आयकर अपीलीय अधीकरण, न्यायपीठ –"A" कोलकाता,

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH: KOLKATA

[Before Shri J. Sudhakar Reddy, AM and Shri A. T. Varkey, JM]

I.T.A. No. 39/Kol/2020
Assessment Year: 2009-10

Decent Enclave (P) Ltd (Formerly known as Drishti Accessories (P) Ltd.) (PAN: AADCD 0308 E)	Vs.	Pr. CIT-4, Kolkata
Appellant		Respondent

Date of Hearing (Virtual)	05.05.2021
Date of Pronouncement	18.06.2021
For the Appellant	Shri Subash Agarwal, Advocate
For the Respondent	Shri John Vincent Donkupuar Longstich, CIT DR

ORDER

Per Shri A. T. Varkey, JM:

This is an appeal filed by the Assessee against the order of Ld. PCIT-4, Kolkata dated 11.11.2019 u/s 263 of Income Tax Act, 1961 (*hereinafter referred to as* the Act) for Assessment year 2009-10.

2. At the outset the Ld. Counsel for the assessee Shri Subash Agarwal pointed out that this is the third (3) exercise of revisional jurisdiction u/s 263 of the Act by the Ld PCIT ; and the assessee is challenging the jurisdiction of Ld. PCIT to invoke the revisional jurisdiction without satisfying the condition precedent as prescribed in Section 263 of the Act.

3. Brief facts of the case is that the assessee company had filed its return of income (ROI) for AY 2009-10 on 17.09.2009, which was processed u/s 143(1) of the Act. Subsequently the case of the assessee was reopened u/s 147 and the first scrutiny assessment order was passed u/s 143(3)/147 of the Act dated 29.12.2011 determining an

income of Rs. 53,130/- (*hereinafter referred to as* the first assessment order and *the AO who passed this order will be referred hereinafter as* the First AO).

4. Thereafter the Ld. CIT-II invoked revisional jurisdiction u/s 263 of the Act and set aside the first assessment order dated 29.12.2011 and directed de-novo assessment by order dated 05.03.2014 (*hereinafter referred to as* the First CIT revisional order and *the Ld CIT who passed this order will be referred hereinafter as* the First Ld CIT).

5. Pursuant to the order of Ld. CIT-II, dated 05.03.2014, the AO gave effect to it on 31.03.2015, making an addition of share capital & premium to the tune of Rs. 16.25 crores. (*hereinafter referred to as* the second reassessment order and *the AO who passed this order will be referred hereinafter as* the Second AO).

6. Thereafter the Ld. PCIT-4, invoked his Second revisional jurisdiction u/s 263 on 19.12.2016 and gave specific direction while framing de novo assessment (*hereinafter referred to as the* second PCIT revisional order and *the Ld PCIT who passed this order will be referred hereinafter as* the Second Ld PCIT)

7. Pursuant to the second revisional order of PCIT-4, dated 19.12.2016, the AO conducted enquiry as directed by Ld. PCIT and after being satisfied with the explanation and documents submitted by the assessee to prove the *nature* and *source* of the share capital of Rs. 16.26 crores, he accepted the claim of assessee and did not make any addition on this issue vide order dated 26.12.2017 (*hereinafter referred to as* the Third assessment order and *the AO who passed this order will be referred hereinafter as* the Third AO).

8. Consequent to the AO passing the third re-assessment order dated 26.12.2017, the Ld. PCIT-4, by the impugned order dated 11.11.2019 has again invoked his revisional jurisdiction u/s 263 of the Act and has set aside the third re-assessment order and directed the AO to reframe the order (*hereinafter referred to as* the Third PCIT revisional order and

the Ld PCIT who passed this order will be referred hereinafter as the Third Ld PCIT) by observing as under:

> *"8. In view of the above, the AO would have to reframe the order after taking into consideration the decision of the Apex Court, Calcutta High Court and Delhi High Court. The assessee would have the onus of establishing the identity of share subscribers, creditworthiness of subscribers and genuineness of the transactions. Accordingly, the AO would reframe the order on merits and Law. The order issued u/s 143(3) dated 26.12.2017 is set aside to the file of the AO."*

9. Aggrieved by the third PCIT impugned order/action of PCIT to have exercised his revisional jurisdiction for the third time on the issue of share capital & premium collected by the assessee, the assessee is before us; and is challenging the jurisdiction of Ld. PCIT to invoke the revisional jurisdiction without satisfying the *condition precedent* as prescribed u/s 263 of the Act i.e, without making out that the Third AO's re-assessment order is erroneous as well as prejudicial to the Revenue .

10. We have heard both the parties and perused the records. The challenge raised by the assessee is whether the third PCIT satisfied the condition precedent as prescribed in Section 263 of the Act before invoking the revisional jurisdiction. For adjudicating this legal issue first of all we need to examine the basic jurisdictional issue i.e. whether the condition precedent stipulated by section 263 of the Act was satisfied, so that the Third Ld. Pr. CIT could have exercised his revisional power which he is empowered to do by the Act. For that, we note that the statutory condition precedent as prescribed by section 263 of the Act is that the Ld. Pr. CIT can invoke the revisional jurisdiction, if the assessment order is erroneous in so far as prejudicial to the Revenue. Keeping this in mind, we have to examine as to whether in the first place the order of the Third Assessing Officer found fault by the Third Principal CIT is erroneous as well as prejudicial to the interest of the Revenue. For that, let us take the guidance of judicial precedent laid down by the Hon'bIe 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 Commissioner of Income Tax (in short, 'CIT'). The twin conditions are that the order of the Assessing Officer must be erroneous and so far as prejudicial to the interest of the Revenue. In the following circumstances, the order of the AO can be held to be erroneous order, that is (i) if the Assessing Officer's order was passed

on incorrect assumption of fact; or (ii) incorrect application of law; or (iii)Assessing Officer's order is in violation of the principle of natural justice; or (iv) if the order is passed by the Assessing Officer without application of mind; (v) if the AO has not investigated an issue before him; then the assessment order passed by the Assessing Officer can be termed as an erroneous order. Coming next to the second limb, which is required to be examined is as to whether the actions of the AO can be termed as prejudicial to the interest of Revenue. When this aspect is examined one has to understand what is prejudicial to the interest of the revenue? The Hon'ble Supreme Court in the case of Malabar Industries (supra) held that this phrase i.e. "prejudicial to the interest of the revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. 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 Pr. CIT/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**."

