IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH 'C' KOLKATA

[Before Hon'ble Shri N.V.Vasudevan, JM & Shri M.Balaganesh, AM]

ITA Nos..764 to 766/Kol/2014
Assessment Years : **2009-10, 2007-08 & 2008-09**

M/s. Classic Flour & Food Processing Pvt. Ltd. Kolkata (PAN:AABCC 1735 G) (Appellant)	-versus-	C.I.T., Kol-IV, Kolkata (Respondent)

For the Appellant: Shri S.M.Surana, Advocate
For the Respondent: Shri G.Mallikarjuna, CIT(DR).

Date of Hearing : 29.03.2017.
Date of Pronouncement : 05.04.2017.

ORDER

PER N.V.VASUDEVAN, JM:

These are appeals by the Assessee against the common order dated 21.3.2014 of CIT, Kolkata, passed u/s 263 of the Income Tax Act, 1961 (Act) relating to AY 2007-08, 2008-09 and 2009-10.

2. We shall first take up for consideration I.T.A Nos.765 and 766/Kol/2014 in which the ld. Counsel for the assessee has filed an application for admission of two common additional grounds of appeal which read as follows :-

"1.For that the order u/ s. 263 is bad in law for the reason that the proceedings u/s. 147 initiated itself was bad in law, the order u/s. 147/143(3) was not maintainable since no assessment can be made for making rowing and fishing enquiry and an invalid assessment cannot be set aside u/s 263.

2. For that the order u/s. 263 is also otherwise bad in law for the reasons that no addition was made for the reasons recorded for reopening of the assessment u/s. 147 and as such no other addition could have been made by the AO, therefore the CIT cannot direct the AO to enquire and make addition of share capital."

3. The facts giving rise to the present appeal are as follows :

The Assessee is a company. As per the order of assessment it is said to be engaged in construction business. For A.Y.2007-08 and 2008-09 the assessee filed returns of income on 27.10.2007 and 05.09.2008 respectively declaring total income of Rs. .Nil. The return was processed u/s 143(1) of the Income Tax Act, 1961 (Act). Subsequently notice u/s 147 of the Act was issued after recording the reasons which is common for A.Y.2007-08 & 2008-09. The reasons recorded read as follows :-

> "Recorded reason for re-opening U/S 147 of the I. T. Act 1961, for the A.Yrs. 2007-08 and 2008-09.
>
> Information in possession revealed that the assessee made investment about 4 crores in Hotel/ Resorts business at Mandarmoni, Purba Midnapore. Whereas by virtue of a reply to notice u/s 133(6) of the I. T. Act 1961 the assessee stated to have invested about Rs. 3.38 crores in the said hotel/resorts during the financial years 2006-07, 2007-08,200R-09 and 2009-10. The sources of fund i.e Rs. 3.38 crores. stated to be out of shares capital and unsecured loan. The value of investment shown in the balance sheet. Thus, differs from the investments made as per information received. It is , therefore, held that the difference amount might have been made out of income not disclosed. The sources investments with reference to the actual cost of construction requires to investigation. Since there was substantial difference in investments. I have reason to believe that the assessee suppressed its true and correct income for which provisions of Section 147 of the I. T. Act,1961 is invoked.
>
> Issue notice U/S 148 of the I. T. Act, 1961 to the assessee."

4. An order of assessment dated 30.12.2011 was passed for both A.Y.2007-08 and 2008-09 in which the AO has recorded the fact that during the previous year relevant to A.Y.2007-08 and 2008-09 the assessee was engaged in the construction of residential hotel and that the assessee was also engaged in money lending, trading of sarees. The AO has also recorded the fact that during the previous year relevant to A.Y.2007-08 the assessee's share capital has increased by Rs.2,80,000/- and the share premium of Rs.3,50,000/- was also received by the assessee. In A.Y.2008-09 the AO has recorded the fact that the paid up share capital has increased by Rs.6,50,000/- along with share premium of Rs.58,50,000/- in both the orders of assessment. The AO has recorded the fact that to verify the genuineness of the share applicants notices u/s

133(6) of the Income Tax Act, 1961 (Act) were issued to the share applicants. Replies were received from them which was verified and placed on record. The AO has also observed that no adverse inference was drawn. Thereafter the total income of the assessee was computed at Rs. Nil. Thus no addition whatsoever was made to the income returned by the assessee.

