completion of assessment u/s 147/143(3) and the AO has passed the order after deep investigation. Referring to the copy of the show cause notice issued by the Id. PCIT, he submitted that there is no fresh material before the PCIT which was not available at the time of recording of reasons or completion of the assessment u/s 147/143(3). Referring to the reply given by the assessee before the PCIT during the 263 proceedings, the Id. Counsel drew the attention of the Bench to paras 3.3 to 3.5 of the said reply which reads as under:-

3.3 It is submitted perusal of the reasons recorded would show that hereto proceedings have been initiated pursuant to Investigation Wing enquiries as a result of search carried out on Jain Brothers, namely, Sh. Virender Jain and Sh. Surender Kumar Jain. It is thus submitted that apparently no fresh material has surfaced subsequent to the assessment framed on the assessee company. It is submitted that should your goodself have any material which specifically establishes that any fresh material has surfaced which was not existing on the

date of the order of assessment dated 20.2.2015, the same may kindly be confronted to the assessee company. It is submitted that perusal of the notice would itself reveal that entire reference is to the search operation carried out on 14.9.2010 in the case of Sh. S.K. Jain group and enquiries made thereafter. It is submitted that factum of search ad factum of enquiry were solitary reasons which triggered the re-opening of the concluded assessment in the case of assessee company and it was only thereafter the claim of the assessee stood accepted under section 147/143 (3) of the Act. Thus, to suggest there is any surfacing of fresh material is not correct appreciation of facts and, therefore, the notice based on such incorrect appreciation of facts is not tenable.

3.4 Apart from above, the assessee humbly submits that your 'goodself has referred to various material which has been made the basis for issuing notice under section 148 of the Act and none of such material has been supplied to tile assessee. It is submitted thus the following material as referred in the notice may kindly be made available to the assessee company:

- i) Copy of seized material namely Annexure A-1 to A-163, specifically pages 38, 19 & 20 of Annexure A-22 and pages 13 & 58 of Annexure A- 16 seized from premises of Jain Brothers along with Panchnama;
- ii) Copy of statements recorded of Jain Brothers on the date of search;
- iii) Copy of pages extracted in the notice at page 4 to 7 of the notice;
- iv) Copy of order of assessment and order of CIT (Appeal) in the case of Sh. S.K.Jain;
- v) Copy of report of Investigation Wing; and
- vi) Copy of list of beneficiaries prepared and filed by Investigation Wing;

3.5 It is submitted that in the absence of the aforesaid material having been supplied to the assessee, the notice otherwise too fails to meet the test of principles of natural justice and is, therefore, without jurisdiction.ö

9. He submitted that it was stated before the PCIT in para 3.8 of the said letter that share application money stands duly explained and accepted in the assessment proceedings and there is no material on record to suggest that there is lack of enquiry. Relying on various decisions, it was argued that the purported inadequate

enquiry cannot be made a ground to cloth the PCIT with jurisdiction u/s 263 of the Act.

10. The Id. Counsel for the assessee, relying on various decisions submitted that the assumption of jurisdiction by the PCIT in the instant case is not in accordance with the law. He submitted that there is a distinction between the lack of enquiry and inadequate enquiry. It is only in case of lack of enquiry that the PCIT/CIT is empowered to exercise his revisional powers by calling for and examining the records of any proceedings under the Act and passing orders thereon. Referring to the decision of the Honøble Delhi High Court in the case of CIT vs. Vikas Polymers, 341 ITR 537 (Del), he drew the attention of the Bench to the following observations:-

ō14. From the above, in our considered opinion, it is clear that in the ultimate analysis it is a prerequisite that the CIT must give reasons to justify the exercise of suo motu revisional powers by him to reopen a concluded assessment. A bare reiteration by him that the order of the ITO is erroneous insofar as it is prejudicial to the interest of the Revenue, will not suffice. The exercise of the power being quasi judicial in nature, the reasons must be such as to show that the enhancement or modification of the assessment or cancellation of the assessment or directions issued for a fresh assessment were called for, and must irresistibly lead to the conclusion that the order of the ITO was not only erroneous but was prejudicial to the interest of the Revenue. Thus, while the ITO is not called upon to write an elaborate judgment giving detailed reasons in respect of each and every disallowance, deduction, etc., it is incumbent upon the CIT not to exercise his suo motu revisional powers unless supported by adequate reasons for doing so.ö

11. Referring to the decision of the Honøble Delhi High Court in the case of CIT vs. Ashish Rajpal, reported in 320 ITR 674, the Id. Counsel for the assessee drew the attention of the Bench to the following observations:-

Moreover, it is apparent that, the assessment proceedings had also not culminated in a day but continued for a span of more than ten months. Therefore, it is evident that the learned officer had conducted proper enquiries before framing the assessment. All what is being alleged is that, the learned AO has not conducted the enquiries in the manner indicated by your goodself in the notice, which is based on no material but mere assumptions, presumptions, surmises, conjectures and, suspicion. Infact, the learned Assessing Officer had made all necessary enquiries provided in law and thereafter alone had accepted claimed of the assessee. Hence, by no justification, it could be alleged that, the order of assessment framed by the learned officer is erroneous within the meaning of section 263 of the Act and as such, notice is without jurisdiction.

