IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH: KOLKATA
[Before Shri A. T. Varkey, JM and Dr. (Shri) Arjun Lal Saini, AM]

I.TA No. 896/Kol/2019 A.Y 2012-13

M/s. Omkar Infracon (P) Ltd PAN: AABCO 2501L	Vs.	I.T.O. Ward 12(2), Kolkata
Appellant		Respondent

Date of Hearing	20.12.2019
Date of Pronouncement	18 .03.2020

For the Appellant	S/Shri S.M Surana, Advocate, Abhishek Bangal, FCA, ld.ARs
For the Respondent	Dr. (Shri) P.K. Srihari, CIT, ld. DR

ORDER

PER SHRI A.T. VARKEY, JM

This appeal preferred by the assessee against the order of Ld. Principal CIT, Kolkata-4, Kolkata dated 12-03-2019 for the assessment year 2013-14 passed u/s. 263 of the Income-tax Act, 1961 (hereinafter, the 'Act').

2. The main grievance of the assessee is against the action of the ld. Pr. CIT invoking his second (2) revisional jurisdictional u/s. 263 of the Act against the action of AO after framing the reassessment pursuant to the first revisional order dated 10.06.2016 which action of Ld. Pr. CIT, according to assessee is without the requisite conditional precedent as laid down u/s. 263 of the Act.

3. Brief facts of the case are that the assessee company filed its return on 28-09-2012 at total income of Rs. 18,166/-. The return was initially processed u/s. 143(1) of the Act. Later, the case of assessee was taken up for scrutiny under CASS. The AO noted that the assessee company was incorporated on 10-02-2010 in A.Y 2010-11. The AO noted that the authorized capital of the assessee company was Rs. 50,00,000/- and paid up share capital of the assessee company as on 31.03.2012 was

Rs. 46,00,000/-. Out of which, share capital subscribed and paid up capital during the A.Y under consideration amounted to Rs. 18,60,000/- and the assessee company also received share premium amounting to Rs. 3,53,40,000/-. And later the assessment u/s. 143(3) of the Act was concluded on 20-03-2015, wherein the AO was pleased to add share capital and share premium as undisclosed cash credit and added the same to the total income which was computed at Rs. 3,72,18,170/-. Thereafter, the ld. PCIT, Kolkata-4, Kolkata exercised his first (1) revisional jurisdiction u/s. 263 of the Act on 10-06-2016, wherein he was pleased to set aside the original assessment order dt. 20-03-2015 and directed the AO to frame de novo assessment along with specific direction to carry out proper examination of books of account, bank account of the assessee as well as that of the investors. And the AO was also directed to examine the source of share application/share applicants' identity of the investors and its genuineness. Pursuant to the order dated 10.06.201 of Ld. Pr. CIT, the AO gave effect to the order of the ld. Pr. CIT vide re-assessment order dt. 25-11-2016, wherein the (AO) was pleased to accept the identity, creditworthiness of the share subscribers and genuineness of the share capital and share premium received by the assessee company in this assessment year and accepted the retuned income of the assessee at Rs.18,166/-.

4. Taking note of the aforesaid action of the AO re-assessing the assessee vide assessment order dt. 25-11-2016, the ld. Pr.CIT vide his show cause notice (SCN) dt. 12-03-2019 proposed to exercise his revisional jurisdiction u/s. 263 of the Act on the following faults he noted from a perusal of the re-assessment order as under:

> *(i) The A.O passed the order without carrying out detailed investigation/ verification/independent enquiry regarding creditworthiness of the shareholders & also the genuineness of transactions relating to share capital that was intended to be carried out and merely accepted the submission of the assessee in this regard.*
> *(ii) That A. 0 has also failed to carryout detailed investigation of the shareholders on the very issue that how they decided to invest in such a company which was never known for its line of business and also they invested at huge premium without verifying the financial position.*
> *(iii) The A.O further failed to examine the rationale behind raising the said share premium and also did not verify the method adopted by assessee for determining such abnormally huge premium specially keeping in view that prima facie there was no material in the balance sheet of the assessee warranting/justifying such huge premium.*
> *(iv) The A.O failed to collect the relevant evidences in order to reach a logical conclusion regarding the genuineness of controlling interest.*

(v) The A. O failed to examine all the bank accounts for the entire period in the course of verification to find out the money trail of the share capital
(vi) The A.O failed to adequately trace out the money trail to ascertain the genuineness of source of fund invested by shareholders in the assessee company.
(vii) On the whole the impugned order dated 25-11-2016 passed u/s 263/143(3) of the Income Tax Act, 1961 prima facie suffers from lack of independent and adequate enquiry on the aforesaid issues."

5. Thereafter, the ld. Pr. CIT after reproducing the assessee's reply in the impugned order date 12.03.2019 was pleased to set aside the assessment order dt. 25-11-2016 by holding as under:-

> *"7. I have carefully considered the submission of the assessee and perused the material available on record and found that the issue pointed out in the show cause needs verification, After having considered the position of law and facts and circumstances of the instant case, I am of the considered opinion that the assessment order passed by the A.O. is erroneous in so far as it is prejudicial to the interest of revenue in accordance with the Explanation '2(c) below section 263 (1) of the Act on the ground of lack of enquiry. Accordingly, the assessment made by the Assessing officer is set aside on the issues as outlined in para 2 above, The A.O. is directed to provide reasonable opportunity to the assessee company to produce documents & evidences which it may choose to rely upon for substantiating its own claim. The AO is further directed to adjudicate the said issue de novo and pass a fresh assessment order in accordance with the relevant provisions of law."*

6. Assailing the aforesaid action of the ld. PCIT to conduct the second (2) revisional jurisdictional u/s. 263 of the Act against the action of AO after framing the reassessment pursuant to the first revisional order dated 10.06.2016 which action of Ld. Pr. CIT, according to ld AR is without the requisite conditional precedent as laid down u/s. 263 of the Act. The ld. AR of the assessee, Shri S.M. Surana, submitted that the assessee company is not a "*fly by night company*" and the AO in the original scrutiny assessment order dt. 20-03-2015 has observed that the business of assessee was manufacturing of cement bricks. Further, The ld. AR submitted that the assessee was engaged in the business of manufacturing and production of bricks using fly ash and was into genuine business activities. In order to prove this fact, the ld. AR drew our attention to page-13 of the paper book, wherein the balance sheet of the assessee is found placed. The ld. AR drew our attention to the fact that as on 31-03-2011 (previous year) the capital work in progress was only to the tune of Rs. 6.31 lakhs whereas in the relevant AY as on 31-03-2012 capital work in progress was to the tune of Rs. 3.3 crores, which shows that the assessee was setting up its bricks unit and large scale expansion is going on. The Ld. AR drew our attention to page 50, Vol-1 of the