5. The CIT-IV, Kolkata in exercise of his powers u/s 263 of the Act was of the view that the aforesaid order of the AO was erroneous and prejudicial to the interest of the revenue, in as much as the AO failed to make proper inquiries with regard to the receipt of share capital and such high share premium by the assessee and that the genuineness of the transactions and the justification of high premium and the creditworthiness of the share applicants were not properly examined by the AO. Ultimately the CIT passed an order u/s 263 of the Act dated 21.03.2014 in which he set aside the order of AO holding that order of AO was erroneous and prejudicial to the interest of the revenue and he directed the AO to make proper inquiries in respect receipt of share capital by the assessee. The following were the relevant observations of the CIT :-

> "4. In view of the above, the assessment order passed is erroneous and prejudicial to the interest on the revenue and therefore the same is hereby set aside denovo with direction to the AO to make thorough examination of the funds raised by the assessee by issuing shares at differential prices of Rs. 10/- and Rs. 100/-.
>
> The AO should issue summons to the corporate share applicants and' make inquiry into the fact whether the shares so allotted to corporate shareholders were transferred later on at prices lower than the issue price to any person related to the assessee company.
>
> The AO should also examine the transferees by issuing summons and should' specifically inquire the price at which the same acquired by them. If the shares' have finally been transferred in the names of the directors and/ or their relatives and / or to the concerns controlled by them, at prices which are substantially lower than the price at which the shares were acquired by the corporate shareholders, the capital should be held as bogus and added as undisclosed income of the assessee.
>
> To verify the transfer of shares the AD should also obtain copies of Annual Returns of the assessee filed with form No. 20B copies of Income Tax Returns and Audited Accounts and audited Financial Investments of the Shares Applicants for the following years and verify the same.

> The AO should also obtain copies of transfer deeds from the assessee. In case of any suspicion the AO may obtain certified copies of these documents from the ROC. The AD should pass the order within 6 months from the date of receipt of this order after providing the assessee a reasonable opportunity of being heard. The Range head must monitor the progress and line of investigation properly ensure justice to Revenue."

6. Aggrieved by the aforesaid order of CIT passed u/s 263 of the Act the assessee has preferred the present appeals before the Tribunal.

7. As far as the additional grounds of appeal raised by the assessee are concerned, it can be seen from the additional grounds that the assessee wants to contend that the very initiation of proceedings u/s 147 of the Act was bad in law and therefore proceedings u/s 263 of the Act cannot be initiated on an order which is invalid in law. It is the further contention of the assessee that in the reasons recorded for reopening of the assessments u/s 147 of the Act, the AO has mentioned that there was unexplained investment in construction of hotel and resorts at Mandarmoni, Purba Midnapore and such unexplained investment in the construction which ought to have been brought to tax as income of the assessee has escaped the assessment. It is the case of the assessee that in the assessment order passed u/s 147 of the Act, the AO did not make any addition on account of unexplained investment in construction. It is the plea of the assessee that when no addition is made on the grounds on which re-assessment proceedings are initiated then no other addition can be made in such reassessment proceedings.

