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

BEFORE SHRI A. T VARKEY, JM &DR. A.L.SAINI, AM

आयकरअपीलसं/.ITA No.2519/Kol/2017

(निर्धारणवर्ष / Assessment Year: 2009-10)

M/s. Garg Brothers Pvt. Ltd. 57, Burtolla Street, Kolkata – 700 007.	**Vs.**	**DCIT, Central Circle-3(2), Kolkata** Aayakar Bhawan Poorva, 110, Shantipally, Kolkata – 700 107.
स्थायीलेखासं/.जीआइआरसं/.PAN/GIR No. : **AAACG 9775 F**		
(Assessee)	**..**	**(Revenue)**

&

आयकरअपीलसं/.ITA No.2520/Kol/2017

(निर्धारणवर्ष / Assessment Year: 2009-10)

M/s. Cliff TreximPvt. Ltd. 57, Burtolla Street, Kolkata – 700 007.	**Vs.**	**DCIT, Central Circle-3(2), Kolkata** Aayakar Bhawan Poorva, 110, Shantipally, Kolkata – 700 107.
स्थायीलेखासं/.जीआइआरसं/.PAN/GIR No. : **AABCC 0961 E**		
(Assessee)	**..**	**(Revenue)**

&

आयकरअपीलसं/.ITA No.2521/Kol/2017

(निर्धारणवर्ष / Assessment Year: 2009-10)

M/s. Span Foundation Pvt. Ltd. 57, Burtolla Street, Kolkata – 700 007.	**Vs.**	**DCIT, Central Circle-3(2), Kolkata** Aayakar Bhawan Poorva, 110, Shantipally, Kolkata – 700 107.
स्थायीलेखासं/.जीआइआरसं/.PAN/GIR No. : **AAECS 4605 C**		
(Assessee)	**..**	**(Revenue)**

Assessee by :Shri S.K. Tulsiyan, Advocate & Bhoomija Verma, AR
Revenue by :Shri G. Mallikarjuna, CIT(DR)

सुनवाईकीतारीख **/Date of Hearing : 26/03/2018**

घोषणाकीतारीख**/Date of Pronouncement : 18/04/2018**

आदेश / O R D E R

Per Dr. A. L. Saini:

The captioned three appeals filed by the different assessee's involving common issues and all appeals pertaining to Assessment year 2009-10, are directed by the orders passed by the Principal Commissioner of Income Tax u/s 263 of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'). By way of these appeals, these assessee's have challenged the correctness of the order passed by the Commissioner of Income Tax, dated 15.03.2017 exercising the jurisdiction u/s 263 of the Act.

2. At the outset it has been brought to our notice that there is a delay of 211 days in filing these appeals. The assessee's have moved a condonation petition before the Tribunal to condone the aforesaid delay. The ld. Counsel for the assessee, Shri S.K. Tulsiyan, has submitted before us that these assessee's are not much aware of the intricacy of income tax and thus, used to rely on the expert advice rendered by their Tax Consultants. Later, on an advice from a senior lawyer, the assessee's came to know that the order of ld. Principal CIT u/s 263 of the Act is appealable before the Tribunal. Since, their earlier Authorized Representative/Tax Consultants had not intimated the assessee's about future course of action which needs to be taken against the said order u/s 263 of the Act, the assessee's did not prefer an appeal before the Tribunal. On advice from a senior lawyer, the assessee's came to know that the order u/s 263 is appealable and thereafter the assessee's handed over the relevant records to the senior lawyer who prepared the necessary documents for filing the appeal against the order u/s 263 and therefore, there was a delay about 211 days.

The ld. DR opposed the admissions of appeal. According to him, *Ignorantia juris non excusat*" i.e. ignorance of law is not an excuse. According to ld. CIT-DR, the assessee should be vigilante and law does not help sleeping person. So he does not want us to condone the delay.

3. We have heard both the parties on this preliminary issue. Having regard to the reasons given in the application for condonation of delay, we are of the considered opinion that assessee was under a bona fide belief that the impugned order of Pr. CIT was not appealable before this Tribunal, since they were not advised by their Tax Consultants about this legal right. Later on, when a Senior Lawyer advised them to file an appeal, the assessee's immediately took steps to file the appeals. Therefore, the delay caused, we note, was because of the wrong advice of the Tax Professional, for which assessee's cannot be penalized. For the ends of justice, we condone the delay and admit the appeal for hearing.

4. These three appeals filed by the different assessee's emanate from a common search conducted at their premises, involves common and identical issues, therefore, appeals have been heard together and are being disposed of by this consolidated order. For the sake of convenience, since facts remain similar and the grounds are identical, we take ITA No.2520/Kol/2017 i.e. M/s Cliff Trexim Pvt Ltd,as lead case for deciding the above appeals *en masse*.

5. The grounds of appeal raised by the assessee in the lead case (ITA No.2520/Kol/2017) are as follows:

> *1. That on the facts and in the circumstances of the case, the Ld. Pr. CIT having derived satisfaction on the basis of information received from the DDIT (Inv), Unit-2(2),Kolkata and not from the record as envisaged u/s.263 of the Act, the impugned order of the A.O. passed u/s.153A/143(3) of the Act could not have been declared erroneous and prejudicial to the interest of revenue.*

2. That the action of the Ld. Pr. CIT in invoking jurisdiction u/s.263 by alleging that the A.O. failed to carry out necessary enquiry and investigation in regard to the share capital is devoid of merit inasmuch as the impugned assessment pertains to unabated assessment of the appellant.

3. That there being no incriminating material discovered pursuant to search in this case and as per proviso 2 to sec.153A the assessment in this case was not pending, the Ld. Pr. CIT erred in alleging that the A.O. failed to carry out necessary enquiry and investigation in relation to the return which pertained to material already on record.

4. That the Ld. Pr. CIT under wrong notion has invoked provisions of sec.263 of the Act without considering that during search operation u/s.132 on two occasions, nothing incriminating was found and the impugned assessment u/s.153A/143(3) of the Act was made by the A.O. after making due verification and after being satisfied with the complete details and authentic documents of the share capital filed by the appellant.

5. That the impugned order passed by the A.O. originally being neither erroneous nor prejudicial to the interest of the revenue, the Ld. Pr. CIT wrongly invoked jurisdiction by making allegation which is not supported by any evidence or by law.

6. That, therefore, as the assessment order passed by the A.O. u/s.153A/143(3) of the Act is neither erroneous nor prejudicial to the interest of the revenue as there is no loss of revenue, the impugned order u/s.263 of the Act of the Ld. Pr. CIT directing to reframe the assessment as per his guidelines on the same set of facts and evidence on record being devoid of any merit and bad in law is liable to be quashed and the appellant be given such relief(s) as prayed for.

7. That, the appellant craves leave to amend, alter, modify, substitute, add to, abridge and/ or rescind any or all of the above grounds."

6. By raising the aforesaid Ground Nos. 1 to 6, the assessee have challenged the jurisdiction of the Principal CIT u/s 263 of the Act to interfere in the order passed by the Assessing Officer u/s 153A r.w. section 143(3) of the Act. The brief facts apropos the aforesaid issue are that a search and seizure operation under the provisions of section 132(1) of the Act was conducted on Banktesh Group on 29.05.2012 and subsequent dates. The assessee's are part of the Banktesh Group. In the instant lead case, the assessee filed its return of income for A.Y 2009-10 u/s 139 of the Act on 25.09.2009 showing total income of Rs.4,28,560/-. A notice u/s 153A of the Act was issued on the assessee on 25.06.2014 calling for filing return of income. In response to such notice, the assessee filed its return of income u/s 153A of the Act on

15.12.2014 declaring total income of Rs.4,28,560/-. The assessment was completed on 30.03.2015 at total income of Rs.7,73,840/-.

7. Thereafter, the ld. Principal CIT found fault with the assessment order passed by the AO, by takingnote that accommodation entries in the form of bogus share capital have been taken by different assessee's of the said group with the help of different accommodation entry operators. According to him during search conducted on 02.03.2016, entry operators have confirmed that the allotment of shares made by the above assessee amounting to Rs.10.40 crores on 31.09.2009 is one of the transactions found as accommodation entry. According to ldPr CIT, the allottee companies were found to be bogus and non-existing and the entry operators admitted to have provided accommodation entry in the form of share capital/premium to the Banktesh Group of companies in lieu of commission. Therefore, the ld. CIT issued a show-cause notice u/s 263 of the Act dated 09.11.2016 asking the assessee to show-cause as to why the assessment order passed on 30.03.2015 u/s 153A/143(3) should not be treated as erroneous in so far it is prejudicial to the interest of the Revenue as per the provisions of section 263 of the I.T. Act.

8. In response to the show-cause notice, the assessee filed written submissions before the ld. Principal CIT and submitted the documents which were submitted by the assessee before the AO in the assessment proceedings u/s 153A of the Act. The assessee submitted that during the assessment proceedings, the assessee has submitted bank statements, balance sheet, Profit & Loss A/c, Income Tax Return Acknowledgement, source of funds for two layers. During the proceedings before the ld. Principal CIT the assessee submitted that during the course of search action conducted

on 02.03.2016 and also the earlier search action conducted 29.05.2012, in all the search actions, the Department did not find a single document from the premises of the assessee group evidencing that the assessee had in fact, paid cash for raising share capital. The assessee also submitted before the Pr. CIT that except the statement of some of the alleged accommodation entry operators, the investigation wing does not have a single document under its possession to prove its allegation that the share capital raised by the assessee company is accommodation in nature. Therefore, the assessee pleaded before the ld. Principal CIT that the order passed by the AO u/s 153A is neither erroneous nor prejudicial to the interest of the Revenue.

9. However, the ld. Principal CIT, having gone through the reply of the assessee held that AO failed to conduct *detailed* investigation about the identity, genuineness and credit worthy of the shareholders. According to him, the genuineness of the investment has to be examined in detail to the extent that the shareholders have invested the money and the corporate veil be lifted. Therefore, the ld. Principal CIT rejected the contention of the assessee and held that order passed by the AO dated 30.03.2015 for A.Y 2009-10 is erroneous and prejudicial to the interest of Revenue and, therefore, he directed the AO to make necessary examination on the issue and pass a fresh assessment order.