paper book, wherein names of shareholders as well as the percentage of holding of the shares are given. Our attentions was drawn to the fact that there were only five (5) shareholders of the assessee company and out of them two (2) are individuals, who were promoters of the assessee and the remaining were private limited companies of its own group only. Further, it was also brought to our notice that the assessee company is presently doing good business which will be visible from the P&L account of the assessee's performance and recently one of the directors, Shri Ashok Choudhury, who holds 23% share of the assessee company, has preferred a petition before the NCLT in respect of a dispute regarding management of the assessee company and drew our attention to Vol.-3, wherein a copy of the company petition has been found placed, (which runs to 362 pages). So, according to Ld. AR, since the assessee company is genuinely running well, one of the director has approached the NCLT for taking control over the management, or else he wondered as to who will be keen to go before NCLT for getting the management of a company if it was merely a jama kharchi company. So, according to Ld. AR, the assessee company was a genuine running company engaged in manufacturing of fly ash bricks which for expansion activities has collected share capital and premium from its own directors and group companies and cannot be compared with the so called shell companies/jama kharchi companies. And, therefore, according to him, Ld. Pr. CIT erred in appreciating these facts and has unnecessarily interfered with AO's action thinking it to be a shell company when the fact is that in the second round of assessment also, the AO did in depth enquiry and after satisfying himself about the identity, creditworthiness of share subscribers and genuineness of the share capital/premium have accepted the same. The Ld. AR of the assessee in order to show us that the assessee company is a genuine business entity also drew our attention to page-16 of the paper book, which is forming part of the financial statement. From a perusal of the same, it is noted that the assessee company has taken secured loans from banks to the tune of Rs. 13,21,178/- and the loans from financial institution to the tune of Rs.24,85,611/-. Thus, secured loans itself comes to Rs.38,06,789/- and unsecured loans from directors and relatives (Rs.51,20,460/-) and body corporate (Rs.65,47,214/-). So the total loan comes to the tune of Rs. 1,16,67,674/-. The ld. AR also drew our attention to the fact that the income of the assessee has increased manifold and the assessee had income/profit for the A.Y 2014-15 of Rs. 63 lakhs. According to the ld. AR of the assessee, these facts ought to have been appreciated by the Ld. Pr. CIT before exercising his revisional jurisdiction u/s. 263 of the Act, and then he might not have interfered with the order of AO. And further according to him, the ld PCIT have issued SCN without even mentioning which direction of his have not been carried out by the AO while giving effect to his first revisional order dated 10.06.2016. According to ld AR, the assessee has raised the legal issue of lack of jurisdiction on the part of Ld. Pr. CIT to again revise the reassessment order of AO, without satisfying the condition precedent as prescribed in section 263 of the Act want us to quash the impugned order of ld PCIT. Per contra, the ld DR relied on the order of ld PCIT and submitted that the AO while framing the re-assessment order simply believed the version given by the assessee and without properly conducting the inquiry has accepted the claim of assessee which action has been rightly interfered by the ld PCIT and he does not want us to interfere with the order of ld PCIT.

7. Having heard both the parties and after perusing the documents we note that the assessee company was incorporated on 10-02-2010 in A.Y 2010-11. The authorized capital of the assessee company was Rs. 50,00,000/- and paid up share capital of the assessee company as on 31.03.2012 was Rs. 46,00,000/-. Out of which, share capital subscribed and paid up capital during the A.Y under consideration amounted to Rs. 18,60,000/- and the assessee company also received share premium amounting to Rs. 3,53,40,000/-. And later the assessment u/s. 143(3) of the Act was concluded on 20-03-2015, wherein the AO was pleased to add share capital and share premium as undisclosed cash credit and added the same to the total income which was computed at Rs. 3,72,18,170/-. Thereafter, the ld. PCIT, Kolkata-4, Kolkata exercised his first (1) revisional jurisdiction u/s. 263 of the Act on 10-06-2016, wherein he was pleased to set aside the original assessment order dt. 20-03-2015 and directed the AO to frame de novo assessment along with specific direction to carry out proper examination of books of account, bank account of the assessee as well as that of the investors. And the AO was also directed to examine the source of share application/share applicants' identity of the investors and its genuineness. Pursuant to the order dated

10.06.201 of Ld. Pr. CIT, the AO gave effect to the order of the ld. Pr. CIT vide re-assessment order dt. 25-11-2016, wherein the (AO) was pleased to accept the identity, creditworthiness of the share subscribers and genuineness of the share capital and share premium received by the assessee company in this assessment year and accepted the retuned income of the assessee at Rs.18,166/-. This action of AO has been interfered by the ld PCIT exercising his revisional jurisdiction for the second time for the AY 2013-14. without even mentioning which direction of his have not been carried out by the AO while giving effect to his first revisional order dated 10.06.2016. The assessee has raised the legal issue of lack of jurisdiction on the part of Ld. Pr. CIT to again revise the reassessment order of AO, without satisfying the condition precedent as prescribed in section 263 of the Act. Before adjudicating the issues arising from the impugned order of the ld. Pr. CIT, we have to remind ourselves as to the scope of revisional jurisdiction by Pr. CIT/CIT u/s. 263 of the Act. 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 should be satisfied before jurisdiction u/s 263 of the Act is exercised by the ld. Pr. CIT. The twin conditions which need to be satisfied are that (i) the order of the Assessing Officer must be erroneous and(ii) as a consequence of passing an erroneous order, prejudice is caused to the interest of the Revenue. In the following circumstances, the order of the AO can be held to be erroneous i.e. (i) if the Assessing Officer's order was passed on assumption of incorrect facts; or assumption of incorrect law; (ii) Assessing Officer's order is in violation of the principles of natural justice; (iii) if the AO's order is passed without application of mind; or (iv) if the AO has not investigated the issue before him. In the circumstances enumerated above only the order passed by the Assessing Officer can be termed as erroneous for the purpose of S.263 of the Act. Coming next to the second limb, the AO's erroneous order can be revised by the Ld. Pr. CIT only when it is shown that the said order is prejudicial to the interest of Revenue. When this aspect is 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. The Hon’ble Supreme Court, held that for invoking powers conferred by S.263 the Ld. Pr CIT should not only show that the AO's order is erroneous as a result of any of the situations enumerated above but CIT must also further show that as a result of an erroneous order, some loss is caused to the interest of the revenue. Their Lordship in the said judgment held 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. It was further observed that when the Assessing Officer adopts one of the course 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 Ld. CIT does not agree, it cannot be treated as an order prejudicial to the interest of the revenue unless the view taken by the Assessing Officer is **unsustainable in law**.

8. Keeping in mind the law laid by the Hon'ble Apex Court in Malabar Industries (supra), when we examined the records and three paper books which contain 201 & 231 & 362 pages, we note the following relevant facts which would reveal that this company is engaged in genuine business of manufacturing.

(a) We note that the Assessee company is engaged in the business of manufacturing and production of Fly Ash Brick and had Started setting up the factory and expansion of it is going on, which is revealed by the fact that the opening fixed assets were only to the tune of Rs.2.32 crores and the closing fixed assets including work in progress was Rs. 6.87 crores.

(b) We note that the opening share capital including reserves by way of share premium was Rs. 2,63 crores and closing share capital was 6.35 crores i.e. fresh issue of Rs. 3.72 crores.

(c) We note that on the earlier year 60000 shares were held by Sri Ashok Chowdhury, 104000 were held by M/s. Subhshree Grihanirmann Pvt Ltd. 10000 shares were held by M/s. Kushal Solutions P Ltd., (refer paper book page 15 and Sri Ashok Choudhury, Sri Sandeep Khandelia and Sri Shankar Saraf were directors during the assessment year in question.