8. The first aspect which needs to be examined is as to whether the assessee is entitled to challenge the validity of initiation of proceedings u/s 147 of the Act in the present appeals in which he has challenged the validity of order passed u/s 263 of the Act. The ld. Counsel for the assessee submitted before us that it is open to an assessee in an appeal against the order u/.s 263 of the Act which seeks to revise an order passed u/s 147 of the Act, to challenge the validity of the order passed u/s.147 of the Act as well as initiation of proceedings u/.s 147 of the Act. In this regard the ld. Counsel for

the assessee placed before us two decisions one rendered by Lucknow Bench of ITAT in the case of Inder Kumar Bachani (HUF) vs ITO 99 ITD 621 (Luck) and ITAT Mumbai ' G ' Bench in the case of M/s. Westlife Development Ltd. Vs Principal C.I.T. in ITA NO.688/Mum/2016. In both the decisions a view has been taken by the Tribunal that when an Assessment order passed u/s 147 of the Act was illegal the CIT cannot invoke the jurisdiction u/s 263 of the Act against such void or non-est order. In the second decision cited the Hon'ble Mumbai bench of the Tribunal has specifically framed the following questions :-

" 1.Whether the assessee can challenge the validity of an assessment order during the appellate proceedings pertaining to examination of validity of order passed u/s 263?

2. Whether the impugned assessment order passed u/s 143(3) dated 24-10-2013 was valid in the eyes of law or a nullity as has been claimed by the assessee?

3. If the impugned assessment order passed u/s 143(3) was illegal or nullity in the eyes of law, then, whether the CIT had a valid jurisdiction to pass the impugned order u/s 263 to revise the non est assessment order?"

9. On question no. 1 and 3 which is relevant to the present case the Hon'ble Mumbai bench of the Tribunal has taken the view that when the original assessment proceedings are null and void in the eyes of law for want of proper assumption of jurisdiction then such validity can be challenged even in collateral proceedings. The Mumbai bench took the view that the proceedings u/s 147 of the Act are primary proceedings and proceedings u/s 263 of the Act are collateral proceedings and in such collateral proceedings, the validity of initiation of the original proceedings u/s 147 of the Act can be challenged. The Mumbai bench of the Tribunal in this regard has placed reliance on several decisions, the principal decision being that of the Hon'ble Supreme Court in the case of Kiran Singh & Ors. V. Chaman Paswan & Ors. [1955] 1 SCR 117 wherein the Hon'ble Supreme Court observed as follows :-

" It is a fundamental principle well-established that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the

action, strikes at the very authority of the Court to pass any decree and such a defect cannot be cured even by consent of parties."

10. The ITAT Mumbai bench made a reference to another decision of the Hon'ble Supreme Court in the case of Sushil Kumar Mehta vs Gobind Ram Bohra, (1990) 1 SCC 193 and the decisions in the case of Indian Bank vs Manilal Govindji Khona (2015) 3 SCC 712. The ITAT Mumbai bench also held that if order of assessment passed u/s 147 of the Act was illegal and nullity in the eyes of law then that order cannot be revised by invoking powers u/s 263 of the Act by CIT. The Mumbai Bench has in this regard placed reliance on the decision of Hon'ble Delhi bench of the Tribunal in the case of Krishna Kumar Saraf vs CIT in ITA NO.4562/Del/2007 order dated 24.09.2015 wherein it was held as follows :-

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

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

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

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

11. The learned DR relied on the order of the CIT(A). We have considered the rival submissions. We are of the view that the validity of the order u/s 147 of the Act depends upon the AO assuming jurisdiction to make an order of assessment u/s 147 of the Act after fulfilling the conditions laid down in the said section namely reason to believe the income chargeable to tax for that assessment year has escaped assessment. If this condition is not satisfied then it cannot be said the AO has validly assumed jurisdiction u/s 147 of the Act. If the validity of proceedings u/s 147 of the Act has not been challenged by the assessee by filing appeal against the order u/s.147 of the Act, can it be challenged in the appeal against an order u/s 263 of the Act revising the invalid order u/s 147 of the Act. This issue has been analysed by the Hon'ble Mumbai Bench of the tribunal in the case of M/s. Westlife Development Ltd. (supra) and 147 proceedings has been equated to primary proceedings and the proceedings u/s 263 passed equated to collateral proceedings. It has further been held based on various judicial pronouncements of the Hon'ble Supreme Court that if the primary proceedings are non-est in law or void on the ground of lack of jurisdiction then the validity of such proceedings can be challenged even in an appeal arising out of collateral proceedings. We have already set out the ratio laid down in these decisions and we do not wish to repeat the same. Suffice it to say the law is well settled that invalidity of the primary proceedings for want of proper jurisdiction can be challenged even in appellate proceedings arising out of a collateral proceeding. In view of the aforesaid legal position we admit the additional grounds for adjudication.