10. Not being satisfied with the order of the ld. CIT(A), the assessee is in appeal before us.

11. The ld. Senior Counsel assailing the decision of ld. Principal CIT drew our attention to show-cause notice (SCN) issued by the ld. Principal CIT dated 04/09.11.2016 and stated as under:

> *"Assessment for the A.Y 2009-10 u/s 153A of the Income Tax Act, 1961 in the case of M/s. Cliff TreximPvt. Ltd. which is a part of Banktesh Group was completed on 30.03.2015 by the DCIT, Central Circle 3(2), Kolkata.*

On analysis of assessment records, it is observed that in the year under consideration, the assessee raised share capital and premium to the tune of Rs.10.40 crore. During the assessment proceeding, the assessee furnished the list of investors who subscribed in shares of the assessee company. The assessee furnished the supporting documents regarding share transactions of investor companies. But no detailed investigation was carried out at the time of assessment regarding genuineness of introduction of share capital.

Meanwhile a search operation against Banktesh group was once again conducted on 02.03.2016 by DDIT(Inv.), Unit 2(2),Kol. During the course of search & post search investigation it was found that accommodation entries in the form of bogus share capital have been taken by different group of companies by the said Group with the help of different known accommodation entry operators. The allotment of shares made by the above assessee amounting to Rs.10.40 crore. On 31.09.2009 is one of the transactions found as accommodation entry by the Investigation wing. The allottee companies were found to be bogus and non-existing. The statements of entry operators were also recorded during the search & seizure operation which confirmed the findings of the Investigation Wing. The entry operators admitted to have provided accommodation entry in the form of share capital/premium to the Banktesh Group of Companies in lieu of commission.

In view of the above discussion, the assessment completed on 30.03.2015 may be erroneous in so far as it is prejudicial to the interest of the revenue.

You are, therefore, requested to show cause as to why the Assessment Order passed on 30.03.2015 u/s.153A by the DCIT, Central Circle 3(2), Kolkata should not be treated as erroneous in so far as it is prejudicial to the interests of the revenue as per the provisions of sec.263 of the Income Tax Act."

12. The ld. Counsel for the assessee drew our attention to following facts which are undisputed and important to adjudicate the issue.

1. Search & seizure operation u/s 132 was conducted on 29.05.2012 on Benktesh group and nothing incriminating was found.

2. Consequent upon the said search, the A.O initiated 153A proceeding on the appellant-company for A.Y 2009-10, which was an unabated year. He was thus not required to investigate further in relation to this unabated year when nothing incriminating document was found/seized. Assessment order u/s 153A/143(3) was passed on 30.03.2015.

3. Ld. Pr. CIT based upon information received from DDIT(Inv.), Kolkata consequent upon search action u/s 132 carried on Banktesh Group on 02.03.2016 and seizure of some documents, issued SCN u/s 263 of the Act (placed at Pages 17 & 18 of the P/B) as to why assessment order for A.Y 2009-10 (unabated year) should not be set aside for de novo assessment.

13. The ld. Counsel pointed out that the sole satisfaction behind SCN was that during search conducted on 02.03.2016 on Banktesh group and investigation it was found that accommodation entries in the form of bogus share capital have been taken by the group companies with the help of different known accommodation entry operators and one of such accommodation entries were allotment of shares of Rs.10.40 crores by the appellant-company. It was further alleged in the SCN that statements recorded from the entry operators during search operation also confirmed the said position.

14. In this connection, it is submitted by the AR that a show-cause notice must be accompanied with the material on which the opinion of the authority (Ld. Pr. C.I.T.) is based. Further, such SCN should have documents on the basis of which the Ld. Pr. C.I.T. has arrived at the conclusion that the assessment order u/s.153A/143 of the Act for unabated A.Y. 2009-10 was erroneous and prejudicial to the interests of revenue. Absence of these two ingredients and/or components is a gross violation of principle of natural justice. Furthermore, mention of the reasons for issuing SCN in the subsequent order passed uls.263 of the Act is of no use/avail. The reasons backed by details and evidences are required to be mentioned in the SCN itself so as to offer opportunity to the noticee to meet up the case and serve the purpose of the appellant-noticee.

15. According to ld. Counsel a reading of SCN, it is quite evident that none of the aforesaid conditions precedent for issuing SCN is existing in this case. Nothing particular has been mentioned on whom search and investigation was carried out. There is no whisper about identity of such entry operators who allegedly admitted to have provided accommodation entries to Banktesh group, including the appellant-company. No report of the Investigating Wing and alleged statement of the so-called entry operators

were provided to the appellant to ensure authentication of documents collected at the back of the appellant. As a corollary, the appellant was denied to have any opportunity to cross-examine such deposed persons, whose statements were out rightly used against the appellant. Therefore, the whole exercise of the Ld. Pr. C.I.T. in having invoked jurisdiction u/s.263 of the Act is bereft of principle of natural justice.

16. Our attention was drawn to the decision of Hon'ble Allahabad High Court in the case of **Vijay Kumar Sharma vs. Appropriate Authority (1996) 220 ITR 509 (All)**. In that case, the notice issued by the Appropriate Authority did not refer to the material on which opinion was formed nor any document whatsoever was annexed to the SCN. It was thus held as under:

> *"Held, on the facts, that the notice did not state that in the opinion of the appropriate authority, the fair market value of the property in question was 15 per cent more than the apparent consideration mentioned in the agreentent to sell between the parties nor did it refer to the material on which such an opinion was formed. No document whatsoever was annexed to this show-cause notice. The notice was not valid. Moreover, the adjournment of the hearing for a very short period and the change of venue of hearing to Lucknow without giving the petitioner sufficient time to make travel arrangements and in disregard of the fact that the petitioner had applied for the earlier adjournment on the ground of illness depicted a complete disregard of the principles of natural justice. The period of limitation prescribed by section 269UD had expired. This was not a fit case for remand. The proceedings were liable to be quashed."*

17. It was brought to our notice that on further reference to the Hon'ble Apex Court by the Appropriate Authority, the Hon'ble Apex Court in their judgment reported in (2001) 249 ITR 554 (SC) affirming the judgment of Hon'ble Allahabad High Court held that a SCN must be accompanied with the material on which the opinion of the said authority is based. Further the same should have documented on the basis of which the said authority has arrived

at any conclusion. Absence of these is a gross violation of natural justice. The order pronounced, to quote, is as under:

> *"There has been so gross a breach of principles of natural justice in this case that the High Court (see [1996 (220 ITR 509 (All)], was right in setting aside the order on that count and not giving consideration to remitting the matter." [Emphasis given]*

18. Attention of ours was drawn to the decision of ITAT, Delhi in the case of Cargill India Pvt. Ltd. vs. DCIT (2008) 300 ITR (AT) 223, wherein at pages 52 & 53 of the Report it has been held as under:

> *"122. We further find substance in the arguments of learned counsel for the assessee that not only notices as above were vague, non-specific and showed lack of application of mind, even the show-cause notice issued under section 271G suffered from the same defect. No specific clause of the rule or detail of the international transaction relating to which default was committed, were stated in the show-cause notice issued by the Assessing Officer. The notices issued were prima facie illegal and bad in law. He relied upon the decision in the case of Reckitt and Colman of India Ltd. [1996] 88 ELT 641 (SC) and on the case of Hindustan Polymers Co. Ltd. [1999] 106 ELT 12. In the case of Amrit Foods v. CCE [2006] 6 RC 435; [2005] 190 ELT 433 (SC) wherein their Lordships observed as under (page 438 of 6 RC) :*
>
> *"The Revenue has preferred an appeal from the order of the Tribunal setting aside the imposition of penalty under rule 173Q of the Central Excise Rules, 1944. The Tribunal has set aside the order of the Commissioner on the ground that neither the show-cause notice nor the order of the Commissioner specified which particular clause of rule 173Q had been allegedly contravened by the appellant. We are of the view that the finding of the Tribunal is correct. Rule 173Q contains six clauses the contents of which are not same. It was, therefore, necessary for the assessee to be put on notice as to the exact nature of contravention for which the assessee was liable under the provisions of rule 173Q. This not having been done the Tribunal's finding cannot be faulted. The appeal is, accordingly, dismissed with no order as to costs."*

123. In the above case the apex court held that if allegations in the show cause notice are not specific and are vague, lacks details and/or unintelligible, that is sufficient to hold that noticee was not given proper opportunity. Such notice was struck down. The cited decisions are applicable to the facts of the case and arguments of Shri Agarwal are well taken. As a penalty of 2 per cent, is imposable under section 271G in respect of international transaction, it was necessary to specify in the show-cause notice under section 271G, the international transactions or the documents/information with reference to which the taxpayer committed the default by failing to furnish the requisite information in time. This would enable him to file a proper reply in defence. Without detail of default, no adequate reply could be furnished. The contention of the learned Departmental representative that specific clauses of rule 10D(1) under which information was not furnished within time and default was committed were mentioned in the penalty order is of no avail. The mention of the above detail in the order is of no use. The details were required to be mentioned in the show cause notice so as to afford reasonable and adequate opportunity to the assessee to meet out the case and serve the purpose of the notice. For the above defect also, the penalty proceedings are held to be vitiated and liable to be cancelled." [Emphasis ours]

19. According to AR, a perusal of the above decisions including that of the Hon'ble Apex Court, which is law of the land, brings out the necessary requirements of a valid SCN and the same are in equal force applicable to the facts and circumstances of the instant case of the appellant. To sum up, these are -

a. The SCN must be accompanied with the material on which the opinion of the issuing authority is based.

b. Further, if the said authority has relied on any documents to arrive at his opinion, the same must be made a part of the SCN so as to enable the noticee-assessee to reply to the same.

c. The SCN must contain the information on which the opinion of the prescribed authority is based.

d. The SCN must contain the details of the alleged default on the part of the assessee so as to enable him to file a suitable reply thereto.

e. A SCN cannot be vague or non-specific.

f. Specific clauses regarding alleged default on the part of the assessee must be spelt out in SCN.

g. All the causes as listed in the final order must form part of the SCN issued to the assessee.

20. The absence of the aforesaid ingredients/conditions precedent to issue of a SCN leads to the following results:

a. Absence of the above is a gross violation of natural justice.

b. Lack of the aforesaid leads to absence of reasonable and adequate opportunity to the assessee to make his case, thereby making the proceedings initiated by the issue of the said notice bad in law.

c. The SCN lacking the above ingredients is illegal and bad in the eyes of law.

d. The matter needs to be set aside on the above counts and not to remit the matter for fresh consideration.

9. To buttress the above submission, following further case laws are relied upon by the Ld. AR:

CIT v. Rajesh Kumar [2008] 306 ITR 027 (Del), Hon'ble Delhi High Court has held that –

"the material collected by the Department behind the back of the assessee was used against him without disclosing the material or giving an opportunity to cross-examine the person whose statement had been used by the Department against the interest of the assessee. There was violation of the principles of natural justice ".