(d) We note that in the current year further 43500 shares were issued to Shri Ashok Choudhury, 25500 shares to M/s Kushal Solutions Private Ltd. and 45500 shares to M/s. Subhshree Grihanirmann Pvt Ltd which were existing shareholders; and 63500 to M/s. Star Trade Vinimay which was group company (refer paper book page 15) and 8000 shares were issued to Shri Shyam Sundar Khandelia who was father of Sri San deep Khandelia, (the director) (refer to pages 33 & 38 of paper book-I). Out of the share capital contributed during the year, the share applicants namely Shri Ashok Choudhry and M/s. Star Trade paid Rs. 10 lakhs each by way of share application money in last year which is fact can be discerned from perusal of page 25 of the paper book.

(e) We note that the assessee company enjoys term loan from bank and financial institution to the extent of Rs.38,06,789/- and unsecured loans from directors, relatives of directors and body corporate (Rs.51,20,460/- and Rs.65,47,214/-). Thus total loan of Rs.1,16,67,674/-.

(f) We note that the assessee company is closely held legal entity and the shareholders (five in numbers) are all from the same group which is evident from the details given in page 2 paper book Vol. 11.

(g) We note that the return filed by assessee was taken up for scrutiny on 27.10.2013 and the original assessment was framed u/s. 143(3) of the Act on 20.03.2015 and reassessment order u/s. 263/143(3) on 25.11.2016.

(h) We take note of the fact that during the original scrutiny assessment proceedings all the individual shareholders and directors of corporate entities appeared before the AO along with the documents to prove their identity, creditworthiness and genuineness of the transaction. We find that notice u/s 133(6) of the Act was issued to (i) director of assessee company Shri Shyam Sundar Khandelia (Refer page 39 paper book vol-I) and pursuant to which, reply was given vide letter dated 28.10.014 (refer page 95) with all details, viz., voter ID, bank statement, acknowledgement of filing of return, allotment of shares worth Rs.16 lakh and source of income of Rs.241akhs and capital of Rs.90 lakhs. Likewise, in respect of (ii) M/s. Subhshree Grihnirmann Pvt. Ltd. notice u/s. 133(6) was issued which is placed at paper book page 41, and pursuant to which reply dated 28.10.2014 was given to AO is found placed at page 147 of vol-I paper book along with all details, viz., bank statement, source, acknowledgement of filing of return and that it had capital of over Rs.177 lakhs. Likewise, in respect of (iii) M/s. Kushal Solutions P. Ltd. the AO had issued notice u/s. 133(6) which is placed at paper book page 43, and reply to it dated 21.10.2014 is found placed at page 61 of paper book along with all details, viz., bank statement, acknowledgement of return filing, source, copy of audited accounts and it had capital of over Rs.84 lakhs. Likewise, in respect of (iv) M/s. Star Trade Vinimay P Ltd. the AO had issued notice u/s. 133(6) which is found placed at paper book page 45 and reply of it dated 20.10.2014 is found placed at page 113 along with all details viz., source, bank statement, acknowledgement of return filing and it had capital of over Rs.732 lakhs. Likewise in respect of (v) Shri Ashok Choudhury the AO had issued notice u/s. 133(6) of the Act which is found placed at paper book page 47 and reply of it is found placed at page 49 of paper book along with all details, ID, bank statement, acknowledgement of filing of return, source, income and he had income of over Rs.24 lakhs and capital of more than Rs. 404 lakhs. It was also brought to our notice that there were further credit from M/s. Subhshree Grihnirmaan Pvt Ltd., and M/s. Star Trade Vinimay P. Ltd. to the extent of Rs. 25 lakhs and Rs. 18 lakhs each which has been accepted by the AO. In the earlier year share application money of Rs. 41 1akhs was received from M/s. Star Trade Vinimay P Ltd. which has also been accepted by AO.

9. We find that the same set of shareholders still continues to hold shares of the assessee company. However, due to internal dispute between one of the director Shri Ashok Choudhury and the other directors regarding the sale of equity shares 166975, Shri Ashok Choudhury has filed company petition before the NCLT at Kolkata under sections 58, 59, 241 and 242 of the Companies Act, 2013. Thus, we note that there is litigation going on

before the Hon'ble NCLT in respect of allotment of shares of the company which is evident from the company petition which is found placed in paper book Vol. III of 362 pages.

10. We note that though the AO made the entire addition of share capital/premium in the first regular Assessment, the Ld. Pr. CIT in his wisdom was pleased to set-aside the order of AO u/s 263 of the Act vide his order dated 10.6.2016 for de novo assessment but with specific direction of enquiry before framing the re-assessment.

11. Thus, the AO during the 2^{nd} round of re-assessment pursuant to the specific direction of Ld. Pr. CIT dated 10.06.2016 had issued 2^{nd} round of summons dated 22.11.2016 u/s 131 of the Act to directors of assessee company, which is found placed at Paper book II page 3. Pursuant to the summons, Shri Ashok Choudhury director of assessee company appeared before AO on 25.11.2016 and AO duly recorded his statement which is found placed at page 4-6 (Vol. II paper book) and also filed document in addition to the documents filed during the first round mentioned (supra) at para 6(h) – (i) copy of passport (refer page 10 of paper book), (ii) Return of Income for AY 2016-17 (page 8 of paper book) which shows that total income was to the tune of Rs.29,22,225/-, (iii) PAN Card, (iv) Balance Sheet etc. (page 17 of paper book). Likewise, Shri Sandeep Khandelwal, director of assessee company as well as that of M/s. Kushal Solutions Pvt. Ltd. also appeared before AO on 25.11.2016 whose statement was recorded by AO which is found placed at pages 27 to 30 of paper book and he also filed documents like the other director, and filed the return of income for AY 2015-16 (refer page 32), PAN Card (refer page 33), passport (refer pages 35-36) and also filed before the AO the following details:

i) Master data of M/s. Kushal Solutions Pvt. Ltd.;
ii) PAN Card of M/s. Kushal Solutions Pvt. Ltd.
iii) MOA/AOA of M/s. Kushal Solutions Pvt. Ltd
iv) Alltoment advice of M/s. Kushal Solutions Pvt. Ltd
v) Income Tax Acknowledgment & Audited financial statement of M/s. Kushal Solutions Pvt. Ltd
vi) Bank Statement of M/s. Kushal Solutions Pvt. Ltd
vii) statement of source of fund of Kushal solutions Pvt. Ltd.

viii) PAN Card, Voter card and death certificate of Shyam sunder Khandelia

ix) Allotment advice of Shyam Sundr Khndelia

x) Income Tax Acknowledgment & audited financial statement of Shyam sunder Khandelia

xi) Bank statement of Shyam sunder Khandelia

xii) Statement of source of fund of Shyam sundr Khandelia.