12. As far as the merits of the validity of initiation of proceedings u/s 147 of the Act for A.Y.2007-08 and 2008-09 are concerned the question for consideration is as to whether on the basis of the reasons recorded it can be said that there can arise any belief on the part of the AO that income chargeable to tax for the relevant assessment years has escaped assessment. In this regard the reasons recorded by the AO for initiating proceedings u/.s 147 of the Act for A.Y.2007-08 and 2008-09 has already been set out by an order in the earlier part of this order. The gist of the reasons recorded by the AO is that the assessee had made investments of about Rs.4 crore in

construction of hotel/resort at Mandarmoni, Purba Midnapore. It is the further allegation in the reasons recorded that to a notice u/s 133(6) of the Act, the Assessee had in reply admitted investment of only Rs.3.38 crores in construction of hotel and that source of funds for such construction was out of share capital and secured loan. It is also not disputed that the value of investments as stated by the assessee in its reply to the notice u/s 133(6) of the Act, was duly shown as the investment in construction of hotel with the balance sheet of the assessee. The AO has however inferred that there is a difference in the value of investment in construction of hotel as shown in the books of account and as per the information in possession of the AO which is a sum of Rs.4 crores. Another reason given by the AO is that the difference in the amount of investment in construction might have been met by the Assessee out of income not disclosed. It has also been mentioned that the source of investment with regard to the actual cost of construction requires investigation.

13. In this regard it can be seen that in its reply dated 26.07.2010 to the notice u/s 133(6) of the Act the assessee has given the following details :-

> " Kindly refer to your above letter dated 18.06.2010 calling for information u/s. 133(6) of the Income Tax Act, 1961 Regarding investment in Hotel Ajoy Minar situated in Mandarmoni, Dist. - Purba Medinipur.
>
> As asked for, we are furnishing the information along with enclosures for your kind perusal.-
>
> I. Total Amount invested up to 31.03.2010 is Rs. 3,38,43,644.00 and source of fund is given hereunder: -
>
Share Capital	Rs. 1,88,30,000.00
Unsecured Loan .	Rs. 1.65.16,005.00
Total	Rs. 3,53,46,005.00
>
> We are enclosing herewith the list of share holders and loaners up to 31.03.2010 showing names, address and PAN of the respective parties for your ready reference. The figures relating to 2009-10 included with the above are subject to audit.
>
> The above two lists are the clear evidence in support of credit worthiness of our company,

2. A separate year wise list of Investment in Hotel Ajoy Minar is enclosed as asked for.

3 We are enclosing herewith photo copy of Audited Balance Sheet for the years 2006-07, 2007-08 & 2008-09. The Audit of Accounts for the year ending 31st• March2010 is under progress. The same, if required, will be furnished when the same will be signed by the auditor.

4 The photo copies of two bank accounts are enclosed for your kind perusal."

14. In the light of the aforesaid reply the question that needs to be answered is as to how did the AO get information that the assessee had invested Rs.4 crores in hotel at Mandarmoni, Purba Medinipur. Apparently there appears to be no basis for this conclusion arrived at by the AO in the reasons recorded. The ld. DR however sought to defend the action of the AO by submitting that there was a survey in the business premises of the assessee and in such survey there was evidence to show that the assessee had invested a sum of Rs.4 crores in construction of a hotel at Mandarmoni. We are of the view that this submission of the ld. DR cannot be accepted. The law is well settled that the reasons recorded by the AO have to be tested on the basis of specific wordings of the reasons so recorded. No external material can be shown to justify the conclusion arrived at in the reasons recorded unless these materials are specifically referred to or incorporated in the reasons recorded. In the reasons recorded the AO has not disclosed the basis of this conclusion that the assessee made an investment of Rs. 4 crores in the construction of a hotel at Mandarmoni. We find that in this regard that Hon'ble Bombay High Court in the case of Hindustan Lever Ltd., Vs. R.B.Wadkar *(2004) 268 ITR 0332* the reasons are required to be read as they were recorded by the AO. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the AO to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the AO to reach to the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the AO to form his opinion. It is for him to put his opinion on record in

black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are the manifestation of mind of the AO. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide link between conclusion and evidence. The reasons recorded must be based on evidence. The AO, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the AO cannot be supplemented by filing affidavit or making oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced.

15. We are also of the view that as rightly contended by the ld. Counsel for the assessee that the reasons recorded are vague and belief regarding escapement of income is on mere pretence. In this regard the decision of ITAT Kolkata bench in ITA No.671/Kol/2015 dated 18.09.2015 in the case of Dr.Papiya Dutta vs ITO is relevant and it has been held in the aforesaid decision as follows :-

> *" It is clearly evident from the reasons recorded by the Assessing Officer that there was actually no reason for him to have formed a belief about the escapement of any income of the assessee from the assessment, but the assessment was reopened by him to verify or examine certain particulars furnished by the assessee in the return of income, which according to the Assessing Officer, might have possibly involved introduction of her un accounted money by the assessee. It is thus clear that the assessment was reopened by the Assessing Officer on the basis of suspicion and in order to make fishing and roaming enquiries, which, in my opinion, is not permissible. It is a settled position of law that the assessment can be reopened under section 147/148 on the basis of 'reason to believe' and not 'reason to suspect'. As held by the Coordinate Bench of this Tribunal in the case of Deputy Director of inc me Tax (International Taxation)-21, Mumbai -vs.- Societe International De Telecommunication (supra) cited by the Id. counsel for the assessee, unless the reasons to believe about the escapement of income exist, no recourse can be*

taken to the provisions of section 147. It was held that where an Assessing Officer ventures to initiate reassessment proceedings with an object of finding some material about the escapement of income, such reassessment cannot legally stand and the law doe s not permit the Assessing Officer to conduct inquiries after the initiation of reassessment ITA No. 671 / KOL ./2015 Assessment year: 2008 - 2009 proceedings, to find if there is an escapement of income. It was held that the scope of section 147 cannot encompass such an action under which certain examination is to be conducted for forming a reason to believe as to the escapement of income. If the facts of the present case including especially the reasons recorded by the Assessing Officer for reopening the assessment a reconsidered in the light of the decision of the Coordinate Bench of this Tribunal in the case of Deputy Director of income Tax (International Taxation)-21, Mumbai - vs.- Societe International De Telecommunication (supra), I am of the view that the initiation of reassessment proceeding itself was bad in law and the assessment completed by the Assessing Officer under section 143(3) read with section 147 in pursuance of such invalid initiation is liable to be cancelled. I order accordingly."

16. In the present case also the re-assessment proceedings have been initiated only for the purpose of verification and examination which is not the scope of re-assessment proceedings. It would be the case of rather reasons to suspect rather than reasons to belief that there was escapement of income. It is a case of the AO seeking to make fishing and roving inquiry without any basis. We have no hesitation in concluding that initiation of reassessment proceedings in the present case was not valid as the mandatory requirement of such 147 has not been satisfied. We therefore hold that reassessments orders for A.Y.2007-08 and 2008-09 dated 30.12.2011 were invalid. Consequently order passed u/s 263 of the Act dated 21.03.2014 for A.Y.2007-08 and 2008-09 are also held to be invalid and quashed. Thus the appeals being ITA No.765 and 766/Kol/2014 are allowed.