Laxmanbhai S. Patel vs. CIT (2008) 174 Taxman 206 (Guj.) -

*Hon'ble Gujarat High Court following the decision of Hon'ble Supreme Court in the case of **Kishinch and Chellaram v. CIT (1980) 125 ITR 713 (SC)** has held that the legal effect of the statement recorded behind the back of the assessee and without furnishing the copy thereof to the assessee or without giving an opportunity of cross-examination, if the addition is made, the same is required to be deleted on the ground of violation of the principles of natural justice. Relevant portion of the judgment is reproduced below:*

"The legal effect of the statement recorded behind the back of the assessee and without furnishing the copy thereof to the assessee or without giving an opportunity of cross-examination, if the addition is made, the same is required to be deleted on the ground of violation of the principles of natural justice. This is clearly stated by the Hon'ble Supreme Court in the case of Kishinch and Chellaram (supra) wherein it is stated that before the Income-tax authorities could rely upon it, they were bound to produce it before the assessee so that the assessee could controvert the statements contained in it by asking for an opportunity to cross-examine."

10. Without any prejudice to the above submissions, undersigned would further state that the Ld. Pr. C.I.T. "on analysis of assessment records" derived satisfaction for issuing the impugned show-cause notice u/s. 263 of the Act that "no detailed investigation was carried out at the time of assessment regarding genuineness of introduction of share capital. The expression record as used in s.263 of the Act is comprehensive enough to include the whole record of evidence on which the original assessment order is based. At the same time, if any information asked for by the assessing authority from the assessee or from others to whom he referred the matter during the course of assessment proceeding was not received but received subsequent to the completion of the assessment, in that situation the assessment order passed without receiving such report may appear to be erroneous within the meaning of

sec.263 of the Act. In the case of the appellant, there is no denying the fact, as detailed above in this submission and acknowledged in the assessment order u/s.153A/143(3) dated 30.03.2015, that in response to notices u/s.143(2)/142(1) and further requisitions made during the course of assessment proceeding, the A/R of the appellant appeared from time to time and produced/submitted necessary details/documents as per requisitions in relation to share capital raised during the year, which were examined. The same confirmation is echoed in the show-cause notice u/s.263 of the Act, to quote "On analysis of assessment records, it is observed that in the year under consideration, the assessee raised share capital and premium to the tune of Rs.10.40 crore. During the assessment proceeding, the assessee furnished the list of investors who subscribed in shares of the assessee company. The assessee furnished the supporting documents regarding share transactions of investor companies." Admittedly, it is not the scenario in the case of the appellant that the A.O. had asked for any further information or evidence from the appellant which were not submitted or received. Similarly, it was not also the case that he had called for some information/report from any other quarter or departmental authority to verify the impugned share transaction, which was not received, far behind passing of the order without receiving such report. That being the admitted position in this case, for invoking provision of s. 263 of the Act, which was received by him after a long gap of one year from the date of passing of the impugned assessment order and definitely this information cannot per se be part of assessment record for the impugned assessment order inasmuch as neither the matter in relation to appellant's share capital was ever referred to the DDIT(Inv.) by the A.O., nor the matter was referred to the DDIT(Inv.) by the A.O. and before receiving report, assessment order was passed.

21. To buttress the above position clear, reliance was placed on the decision of jurisdictional High Court in the case of **CIT v. S.M. Oil Extraction Pvt. Ltd. (1991) 190 ITR 404 (Cal)**. For better appreciation of the ratio of the decision, facts in nutshell in the said case were that the ITO while making the assessment u/s.143(3) accepted the value of plant & machinery as reflected in the balance sheet in toto. During the course of assessment proceeding, the A.O. himself referred the matter for valuation to the Valuation Officer, New Delhi. The valuer made the valuation at Rs.16,12,000/- as against Rs.9,39,449/- shown in the balance sheet.

However, before such report of the Valuation Officer was received by the A.O., the assessment order u/s.143(3) was passed accepting the assessee's valuation. On the above facts, the Ld. C.I.T. invoked jurisdiction u/s.263 of the Act and set aside the said assessment order for passing fresh order. On appeal, the Hon'ble Tribunal held that the material (valuation report) which was not in existence at the time the assessment was made and came into existence afterwards could not form part of the records at the assessment stage and cannot be taken into consideration by the C.I.T. for the purpose of invoking his jurisdiction u/s 263 of the Act. On the above facts, the Hon'ble Calcutta High Court (supra) held as under:

> *"Section 263 of the Income-tax Act, 1961, says that the Commissioner of Income tax may call for the record of any proceedings. The "record" contemplated in section 263(1) of the Income-tax Act, 1961, does not mean only the order of assessment but it comprises all proceedings on which the assessment is based. The Commissioner is entitled for the purpose of exercising his revisional jurisdiction to look into the whole evidence. The expression "record" as used in section 263 of the Act is comprehensive enough to include the whole record of evidence on which the original assessment order was based. All proceedings which constitute evidence on which the assessment order is based must normally be regarded as part of the record. So long as the revisional authority does not rely on any extraneous matter, his jurisdiction cannot be questioned. The assessment order which, on the face of it, was a good order at the time when it was passed mat, in the light of information which although asked for but received subsequent to the completion of the assessment appear to be erroneous. The Commissioner has the jurisdiction to rectify the order in such a case so as to eliminate the error. An assessment without considering the valuation report for which proceeding had already been initiated in the course of an assessment proceedings is not a proper assessment and such assessment is erroneous in so far as it is prejudicial to the interests of the Revenue. The Commissioner of Income-tax has jurisdiction to revise such an assessment. [Emphasis supplied]*

22. Therefore according to ld AR, it is evident from the above decision thus would be that - (1) if the A.O. during pendency of assessment proceeding calls for report from any authority to verify the claim of the assessee and before receiving such report he passes the assessment order, the same constitutes 'record' and the Ld. C.I.T. can invoke jurisdiction u/s. 263 of the Act; and (2) if that would not be the position, in that case, the 'record' within the meaning of s. 263 of the Act would include only the evidence on which the original assessment order is based/passed. The criterion (2) above is the case of the appellant and hence although the Hon'ble High Court allowed the departmental appeal, but the ratio of the decision is squarely applicable to the case of the present appellant. In view of the above decision of Hon'ble jurisdictional High Court, according to ld AR the Ld. Pr. C.I.T. acted beyond his jurisdiction in having directed revision of assessment and the same is liable to be quashed.

23. According to ld AR, despite the aforesaid facts and settled position in law, the appellant filed a reply against the said show cause notice u/s 263 of the Act vide letter dated 16.01.2017 objecting to the impugned proceeding on the premise that the show cause notice alleges that the A.O completed the assessment u/s 153A of the Act without making enquiry and investigation in respect of share capital of Rs.10.40 crores received by the appellant- company during the relevant assessment year. The appellant submitted in its reply that during the course of search & seizure operation, no incriminating document in respect of share capital raised by the appellant-company or assessee group as a whole was found or seized. The case of the appellant was centralized and selected for assessment under the provisions of sec. 153A of the Act. During the course of the said assessment, the appellant was asked to furnish the details in respect of the share capital raised during the block period A.Y. 2007-08 to

A.Y. 2014-15. The appellant during the course of hearing filed all the necessary details in respect of the share capital raised and also submitted supporting documents. On the basis of the documents filed, the A.O. made further enquiries and assessment in the case of the appellant- company was completed on 30.03.2015 determining the total income at Rs.7,73,842/- In its aforesaid reply dated 16.01.2017 in response to show cause notice u/s.263 of the Act, the appellant further submitted as under and could be seen at **pages 19 to 26 of the P/B:**

24. The ld. Counsel submitted that assessment made u/s 153A/143(3) of the Income Tax Act, 1961 was made by the Learned Assessing Officer after making due verification of the share capital raised by the aforesaid assessee. During the course of assessment proceedings the Ld. Assessing Officer was provided with complete details of the share capital raised and allotted during the year along with documents like bank statement, balance sheet and profit and loss account, ITR acknowledgement, source of fund for two layers. As per information available with us due verification of the documents filed was made by the Ld. Assessing Officer. After being satisfied by the documents filed and enquiries made, the Ld. Assessing Officer made addition in respect of 14A, Preliminary Expenses and Interest on IT & FBT therefore, the order passed u/s 153A/143(3) of the Income Tax Act, 1961 should not be considered as erroneous and prejudice to the interest of the revenue.

25. The ld. Counsel submitted that the reason for initiation of revision proceedings as mentioned in notice u/s 263 of the Income Tax Act, 1961, is on the basis of allegations made by the Ld. DDIT (Inv.), Unit-2(2), Kolkata. In this regard it wassubmitted that during the course of search action made

on 02.03.2016 and also the earlier search action made on 29.05.2012 not a single document was found from the premises of the assessee group evidencing that the assessee had in fact paid cash for raising share capital. Apart from statement of some of the alleged accommodation entry operators, the investigation wing does not have a single document under its possession to prove its allegation that the share capital raised by the assessee company is accommodation in nature. In this regard our attention was drawn to the decision of the Hon'ble Apex Court in the case of Vinod Solanki vs. Union of India & Another in Civil Appeal No.740 of 2008 dated 18/12/2008 and in particular paras 14, 22 & 34 of the said judgment where it has been held that the entire burden to prove that the confession was voluntary in nature is on the department. Further, the Hon'ble Apex Court was followed by the Hon'ble Bombay High Court in the case of CIT vs. Uttam Chand Jain in Income Tax Appeal No. 634 of 2009 confirmed the order of the Tribunal, wherein the Tribunal had given the finding that the statement of one Mr. Trivedi to the effect that he was not doing actual business of trading and manufacturing of diamonds and that the transactions reflected in his books of account were merely accommodation entries given to various VDIS declarants was only a general statement and not based on any independent evidence gathered prior to or during the course of reassessment proceedings and, on the other hand, the entries found recorded in the books were considered as genuine and the transaction was held to be genuine.

26. According to him, it is evident from the records that no corroborative evidence has been found during course of search and therefore mere statement without the corroborative evidence cannot be made basis of the assessment. Reliance is placed on the following cases-

ACIT vs. Satya Narayan Agarwalla 255ITR 69

Abdul Qaymme vs. CIT 184 ITR 404

27. The ld. Counsel submitted that proceedings u/s 263 of the Act has been initiated on the basis of material obtained behind the back of the assessee and assessee should be provided with the information under ld PR CIT possession along with an opportunity to cross examine the alleged entry operators. In this regard our attention was drawn to the decision of the Hon'ble Delhi High Court in the case of CIT v. Rajesh Kumar 306 ITR 27 (Delhi) and the decision of the Hon'ble Supreme Court in the case of Andaman Timber Industries v. Commissioner of Central Excise 281 CTR 241 (SC).