Likewise, we note that the statement of Shri Shankar Saraf, director of the assessee company as well as the director of M/s. Subhshree Grihnirmaan Pvt. And M/s. Startrade Vinimay Pvt. Ltd. has been recorded by the AO on 25.11.2016 and the statement is found placed at pages 89-92 of paper book and the income tax return of income for AY 2015-16 (page 94 paper book), PAN Card (page 95 paper book), Passport (page 96-97 of paper book and the following details were filed before the AO :

i) Master data of M/s. Subhshree Grihnirmaan Pvt. Ltd.

ii) PAN Card of M/s. Subhshree Grihnirmaan Pvt. Ltd.

iii) MOA/AOA of M/s. Subhshree Grihnirmaan Pvt. Ltd.

iv) Alltoment advice of M/s. Subhshree Grihnirmaan Pvt. Ltd.

v) Income Tax Acknowledgment & Audited financial statement of M/s. Subhshree Grihnirmaan Pvt. Ltd.

vi) Bank Statement of M/s. Subhshree Grihnirmaan Pvt. Ltd.

vii) statement of source of fund of M/s. Subhshree Grihnirmaan Pvt. Ltd.

viii) Master data of Startrade Vinimay Pvt. Ltd.

ix) PAN Card of Startrade Vinimay Pvt. Ltd.

x) MOA/OA of Startrade Vinimay Pvt. Ltd.

xi) Allotment advice of Startrade Vinimay Pvt. Ltd.

xii) Income Tax Acknowledgment & audited financial statement of Startrade Vinimay Pvt. Ltd.

xiii) Bank statement of Startrade Vinimay Pvt. Ltd.

xiv) Statement of source of fund of Startrade Vinimay Pvt. Ltd.

And the details of M/s. Startrade Vinimay Pvt. Ltd. is seen placed from page 155 to 206 of the paper book. The details of other loans and advance taken by the assessee company from the same shareholders which are shown as loans and advance in the books of the assessee company is placed at page 207 to 231 of the paper book.

12. Thus, the AO after summoning the individual share holders and directors of the share holding corporate entities and after recording their statements and after going through the documents submitted before him, have framed the reassessment order giving effect to the first revisional order of Ld. Pr. CIT wherein the AO accepted the identity, creditworthiness and genuineness of the shareholders. This reassessment framed by the AO has been interfered by the ld. Pr. CIT by this impugned second revisional order. Before the impugned order was passed, the ld Pr CIT had issued SCN proposing his desire to interfere u/s. 263 of the Act (supra). However, we do not find the Ld. Pr. CIT alleging non-adherence by AO to his specific directions passed on 10.06.2016 [i.e, First Round of Revisional order]. Once the AO has reassessed pursuant to the revisional order wherein specific directions were given to the AO while framing the reassessment on the share capital and premium collected by the assessee company, the Ld. Pr. CIT ought to have pointed out where the AO faulted with or which specific directions of his has been ignored by AO, which we find the Ld. Pr. CIT has not touched upon or is found to be totally silent, which implies that ld. Pr. CIT after going through the reassessment records could not find fault with the action of AO in following his specific directions given on 10.06.2016. (1st round of revision order). So after going through the documents and facts noted supra, we find that Ld. Pr. CIT could not point out any omission on the part of AO while framing the reassessment order and it is thus not the case of ld Pr CIT that AO while passing the reassessment order pursuant to his specific direction has not followed any one of it.

13. Further, we note that even though the re-assessment order dated 25.11.2016 was set aside again by the impugned order of Pr. CIT, we note that one of the faults pointed out by the Ld. Pr. CIT to invoke his revisionary jurisdiction were -

"(a) *Detailed investigation /verification in the nature of independent enquiry regarding identify, credit worthiness, and genuineness of transaction that was intended to be carried but not done and merely accepted the submissions of the assessee"*

However, we are unable to agree with this allegation of Ld. Pr. CIT. We note that AO in this case had issued during the first and second round of assessment notice u/s. 142(1) of the Act, pursuant to which the assessee had filed all details and the AO examined the same, and thereafter had issued notice u/s 133(6) of the Act and verified the details, and issued summon u/s 131 to the directors of the assessee company as well as to all the shareholders. And we note that all of them responded and duly appeared before the AO and their statements were recorded and only one shareholder an individual was new and all the shareholder's companies were group companies and the new individual share subscriber was father of a director.

(b). We note that next fault pointed out by the Ld. Pr. CIT was "*the AO failed to carryout detailed investigation as to how they decided to invest in a company at premium which was never a known company*".

According to us, the Ld Pr. CIT did not appreciate the facts in the proper perspective and did not had taken notice of the important fact that these were the promoters who started the company in the year 2010 for the business of making ash-fly bricks and the only new shareholder individual was father of an existing director; and the assessee company in this assessment year had started expansion activities of the business of making/manufacturing fly ash bricks. We note that the share capital infused into the company has yielded result. And moreover the investor companies were group companies and shares allotted this year was to existing shareholders and only new shareholders was the father of a director. As stated earlier, the promoter and group companies found potential of growth in the business and had made the investment and premium which was agreed upon mutually by all the existing shareholders taking into consideration the expansion and future return expected of it. After appreciating these facts and taking into consideration the financial results of the assessee company as on the date of reassessment order, the AO had accepted the genuinity of the transaction, so nothing turns around in respect of this fault raised by the Ld. Pr. CIT.

(c) The next fault found by the Ld. Pr. CIT is that *the AO failed to examine the rationale behind the premium.* From the aforesaid reasons (supra) (b), the AO has accepted the transaction which on the factual background is a probable view.

(d) The other fault noted by Ld. Pr. CIT is that *the AO failed to collect relevant evidences in order to reach a logical conclusion.*

We do not countenance this fault pointed out by ld. Pr. CIT for the simple reason that it is first of all a vague allegation without spelling out what relevant evidences were not collected by the AO. We note that assessee had filed documents before AO, copies of which are produced before us, which is running to three (3) volumes. [Volume I-201 pages, volume II 231 pages, volume III-362 pages;] and the AO after personally summoning the individual share holders and directors of corporate shareholders and after recording their statements, and after verifying the documents produced before him, has accepted the share capital/premium infused into the assessee company which action of AO cannot be called a perverse order and according to us, the AO from the actions discussed above has discharged his duty as an investigator and adjudicator and taken a plausible view which cannot be called an un-sustainable view on facts or law.

(e) The other fault taken note by the Ld. Pr. CIT is that *the AO failed to examine all bank accounts for the entire period.*

To this allegation of Ld. Pr. CIT, we are unable to comprehend the same since the assessee during the first and second round had filed before AO all the relevant bank statements. Before us also all copies and details of bank accounts, have been filed and we find that AO during the assessment proceeding called for the same and examined it, so he has not made any adverse observation against it. So, Ld. Pr. CIT's allegation in respect of non-examination of bank accounts are baseless and deserves to be rejected.

(f) The other fault pointed out by the Ld. Pr. CIT is that *the AO failed to trace out the money trail*

We note that the assessee company is into manufacturing of bricks using fly ash and had set up its factory and the share holder are the promoters/group companies and no allegation has been levelled against the shareholders that they are entry providers. We note that earlier contribution made by them have been accepted in previous years, and also the fact remains that the earlier years of assessment have not been reopened though there was sufficient time for the same. In the light of the documents discussed supra, we are of the opinion that assessee has discharged the onus on it.