11. The Hon'ble Andhra Pradesh High Court in the case of *Spectra Shares and Scrips Pvt. Ltd. V CIT (AP) 354 ITR 35* had considered a number of judgments on this issue of exercise of jurisdiction u/s 263 of the Act by the Principal Commissioner of Income Tax and culled out various principles laid down in different judgments by the Courts as below :

> *"24. In **Malabar Industrial Co.Ltd. (2 Supra),** the Supreme Court held that a bare reading of Sec.263 makes it clear that the prerequisite for the exercise of jurisdiction by the Commissioner suomotu under it, is the order of the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent – if the order of the Income Tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but it is prejudicial to the Revenue – recourse cannot be had to Sec.263 (1) of the Act. It also held at pg-88 as follows:*
> *"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 Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of Revenue: or where two views are possible and the Income-tax Officer 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 Income-tax Officer is unsustainable in law. It has been held by this Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the Revenue. RampyarideviSaraogi v. CIT (1968) 67 ITR 84 (SC) and in Smt. Tara Devi Aggarwal V. CIT (1973) 88 ITR 323 (SC)".

25. In ***Max India Ltd.*** *(3 Supra)****,*** *reiterated the view in* ***Malabar Industrial Co.Ltd.*** *(2 Supra) and observed that 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 Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income Tax Officer 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 Income Tax Officer is unsustainable in law. On the facts of that case, Sec.80HHC(3) as it then stood was interpreted by the Assessing Officer but the Revenue contended that in view of the 2005 Amendment which is clarificatory and retrospective in nature, the view of the Assessing Officer was unsustainable in law and the Commissioner was correct in invoking Sec.263. But the Supreme Court rejected the said contention and held that when the Commissioner passed his order disagreeing with the view of the Assessing Officer, there were two views on the word "profits" in that section; that the said section was amended eleven times; that different views existed on the day when the Commissioner passed his order; that the mechanics of the section had become so complicated over the years that two views were inherently possible; and therefore, the subsequent amendment in 2005 even though retrospective will not attract the provision of Sec.263.*

26. In ***Vikas Polymers*** *(4 Supra), the Delhi High Court held that the power of suomotu revision exercisable by the Commissioner under the provisions of Sec.263 is supervisory in nature; that an "erroneous judgment" means one which is not in accordance with law; that if an Income Tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as "erroneous" by the Commissioner simply because, according to him, the order should have been written differently or more elaborately; that the section does not visualize the substitution of the judgment of the Commissioner for that of the Income Tax Officer, who passed the order unless the decision is not in accordance with the law; that to invoke suomotu revisional powers to reopen a concluded assessment under Sec.263, the Commissioner must give reasons; that a bare reiteration by him that the order of the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue, will not suffice; that the reasons must be such as to show that the enhancement or modification of the assessment or cancellation of the assessment or directions issued for a fresh assessment were called for, and must irresistibly lead to the conclusion that the order of the Income Tax Officer was not only erroneous but was prejudicial to the interests of the Revenue. Thus, while the Income Tax Officer is not called upon to write an elaborate judgment giving detailed reasons in respect of each and every disallowance, deduction, etc., it is incumbent upon the Commissioner not to exercise his suomotu revisional powers unless supported by adequate reasons for doing so; that if a query is raised during the course of the scrutiny by the Assessing Officer, which was answered to the satisfaction of the Assessing Officer, but neither the query nor the answer were reflected in the assessment order, this would not by itself lead to the conclusion that the order of the Assessing Officer called for interference and revision.*

*27. In **Sunbeam Auto Ltd.**(5 Supra), the Delhi High Court held that the Assessing Officer in the assessment order is not required to give a detailed reason in respect of each and every item of deduction, etc.; that whether there was application of mind before allowing the expenditure in question has to be seen; that if there was an inquiry, even inadequate that would not by itself give occasion to the Commissioner to pass orders under Sec.263 merely because he has a different opinion in the matter; that it is only in cases of lack of inquiry that such a course of action would be open; that an assessment order made by the Income Tax Officer cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately; there must be some prima facie material on record to show that the tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation, a lesser tax than what was just, has been imposed. In that case, the Delhi High Court held that the Commissioner in the exercise of revisional power could not have objected to the finding of the Assessing Officer that expenditure on tools and dies by the assessee, a manufacturer of Car parts, is revenue expenditure where the said claim was allowed by the latter on being satisfied with the explanation of the assessee and where the same accounting practice followed by the assessee for number of years with the approval of the Income Tax Authorities. It held that the Assessing Officer had called for explanation on the very item from the assessee and the assessee had furnished its explanation. Merely because the Assessing Officer in his order did not make an elaborate discussion in that regard, his order cannot be termed as erroneous. The opinion of the Assessing Officer is one of the possible views and there was no material before the Commissioner to vary that opinion and ask for fresh inquiry.*

*28. In **Gabriel India Ltd.** (6 Supra), the Bombay High Court held that a consideration of the Commissioner as to whether an order is erroneous in so far as it is prejudicial to the interests of the Revenue, must be based on materials on the record of the proceedings called for by him. If there are no materials on record on the basis of which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be illegal and without jurisdiction. It held that the Commissioner cannot initiate proceedings with a view to start fishing and roving inquiries in matters or orders which are already concluded; that the department cannot be permitted to begin fresh litigation because of new views they entertain on facts or new versions which they present as to what should be the inference or proper inference either of the facts disclosed or the weight of the circumstance; that if this is permitted, litigation would have no end except when legal ingenuity is exhausted; that to do so is to divide one argument into two and multiply the litigation. It held that cases may be visualized where the Income Tax Officer while making an assessment examines the accounts, makes inquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the account or by making some estimate himself; that the Commissioner, on perusal of the record, 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 figure higher than the one determined by the Income Tax Officer; but that would not vest the Commissioner with power to reexamine the accounts and determine the income himself at a higher figure; there must be material available on the record called for by the Commissioner to satisfy him prima facie that the order is both erroneous and prejudicial to the interests of the Revenue. Otherwise, it would amount to giving unbridled and arbitrary power to the revising authority to initiate proceedings for revision in every case and start re-examination and fresh inquiry in matters which have already been concluded under law.*

*29. In **M.S. Raju**(15 Supra), this Court has held that the power of the Commissioner under Sec.263 (1) is not limited only to the material which was available before the Assessing Officer and, in order to protect the interests of the Revenue, the Commissioner is entitled to examine any other records which are available at the time of examination by him and to take into consideration even those events which arose subsequent to the order of assessment.*