Also in the case of K.P. Varghese v. Income Tax Officer (SC)(1981) 131 ITR 597 the Hon'ble Apex Court held that -

> *"the consideration actually received by the assessee is more than what is declared or disclosed by him and the burden of proving such an understatement or concealment is on the revenue. This burden may be discharged by the revenue by establishing facts and circumstances from which a reasonable inference can be drawn that the assessee has not corrected declared or disclosed the consideration received by him and there is an understatement or concealment of the consideration in respect of the transfer. Sub-section (2) has no application in the case of an honest and bona fide transaction where the consideration received by the assessee has been correctly declared or disclosed by him, and there is no concealment of suppression of the consideration."*

28. According to the ld. Counsel, the order passed by the Assessing Officer cannot be treated as erroneous as he had nothing to do more in light of the aforesaid apex court and high court decisions. The apex court in above cases has held that even if the enquiry could not be made the disallowance could not be made as the assessee had discharged his onus. The courts have further observed that even if the share applicants are bogus, the addition could be made in the hands of the share

applicants and not in the hands of the Assessee Company. So there was no need to make any enquiry.

29. According to the ld. Counsel, in the aforesaid notice u/s 263 of the Income Tax Act, 1961, it has also been stated that the proper enquiry was not made. The method and process of proper enquiry has not been mentioned in the Income Tax Act, 1961. It is left at the discretion of the assessing officer. In respect of enquiry being made by the learned assessing officer, we are citing the following judgments from which it is crystal clear that it is not judicious to revise the order u/s 263 of the Income Tax Act, 1961 on the plea of proper enquiry.

In the case of Commissioner of Income Tax, Kolkata V/s M/sLotus Capital Financial Services Ltd., ITAT 125 of 2012 in which the company had raised share capital and the assessment was passed u/s 143(3) of the Income Tax Act, 1961, the Hon'ble CIT revised the order u/s 263 of the Income Tax Act, 1961 on the plea that proper enquiry was not made in spite of the fact that the learned A.O. had made proper enquiry. The Hon'ble ITAT Kolkata Bench held that proceedings u/s 263 of the Income Tax Act, 196l was bad in law. The Hon'ble High Court of Kolkata has also confirmed the said order of ITAT, Kolkata. Sir, the facts of M/s Lotus Capital Financial Services Ltd. (supra) is identical to the facts of this case.

The Hon'ble Gujarat High Court in the case of CIT vs. R.K. Construction Company 313 ITR 65 held that since all the necessary details were furnished to the Assessing Officer, there was no reason for the Commissioner to invoke the revisional jurisdiction under section 263 of the Act. The Assessing Officer had taken a particular view on the basis of the evidence produced before him. On the basis of the evidence before the Assessing Officer and materials which were collected by the Commissioner in revisional proceedings, the Commissioner had taken a different view. However, in the revisional proceedings under section 263, it was not open for the Commissioner to take such a different view. There was nothing on record to suggest that the view taken by the Assessing Officer was unsustainable in law.

The Hon'ble Punjab and Haryana High Court in the case of CIT vs. Deepak Mittal, 324 ITR 411 held that change of opinion by reappraising

the evidence is not within the parameters of revisional jurisdiction of the Commissioner under section 263 of the Income Tax Act, 1961.

In the case of CIT vs. Anil Kumar Sharma (1010) 194 Taxman 504 (Del) the Hon'ble High Court has held that though the assessment order does not patently indicate that the issue in question had been considered by the Assessing Officer, the record showed that the Assessing Officer had applied his mind. Once such application of mind is discernible from the record, the proceedings u/s 263 of the I.T. Act, 1961 would fall into the area of the Commissioner having a different opinion. Hence, the case would not be one of lack of inquiry and commissioner cannot reopen case u/s263 of the Income Tax Act, 1961.

The Hon'ble Supreme Court in the case of CIT vs. Max India Ltd. 295 ITR 282 considering its earlier decision in the case of Malabar Industries Company Ltd.243 ITR 83 held as under:

"The phrase "prejudicial to the interests of the Revenue" in section 263 of the Income Tax Act, 1961 has to be read in conjunction with the expression "erroneous" order passed by the Assessing Officer. Every loss or revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when the Assessing Officer adopts one of two courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Assessing Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the Revenue, unless the view taken by the Assessing Officer is unsustainable in law."

In the case of ***Hycron India vs. Asstt. CIT (2004) 82 TTJ (JD) 450*** *it has been held that assessment having been made by AO after application of mind to the facts of the case, exercise of revisional jurisdiction by CIT was invalid.*

30. From the above decisions, according to ldAR, that it shall not be proper on the part of the Learned Commissioner of Income Tax to revise the order u/s 263 of the Income Tax Act, 1961 on the ground of proper enquiry. The term proper enquiry has not been mentioned in the Income Tax Act, 1961 and since the Learned Assessing Officer is a quasi-judicial

authority, the mode of enquiry and nature of enquiry should not have been questioned by the higher authority.

31. According to ld AR, section 263 of the Income Tax Act, 1961 does not visualize a case of substitution of the judgment of the Commissioner for that of the subordinate authority who passed the order which is sought to be revised. The order passed by a subordinate authority in exercise of its quasi-judicial power vested in him in accordance with law, cannot be termed erroneous merely because the Commissioner does not feel satisfied with the conclusions reached. In this regard, reference may be made to the decision of the Bombay High Court in CIT v. Gabriel India Ltd. (1993) 203 ITR 108 (Bom), wherein it was held as under:

> *"The Commissioner, on perusal of the records, may be of the opinion that the estimate made by the officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a higher figure than the one determined by the Income-tax Officer. That would not vest the Commissioner with power to re-examine the accounts and determine the income himself at a higher figure. This is because the Income-tax Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at a conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion. It may be said in such a case that in the opinion of the Commissioner the order in question is prejudicial to the interests of the Revenue. But that by itself would not be enough to vest the Commissioner with the power of suo motu revision because the first requirement, namely, that the order is erroneous, is absent."*

32. Reference was also made to the decision of Guwahati High Court in SantalalMahendiRatta (HUF) v. Commissioner of Taxes (2006) 143 STC 511 (Gau): (2002) 1 GLR 197 (Gau), where in this High Court while examining section 36 of the Assam General Sales Tax Act, 1993, which is parimateria, held as under:

"The revisional authority for various good reasons may be inclined to view an assessment order from a negative standpoint. The revisional authority may likewise disagree with the view of the primary authority in its interpretation of the law imposing the liability or the extent or quantum thereof. It may disagree with the primary authority with regard to the determination of the amount of tax to be paid. It may also disagree with the primary authority on matters relating to deductions allowable under the statute. All such situations as aforesaid may render the order of the primary authority wrong or erroneous as commonly understood. Such situations, however, would not be facets of an erroneous decision in so far the meaning of the said expression as appearing in section 36 of the Act is concerned. Judicial opinion is unanimous that the expression as appearing in section 36 must be confined to jurisdiction errors otherwise there would be no distinction between the different aspects of the corrective power conferred by the provisions of the Act for application in different situation. No distinction between the power to reopen an assessment and the appellant or revisional power or the power to rectify would exist. There would be an intermingling of the powers resulting in confusion and uncertainty, a situation definitely not contemplated by any statute."

33. In Bongaigaon Refinery and Petrochemicals Ltd. v. Union of India (2006) 287 ITR 120 (Gau), the Guwahati High Court held as under (page 130):

"The above judicial pronouncements therefore adumbrate the essence and extent of the revisional jurisdiction of an authority akin to the Commissioner of Income-tax under the Act. Not only is the exercise of the suomotu power conceptualised therein hedged by the two conditions of error in the order sought to be revised and the consequential prejudice to the Revenue, but no interference is permissible unless the same is afflicted by a jurisdictional error or o potent illegality rendering the same ex facie invalid and non-existent in law. The process to derive the satisfaction that the order is erroneous and is thus prejudicial to the interests of the Revenue, the sine qua non for invocation of the power, thus logically has to be informed with the above limitations. "

34. Further, according to ld AR., under the provision of Income Tax Act, 1961, the Commissioner has the power to revise the assessment order

only if it is erroneous and prejudicial to the interest of revenue. For this purpose the Commissioner should have his own view and it should be based on others view. Besides there should have sufficient reasons for terming the assessment order to be erroneous. The Supreme Court, in the case of Sirpur Paper Mills Ltd. v. CWT (1970) 77 ITR 6 (SC), held that while exercising power, the Commissioner must have an unbiased mind and decide the dispute according to the procedure which is consistent with the principles of natural justice and cannot permit his mind to be influenced by the dictation of another authority. The relevant observations made by a three-judge Bench of the Supreme Court in the case of Sirpur Paper Mills Ltd. (1970) 77 ITR 6 (SC), reads as follows -

> *"In the exercise of that power the Commissioner must bring to bear an unbiased mind, consider impartially the objections raised by the aggrieved party, and decide the dispute according to procedure consisted with principles of natural justice: he cannot permit his judgment to be influenced by matters not disclosed to the assessee, nor by dictation of another authority."*

35. The Division Bench of the Calcutta High Court too in the case of Jeewanlal (1929) Ltd. vs. Addl. CIT reported in (1977) 108 ITR 407 (Cal), following the law laid down by the Supreme Court in Sirpur Paper Mills Ltd. (1970) 77 ITR 6 (SC) observed " this order was passed at the suggestion of the audit department of the revenue and not by the Additional Commissioner in exercise of his quasi-judicial discretion. I have noticed the terms of section 263 of the Act which empowers the Commissioner to call for examination of the record and thereafter to make an order. In this case the Commissioner purported to exercise the power at the suggestion of the audit department. This position would be clear if one refers to the averment made in paragraph 4(d) of the affidavit-in-opposition, by one Madan Mohan Lal, filed on behalf of the respondents. From the facts it is apparent that the Additional Commissioner did not exercise his discretion and judgment. In

the aforesaid view of the matter, on the basis of the principles enunciated by the Supreme Court in the case of Sirpur Paper Mills Ltd. v. Commissioner of Wealth-tax [1970] 77 ITR 6 (SC), this notice cannot also be sustained. The notice, therefore, issued on the 24th of March, 1972, is hereby quashed and set aside."

36. Hence, according to ld AR, proceeding u/s 263 of the Income Tax Act, 1961 is not in accordance with law in light of above mentioned decisions of Sirpur Paper Mills (supra).