(g) The last fault taken note by the Ld. Pr. CIT is that *the reassessment order prima facie suffers from independent and adequate enquiry.*

We do not countenance this allegation of the Ld. Pr. CIT. We have already discussed in detail about how the AO has called the individual share holders and the directors of the corporate shareholders and recorded their statements and gone through the voluminous documents filed by the assessee. Thus, the shareholders had discharged the onus on it to prove the identity, creditworthiness and genuinity of the share transaction who are none other than the promoters, directors and group companies and the AO after examining and satisfying himself about the share capital and premium has accepted it. Thus it is noted that independent and adequate enquiry was made and further it is not pointed out by Ld. Pr. CIT as to what further enquiry was needed or how the enquiry made by AO is wrong, without which in the facts of the case as discussed supra, the ld Pr CIT cannot term the order of AO as erroneous.

14. Further, we note that the Ld Pr CIT in the impugned order u/s 263 concluded that there was lack of enquiry. We also take note that while he proposed to interfere u/s. 263 of the Act, he had opined that there was no detailed or independent enquiry but finally concluded that there was lack of enquiry. So, Ld. Pr. CIT accepts that there was enquiry made by the AO, however, he concludes that there was lack of enquiry so when there was enquiry conducted by AO then the AO has discharged the duty of an investigator. Not satisfied if the Ld. Pr. CIT wanted to still interfere invoking jurisdiction u/s. 263 of the Act, he has to show that the enquiry conducted by AO was factually wrong by conducting

inquiries himself, which is not the case. So we note that from the discussion above on the inquiry conducted by the AO, we are of the opinion that the AO has discharged the duty as an investigator. If the Ld. Pr. CIT wanted to interfere invoking jurisdiction u/s. 263 of the Act he has to show that the enquiry conducted by AO was on a wrong direction or on wrong assumption of fact/law or that the AO misdirected himself in factual investigation or applied the law erroneously to the facts collected by him. For doing that in the facts discussed supra, he (Ld. Pr. CIT) should himself conduct an enquiry and record a finding that the decision of AO's enquiry has resulted in a view which is "unsustainable in law". Since the AO's view on the facts collected and discussed is definitely a possible view, so in the factual background discussed in detail, we are of the considered opinion that Ld. Pr. CIT ought not to have interfered with the AO's reassessment order. In the light of the fact that all individual shareholders and the directors of the corporate shareholders have duly appeared along with documentary evidence and substantiated the share capital and premium they infused into the promoted private limited company, the view taken by the AO after detailed inquiry cannot be termed "unsustainable in law."

15. Thus, we find that during the reassessment proceeding pursuant to the first revisional order under section 263 of the Act dated 10.06.2016 and pursuant to the specific directions of the Ld. Pr. CIT, the AO in the second round had summoned the directors of Group companies as well as that of assessee and examined the books and the bank statement and other documents furnished by them to discharge the onus on them about the identity, creditworthiness and genuineness of the transactions and the AO has recorded their statement during reassessment proceedings wherein he has questioned and elicited answers about the identity, creditworthiness and genuineness of the transaction as well as the source of the investment etc. So, from the aforesaid actions carried out by the AO during the reassessment proceeding cannot be found fault with for lack of enquiry and thus, we note that AO has discharged his duty as an Investigator as per the direction of Ld. Pr. CIT dated 10.06.2016 u/s. 263 of the Act (First 263 order) and further we note that the Ld. Pr. CIT while issuing the Show Cause Notice while exercising his revisional jurisdiction for second time has not made even a whisper about the non-compliance/failure on the part of AO in respect of the specific direction given by the Ld. Pr. CIT dated 10.06.2016 while setting

aside the original assessment order passed by the AO dated 20.03.2015. And in the impugned order the Ld. Pr. CIT has not found fault with the action of the AO in giving effect to the specific directions given by him while passing the first revisional order on 10.06.2016. Thus, we note that when the AO while framing the reassessment order pursuant to the specific direction of the Ld. Pr. CIT's order dated 10.06.2016 (first revisional order) has complied with the specific directions of Ld. Pr. CIT and based on the inquiry conducted and after perusal of the documents running more than 794 pages which reveals the identity, creditworthiness and genuineness of the share capital and premium collected by the assessee from the share subscribers, the satisfaction of AO as envisaged in sec. 68 of the Act is a plausible view and the share subscribers/directors participating in the reassessment proceedings along with the audited financial statements and other documents referred supra, the assessee had discharged the onus on it about the identity, creditworthiness and genuineness of the share capital and premium collected by the assessee from the respective share subscribers. Since the aforesaid exercise was carried out by the AO in the original as well as reassessment proceedings and the documents are in the assessment folder and the statements have been recorded of the individual share subscribers and directors of the Group company share subscribers, the Ld. Pr. CIT erred in holding the reassessment order of the AO in respect of share capital and premium collected by the assessee as erroneous as well as prejudicial to the interest of the revenue unless the Ld. Pr. CIT based on an enquiry conducted by himself in the second round atleast is able to upset the AO's satisfaction in respect of identity, creditworthiness and genuineness of the share subscribers and his decision not to make any addition under section 68 of the Act. In the light of the aforesaid discussions and on perusal of the documents, we are of the view that AO's view to accept the identity, creditworthiness and genuineness of the share capital and premium collected from the share subscribers as a plausible view and at any rate can be termed as an unsustainable view on law or facts.

16. For coming to the conclusion that based on the documents and the inquiry conducted by the AO which are on record as discussed in detail supra, the AO's action of accepting the claim of assessee in respect of collection of share capital and premium is a plausible view and at any rate cannot be held to be unsubstantiable in law or facts. We would like to

discuss about section 68 of the Act for the sake of completeness. Section 68 of the Act reads as under:-

> *"68. Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year. "*

The phraseology of section 68 is clear. The Legislature has laid down that in the absence of a satisfactory explanation, the unexplained cash credit may be charged to income-tax as the income of the assessee of that previous year. In this case the legislative mandate is not in terms of the words 'shall' be charged to income-tax as the income of the assessee of that previous year". The Supreme Court while interpreting similar phraseology used in section 69 has held that in creating the legal fiction the phraseology employs the word "may" and not "shall". Thus the un-satisfactoriness of the explanation does not and need not automatically result in deeming the amount credited in the books as the income of the assessee as held by the Supreme Court in the case of CIT v. Smt. P. K. Noorjahan [1999] 237 ITR 570. We note that against the said decision of Hon'ble Gujarat High Court the special leave petition filed by the Revenue has also been dismissed by the Hon'ble Apex Court.