*30. In **Rampyari Devi Saraogi**(21 Supra), the Commissioner in exercise of revisional powers cancelled assessee's assessment for the years 1952-1953 to 1960-61 because he found that the income tax officer was not justified in accepting the initial capital, the gift received and sale of jewellery, the income from business etc., without any enquiry or evidence whatsoever . He directed the income tax officer to do fresh assessment after making proper enquiry and investigation in regard to the jurisdiction. The assessee complained before the Supreme Court that no fair or reasonable opportunity was given to her. The Supreme Court held that there was ample material to show that the income tax officer made the assessments in undue hurry; that he had passed a short stereo typed assessment order for each assessment year; that on the face of the record, the orders were pre-judicial to the interest of the Revenue; and no prejudice was caused to the assessee on account of failure of the Commissioner to indicate the results of the enquiry made by him, as she would have a full opportunity for showing to the income tax officer whether he had jurisdiction or not and whether the income tax assessed in the assessment years which were originally passed were correct or not"*

31. From the above decisions, the following principles as to exercise of jurisdiction by the Commissioner u/s.263 of the Act can be culled out:

a) The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If erroneous but is not prejudicial to the Revenue or if it is not erroneous but it is prejudicial to the Revenue – recourse cannot be had to Sec.263 (1) of the Act.

b) 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 Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of Revenue: or where two views are possible and the Income-tax Officer 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 Income-tax Officer is unsustainable in law.

c) To invoke suomotu revisional powers to reopen a concluded assessment under Sec.263, the Commissioner must give reasons; that a bare reiteration by him that the order of the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue, will not suffice; that the reasons must be such as to show that the and must irresistibly lead to the conclusion that the order of the Income Tax Officer was not only erroneous but was prejudicial to the interests of the Revenue. Thus, while the Income Tax Officer is not called upon to write an elaborate judgment giving detailed reasons in respect of each and every disallowance, deduction, etc., it is incumbent upon the Commissioner not to exercise his suomotu revisional powers unless supported by adequate reasons for doing so; that if a query is raised during the course of the scrutiny by the Assessing Officer, which was answered to the satisfaction of the Assessing Officer, but neither the query nor the answer were reflected in the assessment order, this would not by itself lead to the conclusion that the order of the Assessing Officer called for interference and revision.

e) The Commissioner cannot initiate proceedings with a view to start fishing and roving inquiries in matters or orders which are already concluded; that the department cannot be permitted to begin fresh litigation because of new views they entertain on

facts or new circumstance; that if this is permitted, litigation would have no end except when legal ingenuity is exhausted

f) Whether there was application of mind before allowing the expenditure in question has to be seen; that if there was an inquiry, even inadequate that would not by itself give occasion to the Commissioner to pass orders under Sec.263 merely because he has a different opinion in the matter; that it is only in cases of lack of inquiry that such a course of action would be open; that an assessment order made by the Income Tax Officer cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately; there must be some prima facie material on record to show that the tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation, a lesser tax than what was just, has been imposed.

g) The power of the Commissioner under Sec.263 (1) is not Commissioner is entitled to examine any other records which are available at the time of examination by him and to take into consideration even those events which arose subsequent to the order of assessment.

19. Now we examine the principles laid down in the following judgments. :-

DIRECTOR OF INCOME TAX vs. JYOTI FOUNDATION 357 ITR 388 (Delhi High Court)

It was held that revisionary power u/s 263 is conferred on the Commissioner/Director of Income Tax when an order passed by the lower authority is erroneous and prejudicial to the interest of the Revenue. Orders which are passed without inquiry or investigation are treated as erroneous and prejudicial to the interest of the Revenue, but orders which are passed after inquiry/investigation on the question/issue are not per se or normally treated as erroneous and prejudicial to the interest of the Revenue because the revisionary authority feels and opines that further inquiry/investigation was required or deeper or further scrutiny should be undertaken.

INCOME TAX OFFICER vs. DG HOUSING PROJECTS LTD343 ITR 329 (Delhi)

Revenue does not have any right to appeal to the first appellate authority against an order passed by the Assessing Officer. S. 263 has been enacted to empower the CIT to exercise power of revision and revise any order passed by the Assessing Officer, if two cumulative conditions are satisfied. Firstly, the order sought to be revised should be erroneous and secondly, it should be prejudicial to the interest of the Revenue. The expression "prejudicial to the interest of the Revenue" is of wide import and is not confined to merely loss of tax. The term "erroneous" means a wrong/incorrect decision deviating from law. This expression postulates an error which makes an order unsustainable in law.

The Assessing Officer is both an investigator and an adjudicator. If the Assessing Officer as an adjudicator decides a question or aspect and makes a wrong assessment which is unsustainable in law, it can be corrected by the Commissioner in exercise of revisionary power. As an investigator, it is incumbent upon the Assessing Officer to investigate the facts required to be examined and verified to compute the taxable income. If the Assessing Officer fails to conduct the said investigation, he commits an error and the word "erroneous" includes failure to make the enquiry. In such cases, the order becomes erroneous because enquiry or verification has not been made and not because a wrong order has been passed on merits.

Thus, in cases of wrong opinion or finding on merits, the CIT has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary enquiry, if required and necessary, before the order under s. 263 is passed. In such cases, the order of the Assessing Officer will be erroneous because the order passed is not sustainable in law and the said finding must be recorded. CIT cannot remand the matter to the Assessing Officer to decide whether the findings recorded are erroneous. In cases where there is inadequate enquiry but not lack of enquiry, again the CIT must give and record a finding that the order/inquiry made is erroneous. This can happen if an enquiry and verification is conducted by the CIT and he is able to establish and show the error or mistake made by the Assessing Officer, making the order unsustainable in Law. In some cases possibly though rarely, the CIT can also show and establish that the facts on record or inferences drawn from facts on record per se justified and mandated further enquiry or investigation but the Assessing Officer had erroneously not undertaken the same. However,

the said finding must be clear, unambiguous and not debatable. The matter cannot be remitted for a fresh decision to the Assessing Officer to conduct further enquiries without a finding that the order is erroneous. Finding that the order is erroneous is a condition or requirement which must be satisfied for exercise of jurisdiction under s. 263 of the Act. In such matters, to remand the matter/issue to the Assessing Officer would imply and mean the CIT has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question.