12. Referring to various other decisions placed in his synopsis and case law compilation, he submitted that since in the present case enquiries were certainly conducted by the AO and it is not a case of no enquiry, therefore, the PCIT should not have set aside the order and directed the AO to conduct further enquiries.

12.1 Referring to the decision of the coordinate Bench of the Tribunal in the case of Dwarkadhis Buildwell (P) Ltd. vs. CIT, Hisar, 109 taxmann.com 5 (Del), he submitted that under identical circumstances, the Tribunal had set aside the order passed u/s 263 of the Act by the PCIT. He accordingly submitted that the order of the PCIT assuming jurisdiction u/s 263 of the Act being not in accordance with the law should be set aside and the grounds raised by the assessee be accepted.

13. The ld. DR, on the other hand, heavily relied on the order of the PCIT. He submitted that the AO in the instant case has not addressed the very basis on which the reopening was made. No deeper enquiry was conducted by the AO to tax the bogus share capital and share premium in the hands of the assessee. He accordingly submitted that the order passed by the AO is both erroneous as well as

prejudicial to the interest of the Revenue and, therefore, the PCIT was fully justified in invoking the jurisdiction u/s 263 of the Act.

14. Referring to the decision of Hon'ble Supreme Court in the case of Deniel Merchants Private Limited and another Vs. ITO vide order dated 29.11.2017 he submitted that Hon'ble Supreme Court in the said decision has held that if no proper enquiry was conducted by the Assessing Officer while making the assessment and he accepts the explanation of the assessee in so far as receipt of share application money is concerned, the order of the CIT setting aside the order of the Assessing Officer with a direction to carry out a thorough and detailed enquiry is justified. The order of the Hon'ble High Court was accordingly upheld. He accordingly submitted that since the AO in the instant case has not made any proper enquiry while making the assessment and accepted the explanation of the assessee on account of receipt of share application money, therefore, the Ld. CIT is justified in invoking the jurisdiction u/s. 263 of the IT Act. He also relied on the following decisions :-

1. Malabar Industrial Co. Ltd. Vs. Commissioner of Income Tax 243 ITR 83 (SC)
2. Bharat Overseas Bank Ltd. Vs. Commissioner of Income Tax 152 TTJ 546 (Chennai)
3. Pratap Footwear Vs. ACIT 1 SOT 638 (Jabalpur)
4. Gee Vee Enterprises Vs. Additional Commissioner of Income Tax 99 ITR 375

5. CIT Vs. Nagesh Knitwear ITA No.591/2008 order dated 01.06.2012.
6. PCIT vs. Shri Braham Dev Gupta, ITA No.907 of 2017, Judgment dated 20.07.2018 (Delhi HC);
7. BSES Rajdhani Power Ltd. vs. PCIT (2017) 399 ITR 228 (Del);
8. Surya Jyoti Software Pvt. Ltd. vs. PCIT, ITA No.2158/Del/2017 (ITAT Delhi);
9. Surya Financial Services Ltd. vs. PCIT, ITA No.2158/Del/2017 (ITAT Delhi)

15. The Ld. Counsel for the assessee in his rejoinder submitted that in the case of Deniel Merchants Private Limited (supra) no enquiry was conducted by the AO whereas in the instant case enquiries were during the reassessment proceedings and order was passed u/s. 143 (3)/ 147. Further, all the investing companies are assessed u/s 153C/153A prior to completion of the assessment in the instant case u/s 147/143(3). Therefore, it cannot be said that in the instant case no proper enquiry was conducted. He accordingly submitted that the order of Hon'ble Supreme Court in the case of Daniel Merchants (P) Ltd. (supra) is not applicable to the facts of the present case.

16. So far as various other decisions are concerned, he submitted that all those decisions are distinguishable and not applicable to the facts of the present case.

17. We have considered the rival arguments made by both the sides, perused the orders of the AO and the PCIT and the paper book filed on behalf of the assessee.

We have also considered the various decisions cited before us by both the sides. We find, the assessment in the instant case was completed u/s 147/143(3) of the Act on 20<sup>th</sup> February, 2015 accepting the returned income at Rs.5,940/-. We find, the case of the assessee was reopened for enquiring the alleged bogus share capital of Rs.40 lakhs received by the assessee from three companies, namely, M/s Victory Software Pvt. Ltd. ó Rs.20 lakhs, Zenith Automotive Pvt. Ltd. ó Rs.10 lakhs, and Humtum Marketing Pvt. Ltd. ó Rs.10 lakhs. We find, the assessee, during the course of such re-assessment proceedings, have filed various details substantiating the identity and credit worthiness of the share applicants and genuineness of the transactions before the AO and the AO, after considering the reply, has accepted the share capital/share premium of Rs.40 lakhs received by the assessee. A perusal of the paper book shows that orders have been passed u/s 153C and 153A in the case of M/s Victory Software Pvt. Ltd. and Humtum Marketing Pvt. Ltd. on 28<sup>th</sup> March, 2013 which is after the search conducted in the case of Surender Jain group of companies. We find, according to the PCIT, the order passed by the AO u/s 143(3)/147 is erroneous and prejudicial to the interest of the Revenue on the ground that the assessment was completed u/s 147/143(3) on 22<sup>nd</sup> February, 2015 without making addition of the amount of share application money received from the three companies and that the AO had not made any further enquiry regarding such share applicants. According to the PCIT, the AO should have appreciated the evidence gathered by the Investigation Wing wherein certain incriminating materials were gathered and the AO should have conducted

further enquiry which was necessary to gather the relevant material which the AO failed to do. Thus, there was complete non-application of mind on the part of the AO in not appreciating the material available on record as well as in not following the course of further enquiry to gather relevant material. Since there was failure on the part of the AO to apply the provisions of law correctly, therefore, he held that the order passed by the AO is both erroneous as well as prejudicial to the interest of the Revenue.

18. It is the submission of the Id. Counsel that the AO had followed the correct proposition of law available at the time of passing the order. The assessee had given all relevant details during the course of assessment proceedings. Further, at the relevant time of assessment, it was the decision of the Honøble Supreme Court in the case of Lovely Exports Pvt. Ltd., wherein it was held that even if the shareholders are bogus, addition cannot be made in the hands of the assessee and addition can be made only in the hands of such bogus shareholders if their identity is known to the Department. It is also his submission that for invoking the jurisdiction u/s 263, the order must be both erroneous as well as prejudicial to the interest of the Revenue. The twin conditions must be satisfied and absence of any one cannot empower the CIT to invoke jurisdiction u/s 263 of the Act. It is also his submission that the AO in the instant case had conducted thorough enquiry and it is not a case of no enquiry or lack of enquiry.

19. We find, some force in the above argument of the ld. Counsel. The assessment year involved in the instant case is 2010-11. The Honøble Supreme Court in the case of Lovely Exports which was applicable at the relevant time, has held that even if the shareholders are bogus, addition cannot be made in the hands of the assessee and addition can be made only in the hands of such bogus shareholders if their identity is known to the Department. Further, a perusal of the relevant material show that there is a long gap between the date of reopening of the assessment and completion of the assessment pursuant to notice issued u/s 147. It is not known what are the further materials that has come to light in between these two periods. Even the assessee had also requested the PCIT to supply or confront any material which specifically establishes that any fresh material is surfaced which was not existing on the date of the order of assessment on 20<sup>th</sup> February, 2015. Further, we find, no such material was ever supplied by the PCIT to the assessee despite being asked by the assessee. Therefore, we find merit in the argument of the ld. Counsel that no such material has surfaced after completion of the assessment u/s 147/143(3) of the Act and, therefore, the notice based on such incorrect appreciation of facts is not tenable

20. The Hon'ble Supreme Court in the case of G. M. Mittal Stainless Steel Private Limited (supra) at para 5 of the order has observed as under :-

"In this particular case, the CIT has not recorded any reason whatsoever for coming to the conclusion that the Assessing Officer was erroneous in deciding that the power subsidy was capital receipt. Given the fact that the decision of

the jurisdictional High Court was operative at the material time, the Assessing Officer could not be said to have erred in law. The fact that this Court had subsequently reversed the decision of the High Court would not justify the CIT in treating the Assessing Officer's decision as erroneous. The power of the CIT under section 263 of the Act must be exercised on the basis of the material that was available to him when he exercised the power. At that time, there was no dispute that the issue whether the power subsidy should be treated as capital receipt had been concluded as against the revenue. The satisfaction of the CIT, therefore, was based on no material either legal or factual which would have given him the jurisdiction to take action under section 263 of the Act."