17. So, with the aforesaid understanding of section 68 of the Act, let us examine whether the view of AO in the light of the investigation and results as discussed supra is a possible view and cannot be termed as un-sustainable view in law and facts. For that let us look at few case laws wherein the AO made additions of share capital and premium and when the aggrieved assessee's filed appeals before the Tribunal/High court/Supreme Court the Hon'ble Courts have held that when the assessee discharges the onus on it in respect of the share subscribers' identity, creditworthiness and genuineness then no addition u/s. 68 of the Act can be made against the assessee. Let us have a look at the following case laws:

18. When a question as to the creditworthiness of a creditor is to be adjudicated and if the creditor is an Income Tax assessee, it is now well settled by the decision of the Calcutta High Court that the creditworthiness of the creditor cannot be disputed by the AO of the assessee but the AO of the creditor. In this regards our attention was drawn to the decision of the Hon'ble High Court, Calcutta in the COMMISSIONER OF INCOME TAX, KOLKA

TA-Ill Versus DATAWARE PRIVATE LIMITED ITAT No. 263 of 2011 Date: 21st September, 2011 wherein the Court held as follows:

> *"In our opinion, in such circumstances, the Assessing officer of the assessee cannot take the burden of assessing the profit and loss account of the creditor when admittedly the creditor himself is an income tax assessee. After getting the PAN number and getting the information that the creditor is assessed under the Act, the Assessing officer should enquire from the Assessing Officer of the creditor as to the genuineness" of the transaction and whether such transaction has been accepted by the Assessing officer of the creditor but instead of adopting such course, the Assessing officer himself could not enter into the return of the creditor and brand the same as unworthy of credence.*
>
> *So long it is not established that the return submitted by the creditor has been rejected by its Assessing Officer, the Assessing officer of the assessee is bound to accept the same as genuine when the identity of the creditor and the genuineness" of transaction through account payee cheque has been established.*
>
> *We find that both the Commissioner of Income Tax (Appeal) and the Tribunal below followed the well-accepted principle which are required to be followed in considering the effect of Section 68 of the Act and we thus find no reason to interfere with the concurrent findings of fact recorded by both the authorities."*

19. We also rely on 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.*

20. We also rely on the decision of the Hon'ble Calcutta High Court while relying on the case of Lovely Exports, in the appeal of COMISSIONER 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.

21. We also rely on 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 APPEAL NO.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."

22. We also rely on 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 HTCCL 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.

23. So, in the light of the case laws discussed supra, we find that in the case in hand and from the details as discussed (supra) which emerges from the paper book filed before us as well as before the lower authorities, it is vivid that all the share applicants are (i) income tax assessee's, (ii) they are filing their return of income, (iii) the share application form and allotment letter is available on record, (iv) the share application money was made by account payee cheques, (v) the details of the bank accounts belonging to the share applicants and their bank statements, (vi) in none of the transactions the AO found deposit in cash before issuing cheques to the assessee company, (vii) the applicants are having substantial creditworthiness which is represented by a capital and reserve as noted above, consequently we find that AO's view is a plausible view.

24. We also note that recently the ITAT Kolkata in several cases has deleted the addition on account of share application in similar circumstances. The relevant portion of the decisions are as follows:

(a) The Ld ITAT Kolkata. in DC IT Vs Global Mercantiles Pvt.Ltd in ITA No. 1669/Kol/2009 dated 13-01-2016. In this the decision the Ld. Tribunal held as follows:

"3.4. We have heard the rival submissions and perused the materials available on record including the detailed paper book filed by the assessee. The facts stated hereinabove remain undisputed are not reiterated herein for the sake of brevity. We find that the assessee had given the complete details about the share applicants clearly establishing their identity, creditworthiness and genuineness of transaction proved beyond doubt and had duly discharged its onus in full. Nothing prevented the Learned AO to make enquiries from the assessing officers of the concerned share applicants for which every details were very much made available to him by the assessee. We find that the reliance placed by the Learned Ld. CIT(1) on the decision of the Hon'ble Apex Court in the case of CIT vs Lovely Exports (P) Ud reported in (2008) 216 CTR 195 (SC) is very well founded, wherein, it has been very clearly held that the only obligation of the company receiving the share application money is to prove the existence of the shareholders and for which the assessee had discharged the onus of proving their existence and also the source of share application money received.

3.4. 1. We also find that the impugned issue is also covered by the decision of Hon'ble Calcutta High Court in the case of CIT vs Roseberry Mercantile (P) Ltd in GA No. 3296 of 2010 ITAT No. 241 of 2010 dated 10.1.2011, wherein the- questions raised before their lordships and decision rendered thereon is as under:-

> *"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 A No. 1669/KoI/2009-C-AM M/s. Global Mercantiles Pvt. Ltd 11 Held After hearing the learned counsel for the appellant and after going through the decision of the Supreme Court in the cases of CIT vs M/s Lovelv Exports Pvt Ltd, 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.

3.4.2. In view of the aforesaid findings and respectfully following the decision of the apex court (supra) and Jurisdictional High Court (supra) , we find no infirmity in the order of the Learned CIT(A) and accordingly, the ground no.2 raised by the Revenue is dismissed.

4. The last ground to be decided in this appeal of the Revenue is as to whether the Learned CIT(A) is justified in deleting the addition u/s 68 of the Act made in respect of allotment of shares to 20 individuals for an amount of Rs.57,00,000/- in the facts and circumstances of the case.

4. 1. The brief fact of this issue is that the assessee had received share application monies from 20 individuals in the earlier year which were kept in share application money account. During the asst year under appeal, the assessee allotted shares to these 20 individuals out of transferring the monies from share application money account to share capital account. The details of 20 individuals are reflected in page 6 & 7 of the Learned CIT(A) order. The Learned AO asked the assessee to produce the shareholders before him. He found that the assessee did not do so but furnished copies of pay orders used for payments to the assessee company and also furnished income tax particulars and balance sheets of all the shareholders. The Learned AO on analyzing all the balance sheets observed that the shareholders have paltry income and small savings and none of them have any bank account and huge cash balances were shown in their hands out of which Pay orders were obtained. Based on this, the

Learned AO concluded that these shareholders do not have creditworthiness to invest in the assessee company and brought the entire sum of Rs. 57,00,000/- to tax as unexplained cash credit u/s 68 of the Act.

4.2. On first appeal, the Learned CIT(A) observed that entire share application monies of Rs. 57,00,000/- we received during the previous year 2004-05 relevant to Asst Year 2005-06 from 20 persons and the shares were allotted to them during the asst year under appeal. He observed that the assessee had furnished details of the share applicants giving the date wise receipts, mode of payment, amount, name, address, income tax returns, PA No. of share applicants along with their balance sheet. The Learned CITA also observed that the assessee in its reply to show cause notice before the Learned AO had requested him to use his power and authority for the physical appearance of the shareholders which was not exercised by the Learned AO. Instead the Learned AO continued to insist on the assessee to produce the shareholders before him. He ultimately concluded that the assessee had duly discharged its onus of providing complete details of the shareholders and in any case, no addition could be made u/s 68 of the Act in the asst year under appeal as no share application monies were received during the asst year under appeal. Aggrieved, the Revenue is in appeal before us by filing the following ground:-

> *"That in the facts and circumstances of the case, the Ld. CIT(A) has erred in deleting the addition made u/s 68 in respect of the allotment of shares to 20 numbers of individual investors for an amount of Rs. 57 lakhs, where genuineness of the transactions and creditworthiness of the investors were not established."*

4.3. The Learned DR prayed for admission of the additional ground raised before us and vehemently supported the order of the Learned AO. In response to this, the Learned AR fairly conceded to admission of this additional ground and vehemently supported the order of the Learned CIT(A).

4.4. We have heard the rival submissions and perused the materials available on record including the detailed paper book filed by the assessee. We find that the additional ground raised by the assessee separately before us vide its covering letter dated 9. 12.2011 is admitted as it appears to be a genuine and bonafide error of omission on the part of the Revenue from not raising this ground in the original grounds of appeal filed along with the memorandum of appeal. Moreover, it does not require any fresh examination of facts. Hence the same is admitted herein for the sake of adjudication.