This distinction must be kept in mind by the CIT while exercising jurisdiction under s. 263 of the Act and in the absence of the finding that the order is erroneous and prejudicial to the interest of Revenue, exercise of jurisdiction under the said section is not sustainable. In most cases of alleged "inadequate investigation", it will be difficult to hold that the order of the Assessing Officer, who had conducted enquiries and had acted as an investigator, is erroneous, without CIT conducting verification/inquiry. The order of the Assessing Officer may be or may not be wrong. CIT cannot direct reconsideration on this ground but only when the order is erroneous. An order of remit cannot be passed by the CIT to ask the Assessing Officer to decide whether the order was erroneous. This is not permissible. An order is not erroneous, unless the CIT hold and records reasons why it is erroneous. An order will not become erroneous because on remit, the Assessing Officer may decide that the order is erroneous. Therefore CIT must after recording reasons hold that the order is erroneous. The jurisdictional precondition stipulated is that the CIT must come to the conclusion that the order is erroneous and is unsustainable in law. It may be noticed that the material which the CIT can rely includes not only the record as it stands at the time when the order in question was passed by the Assessing Officer but also the record as it stands at the time of examination by the CIT. Nothing bars/prohibits the CIT from collecting and relying upon new/additional material/evidence to show and state that the order of the Assessing Officer is erroneous.

COMMISSIONER OF INCOME TAX vs. J. L. MORRISON (INDIA) LTD. 366 ITR 593

As regard the submission on behalf of the Revenue that power under Section 263 of the Act can be exercised even in a case where the issue is debatable, it was held that the case of CIT vs. M. M. Khambhatwala was not applicable. The observation that the Commissioner can exercise power under Section 263 of the Act even in a case were the issue is debatable was a mere passing remark which is again contrary to the view taken by the Apex Court in thecase of Malabar Industrial Company Ltd. & Max India Ltd. If the Assessing Officer has taken a possible view, it cannot be said that the view taken by him is erroneous nor the order of the Assessing Officer in that case can be set aside in revision. It has to be shown unmistakably that the order of the Assessing Officer is unsustainable. Anything short of that would not clothe the CIT with jurisdiction to exercise power under Section 263 of the Act. CIT vs. M. M. Khambhatwala reported in 198 ITR 144; CIT vs. Ralson Industries Ltd. reported in 288 ITR 322 (SC), not applicable; Malabar Industrial Co. Ltd. v. CIT reported in 243 ITR 83, relied on.

(Para 72)

As regard the third question as to whether the assessment order was passed by the Assessing Officer without application of mind, it was held that the Court has to start with the presumption that the assessment order was regularly passed. There is evidence to show that the assessing officer had required the assessee to answer 17 questions and to file documents in regard thereto. It is difficult to proceed on the basis that the 17 questions raised by him did not require application of mind. Without application of mind the questions raised by him in the annexure to notice under Section 142 (1) of the Act could not have been formulated. The Assessing Officer was required to examine the return filed by the assessee in order to ascertain his income and to levy appropriate tax on that basis. When the Assessing Officer was satisfied that the return, filed by the assessee, was in accordance with law, he was under no obligation to justify as to why was he satisfied. On the top of that the Assessing Officer by his order dated 28th March, 2008 did not adversely affect any right of the assessee nor was any civil right of the assessee prejudiced. He was as such under no obligation in law to give reasons. The fact, that all requisite papers were summoned and thereafter the matter was heard from time to time coupled with the fact that the view taken by him is not shown by the revenue to be erroneous and was also considered both by the Tribunal as also by us to be a possible view, strengthens the presumption under Clause (e) of Section 114 of the Evidence Act. A prima facie evidence, on the basis of the aforesaid presumption, is thus converted into a conclusive proof of the fact that the order was passed by the assessing officer after due application of mind. Meerut Roller Flour Mills Pvt. Ltd. vs. C.I.T., ITA No. 116 /Coch/ 2012; CIT vs. Infosys Technologies Ltd., 341 ITR 293 (Karnataka); S.N.

Mukherjee vs. Union of India, AIR 1990 SC 1984; A. A. Doshi vs. JCIT, 256 ITR 685; Hindusthan Tin Works Ltd. Vs. CIT, 275 ITR 43 (Del), distinguished.
(Paras 90-92, 102)

COMMISSIONER OF INCOME TAX vs. SOHANA WOOLLEN MILLS 296 ITR 238 (P&H HC)

A reference to the provisions of s. 263 shows that jurisdiction thereunder can be exercised if the CIT finds that the order of the AO was erroneous and prejudicial to the interest of Revenue. Mere audit objection and merely because a different view could be taken, were not enough to say that the order of the AO was erroneous or prejudicial to the interest of the Revenue. The jurisdiction could be exercised if the CIT was satisfied that the basis for exercise of jurisdiction existed. No rigid rule could be laid down about the situation when the jurisdiction can be exercised. Whether satisfaction of the CIT for exercising jurisdiction was called for or not, has to be decided having regard to a given fact situation. In the present case, the Tribunal has held that the assessee had disclosed that out of sale consideration, a sum of Rs. 1 lakh was to be received for sale of permit. If that is so, there was no error in the view taken by the AO and no case was made out for invoking jurisdiction under s. 263.

12. Taking note of the aforesaid case laws and especially the dictum of law of the Hon'ble Apex Court which was laid in Malabar Industries Ltd vs. CIT (supra), let us examine whether the Third assessment order/re-assessment order passed by the Third AO u/s. 143(3)/263 of the Act dated 26.12.2017 is erroneous in so far as prejudicial to the interest of the revenue. As we have seen (supra), the Second AO in the Second re-assessment order passed u/s. 143(3) of the Act made an addition of Rs.16.26 crores by an order dated 31.03.2015, which has been interdicted by the Second revisional order passed by the Second Ld. Pr. CIT vide order dated 19.12.2016, wherein the Ld. Pr. CIT was pleased to set aside the second assessment order dated 31.03.2015 and directed the AO to de novo assess the income of the assessee and gave specific direction to enquire about share capital & premium. The operative portion of the second revisional order dated 19.12.2016 is reproduced below:-

"4.(iv). Considering the facts and circumstances of the case as discussed above and as per submission of assessee, the assessment order was passed without making inquiries and verifications which would have been made and therefore the order passed on 31.03.2015 stands erroneous insofar as prejudicial to the interest of revenue and is set aside de novo with a direction to AO to carry out proper examination of books of accounts and Bank accounts of assessee as well as investors. AO is also directed to examine the source of share application, identity of investor and its genuineness.