37. Further, the ld AR submitted that merely because of the fact that assessing officer's order is erroneous, a Commissioner of Income Tax cannot interfere. Similarly, because an order of the assessing officer is prejudicial to the interests of the revenue, it will not attract revisional jurisdiction under section 263 of the Income Tax Act, 1961. These two elements, namely, that the order is erroneous and it is prejudicial to the interests of the revenue must co-exist. When an assessing officer has several choices and the he adopts one of the choices, it cannot be interfered with unless it is shown that the choice of exercise by the assessing officer is without application of mind or wholly contrary to the law. The revisional power conferred on the Commissioner is not an appellate power, but a supervisory power. Thus, a Commissioner cannot sit as an appellate authority under section 263 of the Income Tax Act, 1961 on an order passed by an assessing officer. Section 263 of the Income Tax Act, 1961, it must be borne in mind, gives to the Commissioner a special power, which has almost no parallel in any other statute. It is an extraordinary revisional power. This power cannot be exercised as a jurisdictional corrective power or as a review of the orders passed by subordinate authorities. This power under section 263 of the Income Tax Act, 1961 can be invoked only for the purpose of correcting such wrongs, which have

taken place because of non-application of law or for a wholly incorrect application of law and when such application or non-application of law causes prejudice to the revenue. The power under section 263 cannot be equated to, or be regarded as, an appellate jurisdiction or even ordinary revisional jurisdiction. The revisional jurisdiction under section 263 of the Income Tax Act, 1961 is a unique jurisdiction, which has to be understood in the context of the scheme of the Act. Such power can be exercised only against orders which are erroneous, in the sense that it goes to the root of the jurisdiction and also prejudicial to the interests of the revenue.

38. According to ld AR, revisional authority before treating an assessment as erroneous should apply its own mind and should not base its decision on others view. Besides in cases where there is no lack of jurisdiction on the part of the assessing authority in passing the orders of assessment and assessing authority does not exceed his jurisdiction in passing such orders, the same cannot be termed erroneous within the meaning of section 263 of the Income Tax Act, 1961 to enable the Commissioner to invoke power under section 263 of the Income Tax Act, 1961.

39. The ld AR submitted that the phrase 'prejudicial to the interests of the revenue' has to be read in conjunction with "an erroneous order passed by the Assessing Officer'. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the revenue, for example, when an A.O. adopts one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the A.O. has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the A.O. is unsustainable in law.

40. Further, in respect of the verification of identity and genuineness of share capital money raised by the assessee company, the ld. AR submitted that the assessee company has furnished all the necessary details and documents in respect of share capital raised by it such as name, address, PAN of the share applicants etc. and the necessary details and documents were filed of the share applicants company before AO.

41. The ld AR submitted that it is evident from the above discussions that no incriminating material was found during the search operation relating to share capital and the decisions of judicial authorities brought to the notice of the Ld.Principal CIT clearly provide that in an unabated assessment year, the addition can only be made based on the incriminating material and that the statements taken behind the back of the appellant has no evidentiary value. That being so, relying upon such statements nothing can be held against the appellant. Moreover, a statement is never discovery of any incriminating material in course of a search and without linking up such statement with the incriminating material, such statement has no evidentiary value. The Ld. Principal CIT did not agree with the submissions of the appellant. He dealt with few cases relating to cash credit including the decision of Hon'ble Kerala High Court in the case of Bismillah Trading Co. vs. Intelligence Officer (248 ITR 292) and held that the A.O. has power to investigate the identity, creditworthiness and the genuineness of the shareholders.

42. It is submitted by the ld AR that the Ld. Principal CIT did not speak a word in respect of the various authorities which were brought to his notice supporting the appellant's claim that without incriminating material no further investigation or enquiry is required and that the assessment order of the Assessing Officer did not suffer from any deficiency and hence there is no lack of enquiry. Therefore, as no prejudice has been caused to the

revenue, the proceeding initiated u/s.263 of the Act is bad in law. In spite of the above facts, the Ld. Principal CIT proceeded to hold that the action of the A.O. in having not enquired into the identity, creditworthiness and genuineness of the shareholders has led to an erroneous order in so far as it is prejudicial to the interests of revenue for the reason that no enquiry or investigation was done at the time of assessment regarding the genuineness of the share capital to the tune of Rs.10.40 crores.

43. On the above facts, according to ld AR, since the action of the Ld. Principal CIT is directly in conflict with the settled position in law, the order passed u/s.263 of the Act dated 15.03.2017 is legally unsustainable and calls for being quashed. Reliance in this connection is placed on the following further decisions, the ratios of which are applicable to the facts and circumstances of the instant case of the appellant-company:

i) Principal CIT Vs. Kurele Paper Mills P. LTD. [2016] 380 ITR 571 (Del]-

> *"Held, dismissing the appeal, that the order of the Commissioner (Appeals) revealed that there was factual finding that no incriminating evidence related to share capital issued was found during the course of search as was manifest from the order of the Assessing Officer. Consequently, it was held that the Assessing Officer was not justified in invoking section 68 of the Income-tax Act, 1961, for the purposes of making additions on account of share capital. There was nothing to show that the factual determination was perverse. [Emphasis given]*

44. The Supreme Court has dismissed the SLP filed by the Department in [2016] 380 ITR (St.) 64]

ii) ACIT Vs. Budhiya Marketing Pvt.Ltd. (2015) 44 ITR(Trib) 617 (Kol) - held as under:-

Where an assessment order has already been passed for a year or years within the relevant six assessment years, then the Assessing Officer is duty bound to reopen those proceedings and reassess the total income "taking note of the undisclosed income if any, unearthed during the search". The expression "unearthed during the search" denotes that in respect of a completed or non-pending assessment, the Assessing Officer albeit duty bound to assess or reassess the total income, can make the addition if there is scope for additions in such assessment, on the basis of income "unearthed during the search". In other words, the determination of "total income" in respect of the assessment years for which the assessments are already completed on the date of search, shall not be influenced by the items of income other than those based on the material unearthed during the course of search. However, the scope of such determination of total income is different in respect of the years for which the assessments are pending vis-a-vis the years for which assessments are not pending. In respect of the assessment year for which original assessments have already been completed on the date of search the total income shall be determined restricting the additions only to those which flow from incriminating material found during the course of search. If no incriminating material is found in respect of such completed assessment, the total income in the proceedings under section 153A of the Income-tax Act. 1961, shall be computed considering the originally determined income. If incriminating material is found in respect of such assessment years for which the assessment is not pending, then the "total income" would be determined considering the originally determined income and the income emanating from the incriminating material found during the course of search. In respect of an assessment pending on the date of search which abates in terms of the second proviso to section 153A(1), the total income shall be computed afresh uninfluenced by the fact whether or not there is any incriminating material." [Emphasis supplied]

45. CIT vs. Veerparabhu Marketing Ltd. (2016) 388 ITR 574 (Cal), held as under:

"The existence of incriminating material in the seized material is a pre-requisite before exercising power u/s 153C r.w.s 153A of the Income Tax Act, 1961.

On the questions whether the Appellate Tribunal was justified in not holding that pursuant to a search and seizure, an assessment or reassessment was to be made afresh in accordance with section 153C

of the Act and the disallowance which was required to be made if the return was regularly assessed under section 143(1) or under section 147 was not to be made under section 153A :

Held, dismissing the appeal, that incriminating material in the seized material was a pre-requisite before power was exercised under section 153C read with section 153A of the Act. The Department had not shown any incriminating material unearthed either during the search or during the requisition or even during the survey which was or might be relatable to the assessee. The Assessing Officer had made disallowances of the expenditure, which were already disclosed, for one reason or the other, but such disallowances were not contemplated by the provisions contained under section 153C read with section 153A. The disallowances were upheld by the Commissioner (Appeals) and that there was no infirmity in the order of the Appellate Tribunal deleting the disallowances."

46. CIT vs. Kabul Chawla (2015) 380ITR 573 (Del), wherein it has been held as under:

(v) In the absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word "assess" in section 153A is relatable to abated proceedings (i.e., those pending on the date of search) and the word "reassess" to completed assessment proceedings.

(vi) In so far as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under section 153A merges into one. Only one assessment shall be made separately for each assessment year on the basis of the findings of the search and any other material existing or brought on the record of the Assessing Officer.

(vii) Completed assessments can be interfered with by the Assessing Officer while making the assessment under section 153A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment. "[Emphasis given]

v) LMJ International Ltd. vs. DCIT (2008) 119 TTJ 214 (Kol)

> *"13. In view of the above discussions, it is possible to effect reconciliation of the two provisos appended to s. 153A by restricting the meaning of the term "assess or reassess" appearing in the first proviso. After the search, in our considered opinion, the total income of the assessee is to be recomputed on the basis of the undisclosed income unearthed during search and the same is to be added with the regular income assessed under s. 143(3) or computed under s. 143(1) for each of the six preceding assessment years. Where any prepaid taxes are there, the same ore required to be given credit for computing the further tax payable by the assessee. The assessee is also required to pay interest under ss. 234A and 234B on the tax due on the basis of new calculation. Where nothing incriminating is found in the course of search relating to any assessment years, the assessments for such years cannot be disturbed in our considered view. [Emphasis given]*

47. Furthermore, according to the ld. AR, it is a settled position in law that jurisdiction u/s.263 of the Act in respect of issues which were beyond the jurisdiction of the A.O. while framing the original assessment u/s. 153A/143(3) of the Act cannot be exercised. It is because that scope of revisionary jurisdiction depends upon the scope of proceedings/ order sought to be revised u/s263 of the Act. The issues, which are outside the scope of the particular assessment, would, as a necessary corollary, be outside the scope of revisionary proceedings undertaken to revise such assessment. In substance, what the A.O. could not do directly, the Ld. C.I.T. cannot do indirectly. In support of the said settled position, following further reliance is placed before the Hon'ble Bench:

a) Jai Steel (India) vs. ACIT (2013) 259 CTR 281 (Raj)

> *"The provisions of sections 153A to 153C cannot be interpreted to be a further innings for the Assessing Officer and/or assessee beyond provisions of Sections 139 (return of income), 139(5) (revised return of income), 147 (income escaping assessment) and 263 (revision of orders) of the Act.*