21. So far as the allegation of the Ld. PCIT that the AO should have conducted further enquiry which were necessary to gather relevant material which the AO failed to do and there was non application of mind on the part of the AO is concerned, we find in the instant case thorough enquiries were conducted by the AO at the time of reassessment proceedings. Full details giving the names, addresses, number of shares of nominal value and share premium amount of all the share holders alongwith their bank statements, copy of IT returns, PAN etc. were filed before the AO. Even if the share holders were bogus as per allegation of the revenue in view of the reasons recorded for reopening, however, as per prevailing law at that time in view of decision of Hon'ble Supreme Court in the case of Lovely Exports (P) Limited (surpa) addition could not have been made in the hands of the assessee and addition, if any, could have been made only in the hands of such bogus share holders. Since AO has taken a plausible view, therefore, it cannot be said that the order of the AO is erroneous.

22. We find the Hon'ble Delhi High Court in the case of PCIT Vs. Delhi Airport Metro Express Private Limited vide ITA No.705/2017 order dated 05.09.2017 has held that for the purpose of exercising jurisdiction u/s. 263 of the Act, the conclusion that the order of the AO is erroneous and prejudicial to the interest of the revenue has to be preceded by some minimal enquiry. If the PCIT is of the view that the AO did not undertake any enquiry, it becomes incumbent on the part of the PCIT to conduct such enquiry. If the PCIT does not conduct such basic exercise then the PCIT is not justified in setting aside the order u/s. 263 of the IT Act.

23. We find the Hon'ble Delhi High Court in the case of Jyoti Foundation (supra) has held that where revisionary authority opined that further enquiry was required, such enquiry should have been conducted by revisionary authority himself to record finding that assessment order passed by the AO was erroneous and prejudicial to the interest of the revenue. We find Hon'ble Delhi High court in the case of Sunbeam Auto Limited (supra) has held that if the AO, while making an assessment, has made inadequate enquiry that would not by itself give occasion to the CIT to pass order u/s.263 merely because he has different opinion of the matter. Only in the case of "lack of enquiry" that such a course of action would be open. It has further been held in the said decision that where the view taken by AO was one of the possible views, therefore, the assessment order passed by the AO cannot be held to be prejudicial to the interest of the revenue. The Hon'ble Delhi

High court in the case of Anil Kumar Sharma (supra) has held that where it was discernible from record that the AO had applied his mind to an issue in question, Commissioner could not invoke section 263 merely because he has different opinion.

24. So far as the decision relied on by Ld. DR in the case of Deniel Merchants (P) Ltd. (supra) is concerned, the Ld. DR could not controvert the submission of the Ld. Counsel for the assessee that no enquiry was conducted in the said case whereas in the case of the assessee enquiries were duly conducted during the reassessment proceedings. Therefore, the decision relied on by Ld. DR is not applicable to the facts of the present case. The various other decisions relied on by Ld. DR are also distinguishable and not applicable to the facts of the present case. We find from a perusal of the paper book that the assessee during the course of reassessment proceedings had filed the requisite details as called for by the AO and the Assessing Officer after considering the same completed the assessment which is in consonance with the decision of the Honøble Supreme Court in the case of Lovely Exports prevailing at that time. Therefore, in view of our discussion in the preceding paragraphs the order of the AO in the instant case cannot be held as erroneous. Since for invoking jurisdiction u/s. 263 the twin conditions i.e. order must be erroneous and the order must be prejudicial to the interest of revenue must be satisfied and since, we have held that the order cannot be held to be erroneous since the view of the AO in accepting the share capital is a plausible view,

therefore, the twin conditions are not satisfied. Therefore, the Ld. PCIT in our opinion could not have invoked jurisdiction u/s. 263 of the IT Act. We, therefore, set aside the order of the PCIT passed u/s. 263 of the IT Act and the grounds raised by the assessee are allowed.

25. In this view of the matter, we set aside the order of the PCIT passed u/s 263 of the Act and the grounds raised by the assessee are allowed.

26. In the result, the appeal filed by the assessee is allowed.

The order was pronounced in the open court on 24<sup>th</sup> March, 2021..

Sd/-

Sd/-

(SUDHANSHU SRIVASTAVA)  
JUDICIAL MEMBER

(R.K. PANDA)  
ACCOUNTANT MEMBER

Dated:24<sup>th</sup> March, 2021.

dk

Copy forwarded to :

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

Asstt. Registrar, ITAT, New Delhi