The assessment proceedings may be initiated at the earliest and to be completed without waiting time barring date. The AO must provide sufficient opportunity of being heard to the assessee in order to meet natural justice, equity and fairness."

13. Pursuant to the aforesaid direction of the Second Ld. PCIT, the Third AO had framed the re-assessment/Third assessment order by accepting the nature and source of the share capital & premium collected by the assessee vide order dated 26.12.2017. Thereafter the Third Ld. PCIT has again invoked his revisional jurisdiction u/s 263 and was pleased to set aside the re-assessment/ third assessment order of the AO dated 26.12.2017 and directed fresh assessment (which means a fourth re-assessment to be framed).

14. The aforesaid action of the Third Ld. PCIT dated 11.11.2019 is challenged before us. According to the Ld. Counsel, Shri Subash Agarwal, the Ld. PCIT erred in assuming his jurisdiction without satisfying the jurisdictional conditional precedents as prescribed u/s 263 of the Act and therefore, the action of the Ld. PCIT is wholly without jurisdiction and therefore, *ab-initio void* and therefore, need to be struck down. We note that in order to interfere with the third assessment/re-assessment order passed by the Third AO u/s 143(3)/263 of the Act dated 26.12.2017, the only fault pointed out by the Ld. PCIT to interfere with the Third AO's order dated 26.12.2017 is given in para 5 of the impugned order of Ld. PCIT which is reproduced as under:

> *"5. In the case in hand it would be worthwhile to consider whether the enquiry has been conducted or not. Going deeply through the order it is evident that the assessee has raised fresh capital. It has also charged premium. However, from the order of the AO it is evident that Form 2 and Form 5 are part of the Companies Act. So, without going through these two crucial documents it cannot be appreciated that how the AO has given a clean chit to the assessee for raising of fresh capital and premium. There is a clear cut case of lack of enquiry. Form No. 2 and Form No. 5 had not only to be brought on record but should have also been enquired if the AO was dissatisfied."*

15. A bare perusal of the aforesaid fault pointed out by the Ld. PCIT reveal that he noted that since the assessee has raised fresh capital and also charged premium on it, the AO should have called for the Form No. 2 and Form No. 5 as required by the Companies Act and should have gone through these two crucial documents and then only ought to have given clean chit to the assessee. Omission to do so makes the order passed by the Third AO on 26.12.2017 erroneous. In this context we note that Form No. 2 as per Company Act, is the return filed before the Registrar of Companies in respect of allotment of shares. In that Form No 2, the complete details of allotment of shares issued by the assessee company need to be given viz. number of shares, value of shares, nature of payments to whom allotted etc.; and Form No. 5 needs to be filed as per the Companies

Act if there is increase in authorized Capital. Thus we note that Form No. 2 and Form No. 5 need to be filed as per the Companies Act before the Registrar of companies which a compliance form giving details of share capital and premium is issued by the assessee company which facts are discernible from the face of the balance sheet. No new information can be discerned from perusal of Form No. 2 and Form No. 5 and moreover when an AO notices that the assessee company has raised share capital and premium then he calls for the nature and source of it from the assessee; and the assessee pursuant to the same has to discharge the burden on it u/s 68 of the Act and the assessee is duty bound to prima facie to prove the identity, creditworthiness of the share subscribers and genuineness of the transaction. For doing so, the assessee has to file evidence to prove the nature of receipt capital or investment or loan etc; and from whom the loans have been obtained/to whom the shares have been issued viz., their name, PAN No., CIN No. ITR filed etc to prove their identity and furnish evidence to show that they are credit worthy and modus of payments etc to prove the genuineness of the transaction. The assessee needs to file evidence as discussed in order to discharge its burden to prove the nature and source of the credit. In this case, we note that the assessee has raised share capital and premium of Rs. 16.26 crores and has undergone three re-assessment proceedings and last one being dated 26.12.2017 (third re-assessment order) which has been done as per the specific directions issued by Second Ld. PCIT by order dated 19.12.2016 which fact is discernible from the Third assessment order passed by the AO. The relevant portion of AO's enquiry can be seen from the third assessment order which is reproduced below:

> *"As directed by the Principal Commissioner of Income Tax-4, Kolkata in the order u/s 263 of the Act dated 19.12.2016 statutory notice u/s 142(1) of the Act dated 29.11.2017 was issued with questionnaire enclosed as Annexure-A and served on the assessee company through authorized representative Mr, Raghwendra Kumar, FCA by hand fixing the date of hearing on 06.12.2017 at 03:30p.rm in response/Mr. Raghwendra Kumar, FCA appeared and submitted documentary evidences as asked for trough questionnaire. Meanwhile,'acting upon the direction summons u/s-131 of the I.T. Act, 61 issued to the Directors/principal Officers of all the shareholding companies at their official addresses as provided and the same was duly served by the departmental inspector attached to this charge.*
>
> *To ensure genuineness of transaction records of the shareholder companies were checked with the books of a/c of the Assessee Company. Further, it was observed that all the transactions were made through banking channel and duly recorded In the books of accounts of the share holding companies. Accordingly, it is verified in the following manner also as appended below:*
>
> *(i) Departmental inspector was deputed to inquire about the existence of the shareholding companies who was allotted shares by the Assessee Company. Whether, there is any office*

at the specified addresses belong to the share holding companies, is there any employee/employees working, whether it looks like office or anything else etc. On perusal of the inspector's report placed in the records reveal the existence as well as identity of the companies. Due to paucity of time inspector was deputed to enquire on test check basis. At least 3(three) enquiry reports submitted by the Inspector which speak itself supporting the existence of the share holding company.

(ii) It is observed that the shareholders are private limited companies, registered with the Ministry of .Corporate, regularly filing its return of income stating the Fairview affairs and letter issued u/s-133(6) and summons-131 of the I.T. Act, 61 were duly received. So, it may be established that the share holding companies have an established identity. Moreover, the directors of all the companies have responded to summons u/s-131 with the evidences as asked for. Moreover, addresses have been verified with the RAN database and. found ' correct. Statement of all the directors of share holding companies have been recorded and duly placed on the records.

(iii) Details of source of funds have been submitted by ail the shareholders during the course of statement recorded and found satisfactory.

(iv) None of the applications have been made any transaction otherwise than by banking channels.,.

(v) All the investors have submitted their Annual reports and IT returns filed for the A.Y. 2017-18.

(vi) In all the cases the investments is duly reflected in the books of account of the respective investors.