The plea raised on behalf of the assessee that as the first proviso provides for assessment or reassessment of the total income in respect of each assessment year falling within the six assessment years, is merely reading the said provision in isolation and not in the context of the entire section. The words 'assess' or 'reassess' have been used at more than one place in the Section and a harmonious construction of the entire provision would lead to an irresistible conclusion that the word 'assess' has been used in the context of an abated proceedings and reassess has been used for completed assessment proceedings, which would not abate as they are not pending on the date of initiation of the search or making of requisition and which would also necessarily support the interpretation that for the completed assessments, the same can be tinkered on by based on the incriminating material found during the course of search or requisition of documents." [Emphasis supplied]

b) **CIT Vs. Paul John, Delicious Cashew Co. (2011) 200 Taxman 154 (Ker.)**

In this case the question raised by the department was whether the Tribunal was justified in cancelling the order passed by the C.I.T. u/s. 263 of the Act directing the A.O. to disallow and to bring to tax expenditure wrongly claimed by the assessee and allowed in original assessment. The said departmental appeal was dismissed on the proposition that the bar which applies to the assessing officer equally applies to the CIT, for the purposes of section 263 of the Act.

c) The Full Bench of the Hon'ble Delhi High Court in the case of CIT vs. Kelvinator of India Ltd. (2002) 256 ITR 1 (Del) observed as under:

" ... It is well settled principle of law that what cannot be done directly cannot be done indirectly. If the Income tax Officer does not possess the power of review, he cannot be permitted to achieve the said object by taking recourse to initiating a proceeding of reassessment or by way of rectification of mistake." [Emphasis given]

d) **CIT vs. Software Consultants (2012) 341 ITR 240 (Del)**

In this case, the AO initiated proceedings u/s 147 on the issue of taxability of certain FDRs, which were found in possession of a director of the company. However, the director claimed that the FDRs, in her name, actually belonged to the assessee. This stand was accepted by CIT(A) in the appeal filed by the said director. Thereafter, the AO in the case of the assessee issued notice u/s 148 of the Act and passed assessment order accepting that the assessee had established and proved the source and their capacity to invest Rs. 20 lacs and, accordingly, no addition was made on this count. The return filed by the assessee, showing loss of Rs. 1,02,756/- was accepted. Subsequently, the Ld. CIT vide order u/s 263 directed the Assessing Officer to conduct further enquiries in respect of share application money of Rs. 47 lacs. The Hon'ble ITAT quashed the order u/s 263, inter alia, on the ground that since no addition could have been made on the issue of share application money, the assessment order could not be regarded as erroneous. Affirming the decision of the ITAT, the Hon'ble Delhi High Court in the said case held as under by stating that since AO could not have made addition on account of share application money, the assessment order was not erroneous and CIT could not have exercised jurisdiction u/s 263 of the Act:

> *"Held, dismissing the appeal, that the Tribunal had held that the order of the Assessing Officer could not be regarded as erroneous even if the Assessing Officer had failed to carry out necessary verification and required enquiries in respect of the share application money, as no addition had been made on account of the reasons for reopening which were recorded before issue of notice under section 118 of the Act. It had held that the Assessing Officer could not have made an addition on account of the share application money as no addition had been made on account of fixed deposits of Rs.20 lakhs. The tribunal had noticed and recorded that in the reasons for reopening it was mentioned that the assessee had made investment in the form of fixed deposits of Rs.20 lakhs but in the assessment order passed u/s 147/143(3) of the Act it had been held that the assessee had been able to show and establish*

the genuineness and capacity of the share applicants to make the investment. The Assessing Officer did not make any addition for the reasons recorded at the time of issue of notice under section 148 of the Act. This position was not disputed or disturbed by the Commissioner in his order under section 263 of the Act. The assessment order was not erroneous. Thus, the Commissioner could not have exercised jurisdiction under section 263 of the Act."

48 According to the ld. AR, applying the facts and decision in the said case to the case of the present appellant, to reiterate, the company had raised its equity share capital of Rs.10.40 crores by issuing shares to various corporate share subscribers through proper banking channel and after observing all procedural and legal norms. On the basis of a search & seizure operation conducted u/s.132 in the case of Banktesh Group and notice issued u/s.153A of the Act, the appellant filed ROI showing the income which was declared in its original return of income. According to the ld. AR, it is pertinent to reiterate here that during the said search, no incriminating material was discovered. Assessment u/s.153A/143(3) was, therefore, completed after calling for various documents and evidences, inter alia, in relation to share capital and finding no incrimination in the claim vis-a-vis supporting documents, no addition was made in respect of share capital raised during the year. Therefore, according to the ld. AR, there is no denying the facts that the decision in the case of **CIT Vs. Software Consultants (supra)** is squarely applicable to the facts and circumstances of the present case and hence notice issued u/s 263 and subsequent order passed by the Ld. Pr. C.I.T. is legally unsustainable and calls for being quashed.

49. On the other hand, the ld. DR for the Revenue has primarily reiterated the stand taken by the Commissioner of Income Tax u/s 263, which we have already noted in our earlier para and is not being repeated for the sake of brevity. According to the ld. DR in this case since the assessment was not scrutinized u/s 143(3), so it cannot be held to be unabated assessment and relied on the order of Hon'ble Calcutta High Court in the case of Tata Metaliks Ltd. vs. CIT in ITA No.301 of 2005 dated 22.09.2014. Therefore, according to him, judgment rendered by the Delhi High Court in the case of CIT vs. Kabul Chawla (2016) 380 ITR 573 (Del) cannot come to the rescue of the assessee. The ld. CIT(DR) vehemently opposed the appeals and does not want us to interfere in the order of the ld. Principal CIT.

50. We have heard both the parties and perused the materials available on record, we note that there was a search u/s 132(1) of the Act which was conducted against the assessee company on 29.05.2012 (hereinafter referred to the '**first search'**) triggering section 153A proceedings against the assessee which proceedings culminated in the AO framing order u/s 153A/143(3) passed on 30.03.2015, which order of the AO has been interfered by the ld. Pr. CIT exercising his jurisdiction u/s 263 of the Act, which action of the ld. CIT is under challenge before us. Before this first search, we note certain important facts which are germane to decide the "*lis"* before us. We note that the assessment year under consideration is Assessment Year 2009-10. It is an undisputed fact that the original return of income was filed by the assessee on 25.09.2009 declaring total income of Rs.4,28,560/- .Thereafter, the return of income was processed u/s 143(1) dated 25.11.2011. It is pertinent here to note that no notice u/s 143(2) was issued against the assessee for scrutiny of the assessment and it got expired on 30.09.2010. Therefore, when the first search happened on 29.05.2012, there was no assessment proceeding pending before the Assessing Officer on the date of

first search. The Assessing Officer, thereafter, completed the assessment u/s 153A read with 143(3) at Rs.7,73,640/- on 30.03.2015 by making additions of Rs.3,41,973/- u/s 14A and other additions of Rs.2812 & Rs.499 to the returned income by the assessee to the tune of Rs.4,28,560/-.

51. We note that on 02.03.2016 another search and seizure operation was conducted on assessee (hereinafter termed as "**second search**"). Thereafter, impugned action of Pr. CIT started by issuance of a show-cause notice dated 04/09.11.2016 calling upon the assessee as to why the order passed by the Assessing Officer dated 30.03.2015 u/s 153A/143(3) should not be interfered by invoking his revisional jurisdiction u/s 263 of the Act. According to the ld. Principal CIT, the order passed by the Assessing Officer dated 30.03.2015 (which is the assessment framed u/s 153A/143(3) as a fallout of first search) is erroneous and prejudicial to the interest of the Revenue because the Assessing Officer has not conducted proper investigation in respect of share capital and premium to the tune of Rs.10.40 crores. In the SCN the ld. Principal CIT, has mentioned about certain statement recorded by the Investigation Wing during search and seizure dated 02.03.2016 (second search) wherein the statement of certain purported entry operators were recorded against the assessee company in respect of the share capital introduced in the assessment year under consideration. Based on the aforesaid reasoning, the ld. Principal CIT found fault with the assessment order passed by the Assessing Officer u/s 153A/143(3) passed on 30.03.2015. The assessee company has challenged in the first place, the very usurpation of jurisdiction by ld. Principal CIT to invoke his revisional powers enjoyed u/s 263 of the Act. Therefore, first we have to see whether the requisite jurisdiction necessary to assume revisional jurisdiction is there existing before the Pr. CIT to exercise his power. For that, we have to examine as to whether in the first place the order of the Assessing Officer

found fault by the Principal CIT is erroneous as well as prejudicial to the interest of the Revenue. For that, let us take the guidance of judicial precedence laid down by the Hon'ble Apex Court in Malabar Industries Ltd. vs. CIT [2000] 243 ITR 83(SC) wherein their Lordship have held that *twin* conditions needs to be satisfied before exercising revisional jurisdiction u/s 263 of the Act by the CIT. The twin conditions are that the order of the Assessing Officer must be erroneous and so far as prejudicial to the interest of the Revenue. In the following circumstances, the order of the AO can be held to be erroneous order, that is (i) if the Assessing Officer's order was passed on incorrect assessment of fact; or (ii) incorrect application of law; or (iii)Assessing Officer's order is in violation of the principle of natural justice; or (iv) if the order is passed by the Assessing Officer without application of mind; (v) if the AO has not investigated the issue before him; then the order passed by the Assessing Officer can be termed as erroneous order. Coming next to the second limb, which is required to be examined as to whether the actions of the AO can be termed as 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 theinterest of the revenue*'' has to be read in conjunction with an *erroneous order*passed by the Assessing Officer. Their Lordship held that it has to be remembered that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. When the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue **"unless the view taken by the Assessing Officer is unsustainable in law".**

52. Taking note of the aforesaid dictum of law laid down by the Hon'ble Apex Court, let us examine whether the Assessing Officer passed order u/s 153A/143(3) dated 30.03.2015 (assessment framed after first search) is erroneous as well as prejudicial to the interest of the revenue. Undisputedly, the assessment year under question i.e. Assessment Year 2009-10 which was not pending before the Assessing Officer on the date of search on 29.05.2012 (**first search**), therefore, the assessment which is *not pending* before the Assessing Officer is an *unabated proceeding* and the Assessing Officer is empowered to make any addition only based on incriminating materials found/unearthed during search. This is a settled position of law and is no longer res integra. The following judgments are given in support of the above proposition of law:-

The Hon'ble Delhi High Court in Kabul Chawla (supra) has laid down the law which spells out the power of the AO while exercising power u/s 153A after search u/s 132 of the Act was conducted by the Revenue. The same is reproduced as under:

> *"Summary of legal position*
>
> *37.On a conspectus of Section 153A(1) of the Act, read with provisions thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:*
>
> *i. Once a search takes place under Section 132 of the Act, notice under Section 153 A(1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.*
>
> *ii. Assessments and re-assessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.*
>
> *iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the `total income' of the aforementioned six years in separate will be only one assessment order in respect of each of the six `AYs " in which both the disclosed and the undisclosed income would be brought to tax".*

Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

v) In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word `assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word `reassess' to completed assessment proceedings.

vi. *Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record the AO.*

vii. Completed assessment can be interfered with by the AO while making the assessment under Section 153A only on the basis of some incriminating material unearthed during the course of property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.

53. The Hon'ble Jurisdictional Calcutta High Court in Veerprabhu Marketing Ltd though in the context of section 153 of the Act has held as under:

"We agree with the view expressed by the Delhi High Court that incriminating material is pre-requisite before power could have been exercise u/s 153(C) R.W. Section 153(A). In the case before us, the AO has made a disallowance of the expenditure, which was held disclosed, for one reason or the order, but such disallowances made by the AO were upheld by the L.D.CIT (A) but the Ld. Tribunal deleted these disallowance. We find no infirmity in the aforesaid Act of the Ld. Tribunal. The appeal is therefore, dismissed.

54. The Hon'ble Apex court in the case of CIT v. Sinhgad Technical Education Society 397 ITR 344 in the context of section 153 of the Act has held as under:

"18) In this behalf, it was noted by the ITAT that as per the provisions of Section 153C of the Act, incriminating material which was seized had to pertain to the Assessment Years in question and it is an undisputed fact that the documents which were seized did not

establish any co-relation, document-wise, with these four Assessment Years. Since this requirement under Section 153C of the Act is essential for assessment under that provision, it becomes a jurisdictional fact. We find this reasoning to be logical and valid, having regard to the provisions of Section 153C of the Act. Para 9 of the order of the ITAT reveals that the ITAT had scanned through the Satisfaction Note and the material which was disclosed therein was culled out and it showed that the same belongs to Assessment Year 2004-05 or thereafter. After taking note of the material in para 9 of the order, the position that emerges therefrom is discussed in para 10. It was specifically recorded that the counsel for the Department could not point out to the contrary. It is for this reason the High Court has also given its imprimatur to the aforesaid approach of the Tribunal. That apart, learned senior counsel appearing for the respondent, argued that notice in respect of Assessment Years 2000-01 and 2001-02 was even time barred."

Support, is also drawn from the following judgments:

i) BiswanathGarodiaVs.DCIT (2016) 76 taxmann.com81

ii) CIT Vs.ContinentalWarehousinhg (NhavaSheva) Ltd (2015 374 ITR 645).

iii) Jai Steel (India) Jodhpur Vs. ACIT (2013) 259 CTR 281

iv) CIT Vs.Deepak Kumar Aggarwal (2017) 398 ITR 586

v) Principal CIT Vs.DipakJashvantalaPanchal (2017) 397 ITR 253.

vi) Principal VIT vs.Lalit Jain (2017) 384 ITR 543

vii) Pr.CIT vs. Dvangi Alias Rupa (2017 394 ITR 184

viii) Chintels India Ltd Vs. DCIT (2017) 397 ITR 416

ix) Smt. Anjli Pandit Vs. ACIT (2017) 157 DTR (Mum) (Tri.) 17

x) Pr.CITVs.MeetaGutgutia (2016)395 ITR 526.

55. In view of the aforesaid ratio decidendi of the Hon'ble High Court as well as Hon'ble Supreme Court's decisions cited above, since assessment for Assessment Year 2009-10 was not pending before the Assessing Officer on the date of search i.e. on 29.05.2012 (first search), no addition can be made by the Assessing Officer without the aid of incriminating material unearthed during the search conducted on 29.05.2012. Therefore, we have to examine whether there was any incriminating materials unearthed by the Department

during search conducted on 29.05.2012 (first search). We have gone through the assessment order of Assessing Officer in all the counts before us and we find that the Assessing Officer has not made a whisper of any incriminating material which has been unearthed/seized during first search on 29.05.2012. The Assessing Officer having no incriminating materials unearthed during the search on 29.05.2012 against the assessee company, did not make any additions (with the aid of any incriminating material) against the assessees before us for Assessment Year 2009-10.

56. We are aware of the fact that the Assessing Officer's role while framing an assessment is not only an adjudicator. The AO has a dual role to dispense with i.e. he is an *investigator* as well as an *adjudicator;* therefore, if he fails in any one of the role as afore-stated, his order will be termed as erroneous. We note that in this case since there was no incriminating material unearthed during the first search, the Assessing Officer has not made any additions in his assessment order dated 30.03.2015 based on incriminating material since there was none unearthed. We take note that it is not the case of ld. Principal CIT that AO failed to made any additions/disallowances based on incriminating material seized/unearthed during search. On this finding of fact by us, we cannot term the assessment order passed by the AO u/s 153A/143(3) dated 30.03.2015 as erroneous.

57. However, we note that the ld. Principal CIT while invoking the jurisdiction u/s 263 of the Act, has taken note of the *second search* which happened on 02.03.2016 and has referred to the investigation carried out by the investigation wing after the second search on 02.03.2016. In this context, it would be appropriate to reproduce the again the show-cause notice issued by the Principal CIT which is as under:

OFFICE OF THE PR. COMMISSIONER OF INCOME TAX, CENTRAL, KOLKATA – 2

Aayakar Bhawa Poorva, 110, Shantipally, E M Bye Pass, Kolkata – 700 107.

F.No. Pr.CIT/Central II/KOL/263/2016-17/6186 Dated: 04/11/2016

To
The Principal Officer,
M/s. Cliff Trexim (P) Ltd.
57, Burtolla Street,
Kolkata – 700 007.

Sir,

Sub: Show Cause Notice u/s 263 of the I.T. Act, 1961 in the case of M/s. Cliff Trexim (P) Ltd..., (PAN-AABCC0961E) for the A.Y 2009-10.

Please refer to the above.

"Assessment for the A.Y 2009-10 u/s 153A of the Income Tax Act, 1961 in the case of M/s. Cliff Trexim Pvt. Ltd. which is a part of Banktesh Group was completed on 30.03.2015 by the DCIT, Central Circle 3(2), Kolkata.

On analysis of assessment records, it is observed that in the year under consideration, the assessee raised share capital and premium to the tune of Rs.10.40 crore. During the assessment proceeding, the assessee furnished the list of investors who subscribed in shares of the assessee company. The assessee furnished the supporting documents regarding share transactions of investor companies. But no detailed investigation was carried out at the time of assessment regarding genuineness of introduction of share capital.

Meanwhile a search operation against Banktesh group was once again conducted on 02.03.2016 by DDIT(Inv.), Unit 2(2),Kol. During the course of search & post search investigation it was found that accommodation entries in the form of bogus share capital have been taken by different group of companies by the said Group with the help of different known accommodation entry operators. The allotment of shares made by the above assessee amounting to Rs.10.40 crore. On 31.09.2009 is one of the transactions found as accommodation entry by the Investigation wing. The allottee companies were found to be bogus and non-existing. The statements of entry operators were also recorded during the search & seizure operation which confirmed the findings of the Investigation Wing. The entry operators admitted to have provided accommodation entry in the form of share capital/premium to the Banktesh Group of Companies in lieu of commission.

In view of the above discussion, the assessment completed on 30.03.2015 may be erroneous in so far as it is prejudicial to the interest of the revenue.

You are, therefore, requested to show cause as to why the Assessment Order passed on 30.03.2015 u/s.153A by the DCIT, Central Circle 3(2), Kolkata should not be treated as erroneous in so far as it is prejudicial to the interests of the revenue as per the provisions of sec.263 of the Income Tax Act."

You are given an opportunity of being heard before the undersigned on **22.11.2016 at 3:00 P.M. at my office chamber of Aayakar Bhawan Poorva, Room No.301, 3rd Floor, 110, Shantipally, Kolkata – 700 107** to furnish your explanation in the matter.

Yours faithfully,

(**ARVIND KUMAR, IRS**)
Pr. Commissioner of Income Tax
(Central – 2), Kolkata.

58. From a reading of the above show-cause notice of ld. Principal CIT when we analyse the same, what is revealed is the following:

(i) The assessment u/s 153A/143(3) against the assessee being a part of Banktesh Group for A.Y 2009-10 has been completed on 30.03.2015 by the AO.

(ii) The Prin. CIT did an analysis of assessment records and he observed that in the year under consideration, i.e A.Y 2009-10, the assessee has raised share capital and premium to the tune of Rs.10.40 crores.

(iii) During the assessment proceedings, the assessee furnished the list of investors who subscribed in shares of the assessee company.

(iv) The assessee furnished the supporting documents regarding share transactions of investors companies

(v) But no detailed investigation was carried out at the time assessment regarding genuineness of introduction of share capital

(vi) On 02.03.2016 another search was conducted against the Banktesh Group by DDIT(Investigation), Unit-2, Kolkata

(vii) During the search (second search) & post search investigation, it was found that accommodation entries in the form of bogus share capital have been taken by different group of companies by the said group with the help of accommodation entry operators and that the allottee companies are bogus and non-existing.

(viii) The statement of entry operators were also recorded during search and seizure operation which confirmed the finding of the investigation wing that in lieu of

commission they provided accommodation entry in the form of share capital/premium to the Banktesh Group of Companies

(ix) In view of the aforesaid facts, the Pr. CIT is of the view that assessment completed on 30.03.2015 may be erroneous in so far as it is prejudicial to the interest of the Revenue.

59. Further, we note that pursuant to the aforesaid SCN, the assessee's replied to the Pr. CIT, extracts of which has been reproduced by the Principal CIT in the impugned order before us. In the impugned order,we note thatthe Principal CIT has added only the list of shareholders to whom the shares were allotted. In other words, other than the factual contents given in the SCN issued by him (supra), only the list of shareholders are reproduced by the Principal CIT in his order. In the impugned order of Principal CIT, after reproducing certain extracts of the reply of the assessee and judicial precedents, we note that the Principal CIT without giving any factual finding or reasoning as to how the order of the AO can be held to be erroneous in so far as it is prejudicial to the interest of Revenue has simply without adducing any new facts other than what has been stated and reproduced by us in SCN (supra) has simply held that *"no enquiry or examination and verification was done at the time assessment regarding the genuineness of introduction of share capital to the tune of Rs.10.40 crores. Therefore, the assessment made is lacking such examination/verification which is necessary to assess the income of the assessee and such omission to make necessary enquiry has made the order erroneous in so far as prejudicial to the interest of the Revenue".* Since, there is nothing new in the impugned order other than what is stated in SCN reproduced above and detailed analysis stated in Para52 above, we note that facts stated in (i) to (v) are that which is relevant to assessment for A.Y 2009-10 after the first search on 29.05.2012 which is reproduced again for better understanding:

(i) The assessment u/s 153A/143(3) against the assessee being a party of Banktesh Group for A.Y 2009-10 has been completed on 30.03.2015 by the AO.