4.4. 1. We find from the details available on record that the share application monies from 20 individuals in the sum of Rs.57,00,000/- has been received by the assessee during the financial year 2004-05 relevant to Asst Year 2005-06 and only the shares were allotted to them during the asst year under appeal. Admittedly no monies were received during the asst year under appeal and hence there is no scope for invoking the provisions of section 68 of the Act. Hence we hold that the order passed by the Learned CITA in this regard does not require any interference. Accordingly the ground no. 3 raised by the Revenue is dismissed.

(b) The ITAT Kolkata in R.B Horticulture & Animal Projects Co. Ltd, ITA No. 632/Koll2011 dated 13-01-2016. In this the decision the Ld. Tribunal held as follows:

"6. We have heard the Learned DR and when the case was called on for hearing , none was present on behalf of the assessee. However, we find from the file that the assessee had filed a

detailed paper book and written submissions. Hence the case is disposed off based on the arguments of the Learned DR and written submissions and paper book already available on record. The facts stated in the Learned CIT(A) were not controverted by the Learned DR before us. We find that the assessee had given the complete details about the share applicants clearly establishing their identity, creditworthiness and genuineness of transaction proved beyond doubt and had duly discharged its onus in full. Nothing prevented the Learned AO to make enquiries from the assessing officers of the concerned share applicants for which every details were very much made available to him by the assessee. We find that the reliance placed by the Learned CITA on the decision of the Hon'ble Apex Court in the case of CIT vs Lovelv Exports (p) Ltd reported in (2008) 216 CTR 195 (SC) is very well founded, wherein, it has been very clearly held that the only obligation of the company receiving the share application money is to prove the existence of the shareholders and for which the assessee had discharged the onus of proving their existence and also the source of share application money received.

6. 1. We also find that the impugned issue is also covered by the decision of Hon'ble Calcutta High Court in the case of CIT vs Roseberrv Mercantile (P) Ltd in GA No. 3296 of 2010 ITAT No. 241 of 2010 dated 10.1.2011, wherein the questions raised before their lordships and decision rendered thereon is as under:- -

> *"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." Held After hearing the learned counsel for the appellant and after going through the decision of the Supreme Court in the cases of CIT vs M/s Lovely Exports Pvt Ltd, 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."*

6.2. We find that the issue is also covered by the decision of Hon'ble Delhi High Court in the case of CIT vs Value Capital Services P Ltd reported in (2008) 307 ITR 334 (Del) , wherein it was held that:

> *"In respect of amounts shown as received by the assessee towards share application money from 33 persons, the Assessing Officer required the assessee to produce all these persons. While accepting the explanation and ITA No. 632/KoI12011--C-AM M/s. R.B Horticulture 6 & Animal Proj. Co. Ltd the statements given by three persons the Assessing Officer found that the response from the others was either not available or was inadequate and added an amount of Rs. 46 lakhs pertaining to 30 persons to the income of the assessee.*
>
> *The Commissioner (Appeals) upheld the decision of the Assessing Officer. On appeal, the Tribunal set aside the order of the Commissioner (Appeals) and deleted the additions. On further appeal:*
>
> *Held, dismissing the appeal, that the additional burden was on the department to show that even if the share applicants did not have the means to make the investment, the investment made by them actually emanated from the coffers of the assessee so as to enable it to be treated as the undisclosed income of the assessee. No substantial question of law arose. "*

6.3. We find that the argument of the Learned DR to set aside this issue to the file of the Learned AO for verification of share subscribers would not serve any purpose as the ratio decided in the above cases is that in any case, no addition could be made in the hands of the *recipient assessee. In view of the aforesaid findings and respectfully following the decision of the apex court (supra), Jurisdictional High Court (supra) and Delhi High Court (supra) , we find no infirmity in the order of the Learned CIT(A) and accordingly, the grounds raised by the Revenue are dismissed."*

(c) The ITAT Kolkata in ITA No.1061/Ko1/2012 in the case of ITO Wd.3(2) Kol, vs. M/s. Steel Emporium Ltd dated 05-02-2016. In this the decision the Ld. Tribunal held as follows:

"10. We have heard both the rival parties and perused the materials available on record. The Ld. DR vehemently supported the order of the AO. Before us the Ld. AR submitted that the assessee raised share application money during the year from 25 applicants. The AO was furnished with the copy of Form 2 of Allotment of Shares to the Applicants as filed with the Registrar of Companies, West Bengal. On the date of receipt of Share applications from the Applicants, they furnished their addresses, which were recorded in the Register of Members. The AO observed that as per ROC records the addresses of the nine companies were different from the address as per Form filed with him. The AO issued notices u/s.133(6) to all the companies at the addresses furnished in Form 2 as filed with him, which were duly served at the given addresses. The A0 argued that the letters should not have been served at the given address by the assessee. He served a show a cause notice dated 09.12.2011 asking for the explanation from the assessee as to how the notices u/s. 133(6) could be served to these nine companies who had different address as per ROC records. The AO was explained vide letter dated 20.12.2011 of the assessee that those companies had changed their addresses since filing of Form 2 with the Registrar. Further, it was none of the business of the assessee to question the addresses of the applicants as long as they affirm the address. The applicants were duly incorporated bodies under the Companies Act. 1956 since long. They have been regularly filing their returns of income under the Income Tax Act and are being assessed by the Revenue since long. Some of them are even registered as Non-Banking Financial Companies with Reserve bank of India. They have been filing returns regularly with Registrar of Companies and RBI since long. The letters might have been received at their old addresses because in case of change in the address, people instruct the incumbents at old addresses not to refuse the receipt of letters and receive the same. Just because, a letter was received at the old address instead of present address, it cannot be said that the identity of the applicant has not been verified. All of these companies had duly replied to notice u/s. 133(6) and confirmed the transaction with all the evidences. The AO has not raised any objection on any of the information furnished before him. The AO has not asked the respective Company applicants also to explain the alleged discrepancy in the address. The AO has not brought any material on account of record to disbelief the evidences furnished with him and treat the transaction as not genuine. The assessee submitted the following material at the time of assessment.

a) Copy of share applications from the share applicants (copies enclosed)

b) Copy of Form 2 filed with Registrar of Companies, West Bengal (copy enclosed)

c) Copy of Form 18 about the Registered Office of the applicants for change of address subsequent to the date of allotment, i.e. 31.03.2009 (copies enclosed)

d) Members register

e) Share application & Allotment Register

f) Copy of board resolution.

g) Replies from Share applicants to the notice u/s. 133(6) issued to them by the AO seeking information and documents about the sources and to examine their identity, genuineness of the transaction and their creditworthiness. (copy enclosed).

h) Copy of audited accounts.

i) Copy of bank statements.

j) Copy of Income tax acknowledgment of return filed for AY 2009-

k) Copy of PAN Card.

l) Details of sources of funds.

m) Copy of covering letter for delivery of shares.

n) Copy of master data as per ministry of Company Affairs records.

o) Copy of Annual return.

p) Copy of Memorandum and articles of Association.

Finally the Ld. AR relied on the order of the Ld. CIT(A 10. 1 From the aforesaid discussion we find that the AO has made the addition of the share application money because all the nine companies were having the common address and the notice sent under section 133(6) was received by the single person. Accordingly the AO opined that the assessee has used its unaccounted money in the share application transactions. However we find that all the money received in the form of share capital is duly supported with the requisite document as discussed above. To our mind the basis on which the addition was made by the AO is not tenable. The Ld. DR also could not brought anything on record to controvert the findings of the Ld. CIT(A). In view of above we find no reason to interfere in the order of the Id. CIT(A). Accordingly the ground raised by Revenue is dismissed."

(d) The ITAT Kolkata in ITO vs Cygnus Developers (I) P Ltd in ITA No. 282/Kol/2012 dated 2.3.2016. In this the decision the Ld. Tribunal held as follows:

"6. On appeal by the assessee the CIT(A) deleted the addition made by the AO observing as follows

"6) I have considered the submission of the appellant and perused the assessment order. I have also gone through the details and documents filed by the appellant company in the course of assessment: proceedings vide letter dt. 3-10-2007. On careful consideration of the facts and in law I am of the opinion that the AO was not justified in making, the addition aggregating to Rs.54,00,000/- u/s.68 of the Act being the amount of share application money by holding that the appellant company has failed to prove the identity, and creditworthiness of The creditors as well as the genuineness of transactions. It is observed that all the three share applicant companies i.e. M/s. Shree Shyam Trexim Pvt. Ltd., M/s Navalco Commodities Pvt. Ltd. and M/s. Jewellock Trexim Pvt. Ltd. had filed their confirmations wherein each of them confirmed that they had applied for shares of the appellant -company. All the three companies provided- the cheque number, copy of bank statements and their PAN. It is observed that these companies also filed, copies of their return of income and financial statements for as well as copy of their assessment order u/s. 143(3) of the I. T Act for AY 2005-06. In the case of M/s. Jewellock Trexim Pvt. Ltd. the assessment for AY 2005-06 was completed by the ITO Ward 9(3), Kolkata and the assessments in the case of M/s. Navalco Commodities Pvt. Ltd. and M/s.

Shree Shyam Trexim Pvt. Ltd. for A. Y.2005-06 and AY.2004-05 respectively were completed by the I TO, Ward 9(4), Kolkata. Under the circumstances, I am of the opinion that the AO was not justified in holding that the share applicant companies were not in existence. The assessment orders were completed on the address as provided by the appellant company in the course of assessment proceedings. It is not known as to how the AO's inspector had reported that the aforesaid companies were not in existence at the given address. Since the appellant company had provided sufficient documentary evidences in support of its claim of receipt of share application money, I am of the opinion that the no addition u/s.68 could be made in the hands of appellant company. On going through the various judicial pronouncements relied upon by the appellant, it is observed that the view taken as above is also supported by them. In view of above the AO is directed to delete the addition of Rs.54,00,000/ -. The ground Nos. 2 and 3 are allowed, "

7. Aggrieved by the order of CIT{A) the Revenue is in appeal before the Tribunal.

8. We have heard the submissions of the learned DR, who relied on the order of AO. The learned counsel for the assessee relied on the order of CIT(A) and further drew our attention to the decision of Hon'ble Allahabad High Court in the case of CIT vs Raj Kumar Agarwal vide ITA No. 179/2008, dated 17. 11.2009 wherein the Hon 'ble Allahabad High Court took a view that non production of the director of a Public Limited company which is regularly assessed to Income tax having PAN, on the ground that the identity of the investor is not proved cannot be sustained. Attention was also to the similar ruling of the ITAT Kolkata bench in the case of ITO vs Devinder Singh Shant in IT A No.20BIKo112009 vide order dated 17.04.2009.

9. We have considered the rival submissions., We are of the view that order of CIT(A) does not call for any interference. It may be seen from the grounds of appeal raised by the Revenue that the Revenue disputed only the proof of identity of the shareholder. In this regard it is seen that for A Y.2004-05 Shree Shyam Trexim Pvt. Ltd., was assessed by ITO, Ward-9(4), Kolkata and the order of assessment u/s/143(3) dated 25.01.2006 is placed in the paper book. Similarly Navalco Commodities Pvt. Ltd., was assessed to tax u/s 143(3) for A Y.2005-06 by I TO, Ward- 9(4), Kolkata by order dated 20.03.2007. Similarly Jewellock Trexim Pvt. Ltd was assessed to tax for A Y.2005-06 by the very same ITO- Ward- 9(3), Kolkata assessing the Assessee. In the light of the above factual position which is not disputed by the Revenue, it cannot be said that the identity of the share applicants remained not proved by the assessee. The decision of the Hon'ble Allahabad High Court as well as ITA T Kolkata Bench on which reliance was placed by the learned counsel for the assessee also supports the view that for non production of directors of the investor company for examination by the AO it cannot be held that the identity of a limited company has not been established. For the reasons given above we uphold the order of CIT(A) and dismiss the appeal of the Revenue. "

25. Thus, in the light of the judicial precedents of the Hon'ble Apex/High court/Tribunal, we are of the view that the action/view taken by the AO after enquiry made by him as per the direction of the Ld. Pr. CIT in the set aside proceedings dated 10.06.2016 pursuant to which the AO has reassessed the assessee after inquiry and accepted the share capital and premium collected by assessee is a plausible view and cannot be held to be unsustainable view in facts or law, therefore, the impugned action of the Ld. Pr. CIT to interfere with the reassessment order of the AO, is without jurisdiction and liable to be quashed.

26. Therefore, in the light of the discussion on fact as well as on law, we are of the considered opinion that AO's action (reassessment) pursuant to the first revisional order of Ld. Pr. CIT dated 10.06.2016, to accept the share capital and premium as a possible view in facts and law as per the ratio laid by the Hon'ble Supreme Court in Malabar Industrial Co. Ltd. Vs. CIT 243 ITR 83 (SC). The AO's action/reassessment order cannot be termed as erroneous and prejudicial to the interest of the Revenue. Therefore, the condition precedent for usurping revisional jurisdiction u/s. 263 of the Act is absent and, therefore, the Ld. Pr. CIT lacked jurisdiction to assume second time revisional jurisdiction u/s. 263 of the Act. Therefore, the assessee succeeds on the legal issue raised and, therefore, on the facts and circumstances discussed (supra), we are inclined to quash the impugned order of Ld. Pr. CIT dated 12.03.2019.

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

Order is pronounced in the open court on 18 March, 2020.

Sd/-	Sd/-
Arjun Lal Saini Accountant Member	A.T. Varkey Judicial Member

Dated 18 -03-2020

PP(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant/Assessee: M/s. Omkar Infracon Private Limited P.O Barunda P.S Bagnan, NH-6, Near: Ananda Niketan School, Howrah-711303.

2 Respondent/Revenue: The ITO, Ward-12(2), Aaykar Bhawan, 7th Fl., P-7 Chowringhee Sq., Kolkata-700 069.

3. CIT,

4. CIT(A), Kolkata.

5. DR, Kolkata Benches, Kolkata

**PP/SPS True Copy By By Order Assistant Registrar
ITAT Kolkata