Before discussing the Issue it is necessary for the Assessee Company to prove prima facie the transactions which results in a cash/cheque/other mode in its books of accounts. Such proof mainly includes proof of identity of creditors, the capacity of such creditors to advance the money or creditworthiness and finally the genuineness of the transactions.

When the entry stands in the name of any third party and the Assesses Company establishes the identity of the creditor and produces evidences showing that the entry is not fictitious, initial burden lying on the assesses stands discharged; the burden shifts on the revenue department to show that the entry represented assessee's suppressed income. Where identity of creditor is and entry shown to be no fictitious; the department has to show/prove the entry still represented the suppressed income of the assessee. The assessee cannot be called upon to prove the worth of the creditor/creditors, The fact that in the books of the creditor/creditors exactly the same amount had been credited in the name of other parties and that immediately after repayment, the creditors withdrew the money could not lead to any adverse inference when this was their modus operandi and assessee's case; was not the solitary transaction if creditor/creditors appears before the A.O. and shows their books of account and admits categorically having advanced money to the Assessee Company. Then the Assessee Company can, therefore, be taken as having established that money has come from the creditors.. Where the Assessee Company has established the identity of the creditor/creditors the genuineness of such transaction is also to be proved accordingly in accordance with the burden which rested on the Assessee Company u/s-106 of the Evidence Act. If the money/worth received from the creditor/creditors is proved transacted through-banking system which is not in dispute then the Assessee Company must be treated to have proved that the creditor/creditors had the creditworthiness.

Acting upon the direction, statements are recorded under oath of each and every director of the shareholding companies at the chamber and before doing so copy of PAN card was verified with the original as proof of identity. Apart from that copy of bank statement, books,of a/c, audit report, copy of share application and allotment, bank statement and return filing evidences are checked and placed in the records. In most of the eases directors were interrogated with the facts and figure of the company as balance Sheet and (P+L) a/c do not reveal any business activities and asked to explain why and how the fund was invested and collected. Almost all the directors explained that short term advances/loan recovered and invested on the long term basis expecting moderate

benefit would come in the long run without being perturbed whatever the premium component considering the lucrative investment opportunity. As the Assessee Company decided to start their business from the relevant F.Y. 2008-09 old limited companies are always interested to utilise its fund realising old short term loans/advances of selling old investments where from no benefit has been generating. As an investment company it is the conventional phenomenon of each and every board of directors always looks forward for the benefit of its own shareholdings entities. Sometimes, the prediction may not be materialised. Then the old stock/investment made with the Assessee Company is sold out normally and try to inquest of fresh entities/companies where investment would be fruitful. All the facts of the each statement recorded have been scrutinized to substantiate whether the confessions are concocted or excogitated in comparison to the loans/ advances granted and stock of investment retained with the balance. After careful consideration of ail the documentary evidences submitted on behalf of the Assessed Company as well as by the share holding companies especially bank statement and statement recorded under oath the share capital and share premium brought into books of a/c abiding by the principles of accounting as per GAAP by the Assessee Company. In this context, all kinds of enquiries have been made whatever is humanly possible within a short period.

It is also stated that departmental inspector attached to this charge was deputed to enquire about the existence of the share holding company on test check basis with a direction to collect information about activities are being performed by them if possible. The inspector has visited three/four addresses of the share Allottee Companies and submitted his enquiry reports supporting the existence of the entities/companies which are placed in the records. It is also seen that all the share holding companies have been filing its return of income regularly with their jurisdictional charges. Moreover, it is already stated above (In supra) that share premium,

In fact any adverse inference only can be drawn if anything found wrong from the books Of a/e maintained by the Assesses Company or any third party confirmation available in black and white then only share capital or share premium amount subscribed by the share holding entities/companies would be treated as unexplained credit as per provision u/s 68 of the I.T, Act, 61 and may be entangled accordingly for taxation. Otherwise, it is next to impossible to prove any credit clearing transaction transacted through electronic system as unexplained credit and should not be taxed within the purview of I.T. Act, 61. Unless; department showing that the investment made by subscribers actually emanated from coffers of assessee ta be treated as undisclosed income of the assessee. No such transaction has been identified from the documentary evidence collected from various enquiries especially in the bank statement of any share holding companies where from adverse inference can be drawn. It is. observed that the shareholders are private limited companies, registered with the Ministry of Corporate, regularly filing its return of income stating the Fairview state of affairs and letter issued u/s-133(6) and summons-131 of the I.T, Act, 61 were duly received. So, it may be established that the share .holding companies have an established identity. Moreover, the directors of ail the companies have responded to summons u/s-131 with the evidences as asked for. Moreover, addresses have been verified with the PAN database and found correct. Statement of all the directors of share holding companies have been recorded and duly placed on the records. The case is heard and discussed."

16. From a perusal of the aforesaid action taken by the Third AO pursuant to the specific direction given by the Ld. PCIT-4, Kolkata dated 19.12.2016, we note that the AO has enquired about the issue by serving the summons u/s 131 of the Act to the Directors/ Principal officers of share holding companies at their official addresses through the departmental Inspectors. And it is noted that the AO has made field enquiry through the

Inspector (on test-check basis) to find out the actual existence of company and to find out whether there are employee/employees working there etc. The AO has made specific finding that the share holders are duly registered with the Ministry of Corporate Affairs and they all have filed their respective return of income regularly. The AO notes that the directors of all the share holders company have responded to the summons u/s 131 of the Act and their existence has been verified with the PAN data base and found to be correct. The AO has acknowledged to have recorded statement of directors on oath and placed the same on record. The AO has looked into the details of the source of funds submitted by the share holders during the course of statement recorded of the directors and he has recorded his satisfaction on the source of share subscribing money of the share holders. The AO has made a finding of fact that the share subscription was made through the banking channel and that all the share subscribers have submitted even their annual return filed for AY 2017-18 (when the Third Assessment order was being framed) even though the assessment was regarding AY 2009-10. Further the AO has noted that the investments made by the share holders are duly reflected in the respective books of accounts and moreover the AO has also noted their creditworthiness and genuineness of the transaction. The details of his investigation are discernible from page 5 and 6 (supra) which are not repeated for the sake of brevity. We note that in order to prove identity, creditworthiness and genuineness of the transaction the assessee had filed the following details of each share subscribers which is evident from PB filed before us. We note that the share holders have filed the following details before AO to prove the identity, creditworthiness and genuineness of the share transaction.