(ii) The Prin. CIT did an analysis of assessment records and he observed that in the year under consideration, i.e A.Y 2009-10, the assessee has raised share capital and premium to the tune of Rs.10.40 crores.

(iii) During the assessment proceedings, the assessee furnished the list of investors who subscribed in shares of the assessee company.

(iv) The assessee furnished the supporting documents regarding share transactions of investors companies

(v) But no detailed investigation was carried out at the time assessment regarding genuineness of introduction of share capital

60. From a perusal of the above facts reveal that ld. Principal CIT is finding fault with the AO in not conducting detailed enquiry about the share capital introduced into the assessee company. Though in the same breath, the Principal CIT admits that assessee has produced all relevant documents before the AO in respect to the share capital. However, the ld. Principal CIT missed the most important fact that A.Y 2009-10 was not pending before the Assessing Officer on the date of first search on 29.05.2012, so it is an unabated assessment and the AO could have only reiterated the assessment crystallized as per intimation forwarded by the Department u/s 143(1) dated 25.11.2011 wherein the Department accepted the returned income filed by the assessee on 25.09.2009, because there was no incriminating material unearthed/seized during search (first) on 29.05.2012. It is very important to take note of the Hon'ble Delhi High Court in Kabul Chawla case (supra) wherein on a similar situation laid the law as under:

v) In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word `assess' in Section

153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word `reassess' to completed assessment proceedings.

61.So from the aforesaid dictum of law laid by the Hon'ble High Courtin the absence of any incriminating material unearthed during first search on 29.05.2012, we have no hesitations to hold that for A.Y 2009-10, the AO could have only reiterated the assessment intimated u/s 143(1) of the Act, because the time for issuance of scrutiny notice u/s 143(2) expired on 30.09.2010 and the assessment for this relevant assessment year, therefore, was not pending before the AO on the date of search on 29.05.2012 and, therefore, is an unabated assessment. Therefore, as per the law laid down by the Hon'ble High Court, the AO could not have disturbed the assessment already existing without the aid of incriminating materials seized during search on 29.05.2012 (first search). Therefore, the order of the AO cannot be held to be erroneous order. Therefore, without finding the order of the AO to be erroneous, the ld. Principal CIT lacks jurisdiction to usurp the revisional jurisdiction u/s 263 of the Act.

62.For completeness of the adjudication, when we look at the SCN and the impugned order of ld. Principal CIT, we note that the following facts have influenced him to invoke the section 263 jurisdiction which are (vi) to (ix) which are again reproduced for better understanding.

(vi).On 02.03.2016 another search was conducted against the Banktesh Group by DDIT(Investigation), Unit-2, Kolkata

(vii).During the search (second search) & post search investigation, it was found that accommodation entries in the form of bogus share capital have been taken by different group of companies by the said group with the help

of accommodation entry operators and that the allottee companies are bogus and non-existing.

(viii).The statement of entry operators were also recorded during search and seizure operation which confirmed the finding of the investigation wing that in lieu of commission they provided accommodation entry in the form of share capital/premium to the Banktesh Group of Companies

(ix).In view of the aforesaid facts, the Pr. CIT is of the view that assessment completed on 30.03.2015 may be erroneous in so far as it is prejudicial to the interest of the Revenue.

63. From the reading of the aforesaid facts taken note by the Principal CIT, it is evident that the sheet anchor on which the Principal CIT based his foundation to find fault with the Assessing Officer is emanating from the second search which happened on 02.03.2016 based on which investigation report has been made wherein the share capital raised by the assessee company for Assessment Year 2009-10 is under suspicion/cloud. So, the Principal CIT refers to the second search which happened on 02.03.2016 and the investigation report thereafter made by the investigation wing which is subsequent and obviously a development after framing the assessment order by the Assessing Officer dated 30.03.2015. The Assessing Officer cannot be said to be a clairvoyant, who could have forecasted or foreseen that a second search would take place on 02.03.2016 and thereby some material/oral/evidence would be collected by the investigation wing a year before i.e. on 30.03.2015 when the assessment order was framed by AO after the fallout of first search conducted on 29.05.2012.

64. From the facts narrated above, we note that it is not the case of the Principal CIT that Assessing Officer failed to take into consideration any incriminating material unearthed during first search on 29.05.2012 and has

failed to make any investigation on it or make any additions / disallowances thereon. The case of the Principal CIT is simply that during second search on 02.03.2016, the investigation wing has found fault with the share capital raised by the assessee company for Assessment Year 2009-10. It should be noted that the Assessing Officer has framed assessment u/s 153A on 30.03.2015 as per the law laid down by the Hon'ble Delhi High Court in the case of CIT vs. Kabul Chawla (supra) and other High courts/Apex Court as stated above which according to us is the correct view or at the most can be definitely termed as a plausible view. Therefore, the view taken by the Assessing Officer cannot be held to be erroneous order and prejudicial to the interest of the revenue as held by the Hon'ble Supreme Court in the case of Malabar Industries vs. CIT (supra). The Assessing Officer's order dated 30.03.2015 at any rate cannot said to be unsustainable in law.

65. In any event, we note that the Assessing Officer has adopted one of the courses permissible in law and even if it has resulted in loss to the revenue, the said decision of the Assessing Officer cannot be treated as erroneous and prejudicial to the interest of the revenue as held by Hon'ble Supreme Court in Malabar Industries Ltd. vs. CIT (supra). Since the order of the Assessing Officer cannot be held to be erroneous as well as prejudicial to the interest of the revenue, in the facts and circumstances narrated above, the usurpation of jurisdiction exercising revisional jurisdiction by the Principal CIT is ''null'' in the eyes of law and, therefore, we are inclined to quash the very assumption of jurisdiction to invoke revisional jurisdiction u/s 263 by the Principal CIT. Therefore, we quash all the orders of the Principal CIT dated 15.03.2017 being ab initio void.

66. Before we part, we would like to address the contention of ld. CIT(DR), that since intimation u/s 143(1) was only issued by the Department in this case, it cannot be viewed that the assessment was unabated on the date of search. We note that the very same issue was before the Hon'ble Delhi High court in Kabul Chawla (supra) wherein also the issue of 143(1) intimation and the expiry of time to issue 143(2) notice by Assessing Officer before the date of search was also adjudicated and thereafter only the law was laid down by the Hon'ble High Court of Delhi, so the issue raised by the ld. CIT(DR) is no longer res integra and therefore, has no merit. The Hon'ble Calcutta High court's order in Tata Metaliks Ltd. is distinguishable on facts and pertained to filing of revised return of income in cases where assessee received intimation u/s 143(1) of the Act and is not in conflict with the view of Hon'ble Delhi High Court in Kabul Chawla (supra) which is on 153A proceedings after search is conducted by the Department.

67. Moreover, it has to be remembered that Principal CIT cannot do indirectly what he could have done directly. The said proposition of law has been laid in a similar case by this Tribunal in the case of M/s Ujjal Transport Agency vs. CIT, Central-II in IT(SS) No.58/Kol/2013 Assessment Year 2007-08 wherein it has held as under:

> *16. Having held that the scope of the proceedings u/s.153A in respect of assessment year for which assessment have already been concluded and which do not abate u/s.153A of the Act, that the assessment will have to be confined to only incriminating material found as a result of search, the question to be decided is as to whether the proceedings u/s.143(1) of the Act can be said to be assessment proceedings concluded that have not abated u/s.153A of the Act" Section l53A of the Act, uses the expressing "pending assessment or reassessment". When a return is filed and acknowledgement or intimation issued u/s.143(1), the proceedings initiated by filing the return are closed, unless a notice u/s 143(2) of the Act is issued. In the present case, the period for issuing the notice u/s 143(2) elapsed. Therefore the process has*

attained the finality which can only be assailed u/s 148 or 263 of the Act. It can thus be concluded that making of an addition in an assessment under section 153A of the Act, without the backing of incriminating material, is unsustainable even in a case where the original assessment on the date of search stood completed under section 143(1) of the Act, thereby resulting in non-abatement of such assessment in terms of the Second Proviso to section 153A(1) of the Act.

17. In the light of the discussion above, our conclusion is that in the present case, the issue with regard to additional depreciation could not and ought not to have been examined by the AO in the assessment proceedings u/s.153A of the Act as the said issue stood concluded with the assessee's return of income being accepted u/s.143(1) of the Act prior to the date of search and no notice having been issued u/s.143(2) of the Act within the time limit laid down in that section which time limit as per the law prevailing on the date when the Assessee filed return of income i.e.,30.10.2007, would expire on 31.12.2008. Such assessment u/s.143(1) of the Act did not abate on the date of search which took place on 15.1.2009.In respect of assessments completed prior to the date of search that have not abated, the scope of proceedings u/s.153A of the Act has to be confined only to material found in the course of search. Since no material whatsoever was found in the course of search, the question of allowing additional depreciation or not could not have been subject matter of proceedings u/.s.153A of the Act. Consequently, the CIT in exercise of his powers u/s 263 of the Act ought not to have or could not have directed examination of the said issue afresh by the Assessing Officer. Thus ground no.1 raised by the assessee is allowed. The proceedings u/s 263 of the Act is accordingly quashed. In view of the above conclusion, the other ground of appeal raised by the assessee does not require any consideration.

18.In the result, appeal of the assessee is allowed."

68. Since, we have quashed the Section 263 proceedings; therefore, we are not adjudicating the other arguments of the ld. AR.

69. In the result, these three appeals of the assessee's are allowed.

Order is pronounced in the open court on 18/04/2018.

Sd/-	***Sd/-***
(A. T. VARKEY)	**(DR. A.L.SAINI)**
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

कोलकाता /Kolkata;
दिनांक Dated 18/04/2018
[RS, SPS]

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Assessee – (i) M/s. Garg Brothers Pvt. Ltd.
   (ii) M/s. Cliff TreximPvt. Ltd.
   (iii) M/s. Span Foundation Pvt. Ltd.
2. प्रत्यर्थी/ The Revenue –DCIT, Central Circle-3(2), Kolkata
3. आयकरआयुक्त)अपील (/ The CIT(A),
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि ,आयकरअपीलीयअधिकरण ,**कोलकाता**/ DR, ITAT, Kolkata
6. गार्डफाईल / Guard file.

सत्यापितप्रति

True Copy

By Order

Senior Private Secretary,
Head of Office/D.D.O,
I.T.A.T, Kolkata Benches,
Kolkata.