ITA NO.764/Kol/2014 (A.Y.2009-10)

17. As far as this appeal is concerned this arises out of an order passed u/s 263 of the Act revising an order passed u/s 143(3) of the Act dated 30.12.2011. In the assessment u/s 143(3) of the Act the AO has observed that the assessee has received share capital and share premium of Rs.8,80,000/- and Rs.79,20,000/- respectively during the

relevant previous year. He also observed that to verify the genuineness of the share applicants notices u/s 133(6) of the Act were issued to the share applicants. Replies received from them were verified and placed and no adverse inference were drawn.

18. In the impugned order u/s 263 of the Act the CIT has observed that the net asset value of the company was only Rs.42.37 as on 31.03.2007 and net asset value was Rs.78.74 as on 31.03.2008 respectively and there was no justification at a very high premium which was eight times of the share capital and that the AO failed to examine as to why such high premium was paid by a person acquiring shares of the assessee company. The CIT has also observed that the facts and circumstances under which such high premium was charged raised serious concern and about the genuineness of the transactions as well as the source of funds. The CIT also found that notice u/s 133(6) of the Act was issued by the AO only to five out of seven share holders and that no query was raised regarding the justification of the premium. Finally the CIT came to the conclusion that order of the AO was erroneous because the AO failed to make proper inquiries with regard to the receipt of share capital and share premium by the assessee. We have already set out in the earlier part of the order the directions given by CIT in the order u/s 263 of the Act. In short it is the direction of CIT that the share applicants should be summoned to find out the genuineness of the transactions in the light of the share premium paid by them and also to see that if the subsequent transfer of shares by the share holders had lower price.

19. The ld. Counsel for the assessee submitted before us that the only grievance of the CIT in the impugned order was justification for a high premium. It was the submission that the justification of paying high premium on shares acquired was not necessary to be examined u/s 68 of the Act prior to introduction of first proviso to section 68 of the Act by the Finance Act 2012 w.e.f. 01.04.2013 whereby it has been provided that where the assessee is a company, (not being a company in which the public are substantially interested) and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever

name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless—

> (a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and
>
> (b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:

It was therefore submitted by him that the impugned order u/s 263 cannot be sustained. It was also submitted by him that there is no charge of money laundering by CIT in the impugned order and therefore the decision of the Hon'ble Calcutta High Court in the case of Subhlakshmi Vanijya Pvt. Ltd *(ITA No.1104/Kol/2014)* dated 30.7.2015 (2015) 155 ITD 171 (Kolkata) will not be applicable. The ld counsel also submitted that there was improper application of mind by CIT as he has acted on the basis of the recommendation of the AO and has not applied his mind. The ld. DR relied on the order of CIT and further submitted that the CIT has applied his mind and has duly accepted the recommendations of the AO and issued notices in the seeking which clearly exhibits application of mind by CIT.

20. We have considered the rival submissions. It is nobody's case that the AO did not issue notices u/s 133(6) of the Act to some of the subscribers of the share capital, who, in turn submitted details of their PANs, bank accounts, etc., copies of which have been placed on record. The AO after getting some documents did not think it fit to make further enquires. In the light of the high share premium received by the Assessee it was incumbent on the part of the AO to examine the rationale or logic behind issuing shares at such a high premium. He ought to have examined the directors of the companies who had subscribed to share capital. No attempt was made to require the assessee to justify the charging of such a high premium and further what prompted the subscribers to purchase shares at such a huge premium when the company did not have any worthwhile net worth and was relatively a new one without any business activity. To argue that once the AO, as per his wisdom, has inquired into

certain aspects of assessment which he considered relevant and, thereafter, CIT cannot intervene, is wholly untenable. If this argument is taken to its logical conclusion, then it would mean obliterating the provisions of section 263 from the statute. The Hon'ble jurisdictional High Court in the case of Maithan International 277 CTR 65 (Cal) had to consider a case where an assessee obtained loans aggregating to Rs.1.60 crore from six private limited companies ranging between Rs.7 lac to Rs.1.10 crore. These companies had filed their returns with nominal income. The AO mentioned in the assessment order that Inspector was deputed to verify fresh loans received during the year. The Inspector verified such loans and gave a positive report. Keeping such report on record, the AO accepted the genuineness of the transactions. The CIT invoked section 263 by observing that the report given by the Inspector was very elementary and simply mentioned that he had verified bank passbooks, Profit & loss account and Balance sheets of these companies. In none of the reports, he had commented on the issue of credit worthiness of the parties. The CIT opined that the AO was required to make proper investigation to determine whether the loans were really made by the third parties or they had come out of the sources of the assessee himself. The Tribunal set aside the order u/s 263 of the Act by observing that the AO did conduct enquiry and: "if there is an enquiry, even inadequate, that would not by itself give occasion to the ld. CIT to pass order u/s 263 of the Act." Setting aside the order passed by the Tribunal, the Hon'ble jurisdictional High Court has laid down that : "CIT had reasons to hold that credit worthiness of the alleged lenders was not enquired into." It further went on to hold that a mere examination of the bank passbook, Profit & loss account and Balance sheet is not enough. When the requisite enquiry was not made, the Hon'ble High Court held that, the order was to be considered as erroneous and prejudicial to the interests of the Revenue. It also set aside the view of the Tribunal on inadequate enquiry by holding that: "If the relevant enquiry was not made, it may in appropriate cases amount to no enquiry and may also be a case of non-application of mind." It further observed that the question of inadequate enquiry should be understood in its proper perspective and: "if it can be shown that the inadequate enquiry led the AO or may have led into assumption of

incorrect facts, that could make the order erroneous and prejudicial to the interests of the revenue." Setting a bad trend has also been held to be prejudicial to the Revenue.

21. When we comparatively consider the facts of the instant case visa-vis those of Maithan International (supra), it can be seen that the facts under consideration are on a much weaker footing. In the present case, the AO obtained confirmations and copies of bank statements, etc., from some of the shareholders and got himself satisfied, whereas in the case of Maithan International, an Inspector was also deputed to conduct a further enquiry in addition to the collection of documents etc. as has been done in the instant cases. We are therefore of the view that the enquiry conducted by the AO was inadequate and would amount to no enquiry at all.

22. As to whether enquiry into high share premium ought to have been made by the AO and also as to what was the justification for such high premium could to be investigated by the AO at all because the 1st proviso to Sec.68 of the Act inserted by the Finance Act, 2012 w.e.f. 1-4.2013 was only prospective in operation, we are of the view that since section 68 covers `any sum credited' in the books without any exception, which, inter alia, includes share capital, it cannot be held that the examination of share capital with premium etc. was earlier outside the ambit of section 68 and now this amendment has brought it into its purview. The amendment has simply made express which was earlier implied. We are therefore of the view that the assessee is always obliged to prove the receipt of share capital with premium etc. to the satisfaction of the AO, failure of which calls for addition u/s 68 of the Act.

23. The argument with regard to non application of mind by the CIT is without any basis as all show cause notice u/s.263 of the Act were issued by him and ultimately he has passed the impugned order. There is no material brought on record to show that the CIT acted without application of mind. We therefore reject this argument on behalf of the Assessee.

24. We are therefore of the view that the order u/s.263 of the Act is valid and proper in so far as it relates to AY 2009-10 is concerned and we uphold the same.

25. In the result, ITA No. 765 & 766/Kol/2014 are allowed while ITA No.764/Kol/2014 is dismissed.

Order pronounced in the Court on 05.04.2017.

Sd/-	Sd/-
[M.Balaganesh] Accountant Member	[N.V.Vasudevan] Judicial Member

Dated : 05.04.2017.

[RG PS]

Copy of the order forwarded to:

1.M/s. Classic Flour and Food Processing Pvt. Ltd., 49/2, Gariahat Road, Kolkata-700019.
2. C.I.T.- Kol-IV, Kolkata.
3. CIT(DR), Kolkata Benches, Kolkata.

True Copy

By order,

Asst. Registrar, ITAT, Kolkata Benches