(i) Their names and addresses
(ii) PAN No.
(iii) Share applicant's own funds
(iv) Number of shares
(v) Total amounts
(vi) ITR acknowledgment
(vii) Bank statement
(viii) Board resolution
(ix) Share application form

(x) Certificate of source of share amount

(xi) Allotment advise

17. These details have also been filed before us, which is discernible from paper book-volume II page 57 to 481. In the light of the aforesaid facts discussed (supra) we note that AO has conducted enquiry to find out nature and source of the credit entry in the form of share capital and premium collected by the assessee. Therefore, the order passed by the Third AO pursuant to the directions of Second Ld. PCIT-4, Kolkata is the outcome of the enquiry conducted by Ld PCIT and the view taken by the AO is a plausible view. Moreover since the Third Ld. PCIT was interfering with the order passed by the Third AO which was enquired as per the direction of second Ld. PCIT, then he (Third PCIT) at least should have pointed out as to where the third AO faulted while making the enquiry as ordered by Second Ld. PCIT dated 19.12.2016. Here in this case, the only fault pointed out by the third Ld. PCIT is that the third AO has not collected the purported crucial document Form No. 2 and 5 which are filed as per the Companies Act and carried out enquiries based on it. We have in this regard had already noted (supra) that these documents are only compliance forms filed before the Registrar of Companies when the assessee company issue shares and in the event there is any increase in authorized capital and cannot be termed as crucial document in the factual scenario of this case. And as noted by us, no new information is available from these two forms, so the omission to consider the contents of these two forms cannot influence in anyway the outcome of the finding/satisfaction drawn by the third AO. Moreover, if the Ld. Third PCIT in his own wisdom for any reason held an opinion that form 2 & 5 are crucial documents and the contents of the same would have overturned the decision of the third AO and thereby the third AO's view on the facts can be held to be unsustainable in law or facts, then the third Ld. PCIT ought to have summoned/directed the assessee to produce both the Forms and demonstrated that the contents of Form 2 & 5 filed before the Registrar of Companies when considered in the facts of the case, would have given an opposite result/overturn the decision of third AO and thus making the view of third AO unsustainable in law or facts, which exercise the third Ld. PCIT did not bother to do. So, the Ld. PCIT 's finding fault on this score cannot be accepted. Other than this omission which we have dealt with

(supra), the third Ld PCIT has not pointed out any other fault or spelled out as to where the third AO erred in carrying out the enquiry as commanded /directed by the Ld. PCIT-4, Kolkata (2nd PCIT), so the re-assessment order passed by the third AO cannot be termed as erroneous as well as prejudicial to the revenue. In the light of the aforesaid factual scenario, the assumption of jurisdiction by the Third Ld. PCIT to interfere with the order of Third AO dated 26.12.2017 cannot be countenanced. In the facts and circumstances discussed supra we are satisfied that the Third AO has conducted enquiry as directed by Second PCIT [order dated 19.12.2016] by carrying out enquiry by himself (AO) as well as through the Inspectors and after recording the statements of directors of all the share subscribing companies on oath, the AO has recorded his satisfaction in respect of nature and source of the share capital and premium collected by the assessee. The view taken by the AO is a plausible view and is in line with the judicial precedents on the issue of share capital and premium and at any rate cannot be termed as *'unsustainable in law'*. And the case laws cited by the Ld PCIT are not applicable in the facts of this case and he erred in relying on the same to interfere by exercising his revisional jurisdiction and by erroneously relying on the case laws, he mis-directed himself without properly understanding the facts of these cases which for completeness will be discussed (infra).

18. **Rajmandir Estates (P) Ltd vs PCIT 363 ITR 162 (Cal)**

1.1 In this case, the assessee had increased the share capital, reserves and surplus by issuing shares of Rs. 10/- each at a premium of Rs. 390/-. Assessment was framed u/s 143(3) r.w. section 147. Subsequently, a notice u/s 263 was issued alleging that the assessment u/s 143(3)/147 was completed without application of mind and without requisite enquiry into the increase in share capital including premium received by the assessee company. Ld. CIT passed order u/s 263 holding that the unaccounted money was laundered as clean share capital by creating a fa?ade of paper work, routing the money through several bank accounts and getting it the seal of statutory approval by reopening the ease u/s 147 suo moto. The appeal of the assessee before ITAT was unsuccessful. On assessee's appeal before the Hon'ble High Court, and the Hon'ble High Court at para 24 of its order tabulated, inter alia, the following evidences which were noticed by the lower authorities-

(a) Some of the share applicants did not disclose the nature of receipt at their end though the source of fund was identified.

(b) Forms of share application signed by the applicant companies as disclosed revealed that various details like share application no., date of allotment, no. of allotment etc. had all been kept blank.

(c) Nineteen companies which contributed to the share capital of the assessee, in the name of assets were left merely with the share scripts of the assessee while another lot of 15 subscribers had the share scripts held by them substituted by the share, scripts of the assessee.

(d) It was not disputed on behalf of the assessee the finding of the CIT that the A.O. did not examine a single director of the assessee company or of the subscribing company.

It was further pointed out by the Hon'ble Court (at para 28) that the fact that the A.O. did not apply his mind to those pieces of evidence was apparent from the assessment order itself which read as under-

"During the Financial Year the assessee company has issued 792737 No. of equity share with a face value of Rs. 10/- along with a premium of Rs.390/-.

Thereafter, Notices u/s. 133(6) of the I.T. Act, 1961 were also issued to verify the transactions of the assessee on test check basis. The case is discussed and heard. Issue relevant for determination of total income of the assessee is discussed as under:"

The court finally held that in view of the above material facts, CIT was justified in treating the assessment order erroneous and prejudicial to the interest of the revenue.

1.2 However it is noted that in the instant case before us the following facts/aspects distinguishes the case of the appellant-assessee from the aforesaid case-

(a) In the instant case, the assessee was subjected to three scrutiny assessment proceedings and two revisionary proceedings u/s 263 prior to the passing of the instant assessment order unlike in the above referred case where the assessment in question was re-opened at the behest of the assessee itself for getting seal of statutory approval. But in

the instant case, the A.O. has framed the assessment order not at the behest of the assessee but as per the direction of his superior authority i.e. Ld. PCIT.

(b) In the instant case, A.O. has followed the direction of his superior authority i.e. Ld. PCIT to the AO which is evident from the finding given by the A.O.at page 5 and 6 of his order (supra).

(c) In the instant case, nowhere in his order, Ld. PCIT has alleged that the assessee has laundered the unaccounted money as clean in the form of share capital by creating a facade of paper work.

(d) In the instant case, the assessee has disclosed the share application forms which are placed in the paper book, Volume II, (index has been placed at page 55). On perusal of the share application forms, it can be seen that none of the requisite columns are blank. Further, share allotment letters / advice were also disclosed / produced. The said advices contain complete details like allotment advice no., date of allotment, certificate nos, distinctive nos. and no part has been kept blank.

(e) In the instant case, unlike in the above referred case, the investment in the assessee company by the shareholders is a small fraction of their total own funds. This fact is apparent from the table placed at page 55, Volume 2 of the P/B.

(f) In the instant case, unlike in the above referred case, the A.O, has passed a speaking order and has recording his findings and has spelled out the enquiry he conducted as per the direction of the Ld. PCIT. So this case law does not apply to the facts of this case.

2. **CIT vs. N.R. Portfolio (P) Ltd 2i4 Taxman 408 (Del)**

2.1 In the above case, the case of the assessee was reopened and assessment, was framed u/s 147/144 and addition was made to the tune of Rs. 35 lakhs on account of share capital u/s 68. On appeal before CIT(A), he sought for a remand report. The A.O. furnished the

remand report where he clearly observed that summons u/s 131 were sent to the parties, summons in respect of four parties returned back unserved and out of remaining three parties, though summons were served but nobody attended nor filed any details asked for. The A.O. had further observed that the shareholders were entry operators and they were absconding or evading any kind of notice from the department and lacked real identity creditworthiness and business. In the remand report, it was further observed that all the monies appearing in the bank account of the share holders originated from some other accounts in which cash was deposited and the entities in which cash was deposited were only paper entities.

In this factual background, the Hon'ble Court has given the following finding holding that the onus shifts back to the assessee if during the assessment proceedings, A.O. cannot contact the share applicants or the information provided becomes unverifiable-

> *"One must remember that in all such cases, more often than not, the company is a private one, and share applicants are known to it, since they are issued on private placement, or even request basis. If the assessee has access to the share applicant's PAN particulars, or bank account statement, surely its relationship is closer than arm's length. Its request to such concerns to participate in income tax proceedings, would, viewed from a pragmatic perspective, be quite strong, because the next possible step for the tax administrators could well be re-opening of such investor's proceedings. That apart, the concept of "shifting onus" does not mean that once certain facts are provided, the assessee's duties are over. If on verification, or during proceedings, the AO cannot contact the share applicants, or that the information becomes unverifiable, or there are further doubts in the pursuit of such details, the onus shifts back to the assessee. At that stage, if it falters, the consequence may -well be an addition under Section 68. "*

2.2. However in this case before us, the AO has recorded the statements under oath of each and every director of the shareholding companies and before doing so, copy of PAN card was verified with original as proof for identity and also conducted field enquiries by Inspector. Further bank Statements, books of accounts, copy of share application and allotment forms, bank statements etc were checked and placed in the records (Refer page 5 of the assessment order dated 26.12.2017) (supra). Further it is nobody's finding that

cash was deposited at any stage in the bank account of the shareholders, so the case of assessee is distinguishable and so this case law does not apply to the facts of this case..

3. **PCIT vs. NRA Iron and Steel (P) Ltd 103 taxmann.com 48 (SC)**

3.1 In this case, the assessee had raised a share capital of Rs. 17.60 crores. In the course of assessment proceedings, the A.O. had issued summons to the investor companies and got field enquiries conducted. The A.O. recorded that enquiries at Mumbai revealed that out of four companies at Mumbai, two companies were found to be nonexistent. Kolkata companies responded through dak only and they did not submit bank statements to substantiate the source of funds. In respect of Guwahati companies, enquiries revealed that they were non-existent at the given address. The A.O. gave a finding in his order that almost none of the companies produced bank statements and none of the investor companies appeared before the A.O. Finally, the Hon'ble Court gave the following finding at para 13 -

> *"13. The lower appellate authorities appear to have ignored the detailed findings of the AO from the field enquiry and investigations carried out by his office. The authorities below have erroneously held that merely because the Respondent Company -Assessee had filed all the primary evidence, the onus on the Assessee stood discharged.*
>
> *The lower appellate authorities failed to appreciate that the investor companies which had filed income tax returns with a meagre or nil income had to explain how they had invested such huge sums of money in the Assessee Company -Respondent. Clearly the onus to establish the credit worthiness of the investor companies was not discharged. The entire transaction seemed bogus, and lacked credibility.*
>
> *The Court/Authorities below did not even advert to the field enquiry conducted by the AO which revealed that in several cases the investor companies were found to be non-existent, and the onus to establish the identity of the investor companies, was not discharged by the assessee.*
>
> ---
>
> *15. On the facts of the present case, clearly the Assessee Company - Respondent failed to discharge the onus required under Section 68 of the Act, the Assessing Officer was justified in adding back the amounts to the Assessee's income.*
>
> *16. The appeal filed by the Appellant-Revenue is allowed. In the aforesaid facts and circumstances, and the law laid down above, the judgment of the High Court, the ITAT, and the CIT are hereby set aside. The order passed by the AO is restored."*

3.2 However, it is noted that in this case before us, the assessee had not only submitted all the details and evidences to prove the share capital raised but has also produced all the

directors of shareholder companies who were examined on oath. Further the AO has verified the bank statements, books of accounts, copy of share application and allotment forms, etc. were checked and placed in the records. So the case of assessee is distinguishable and therefore this case law does not apply to the facts of this case.

19. In the light of the facts and law discussed, we are of the considered opinion that the Third PCIT could not have usurped the revisional jurisdiction u/s 263 of the Act without satisfying the condition precedent as prescribed in the section 263 of the Act and consequently the action of the third Ld. PCIT-4, to interfere with the AO's order dated 26.12.2017 by passing impugned order dated 11.11.2019 u/s 263 of the Act is held to be without jurisdiction and therefore the impugned order is null in the eyes of law and so quashed.

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

Order is pronounced in the open court on 18th June, 2021

Sd/-	Sd/-
(J.S. Reddy)	(A. T. Varkey)
Accountant Member	Judicial Member

Dated: 18.06.2021

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- Decent Enclave (P) Ltd (Formerly known as Drishti Accessories (P) ltd.), C/o Subash Agarwal & Associates, Advocates Siddha Gibson, 1, Gibson Lane, Suite 213, 2nd Floor, Kolkata-700069.
2. Respondent – PCIT-4, Kolkata
3. The PCIT- Kolkata
4. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata