IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

BEFORE SHRI M. BALAGANESH, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No.998/Mum/2019
(**निर्धारण वर्ष** / Assessment Years: 2011-12)

<table>
<tr><td>M/s. True Value Steels
002, Ground Floor,
Parshvanath Apartment,
Sarvoday Parshvanath
Naga, Nahur Road,
Mulund West-400080.</td><td>बनाम/
Vs.</td><td>ITO-29(3)(2)
Pratyakshakar Bhavan, C-10, Bandra Kurla
Complex, Bandra East,
Mumbai.</td></tr>
<tr><td colspan="3">स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAFFT9063M</td></tr>
<tr><td>(अपीलार्थी /Appellant)</td><td>..</td><td>(प्रत्यर्थी / Respondent)</td></tr>
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Assessee by:	Shri Bhadresh Doshi
Revenue by:	Shri R. Manjunatha Swamy

सुनवाई की तारीख / Date of Hearing: 25.04.2019
घोषणा की तारीख /Date of Pronouncement: 26/06/2019

आदेश / O R D E R

PER AMARJIT SINGH, JM:

The assessee has filed the present appeal against the order dated 28.03.2018 passed by the Principal Commissioner of Income Tax-29, Mumbai [hereinafter referred to as the "PCIT"] relevant to the A.Y.2011-12 in which the Principal Commissioner of Income Tax-29 has invoked the provisions u/s 263 of the I.T. Act, 1961.

2. The assessee has raised the following grounds of appeal: -

> *"1. On the facts and circumstances of the case and in law, the Ld. Pr. CIT has erred in holding that the reassessment order passed by the AO is erroneous and prejudicial to the interest of the revenue.*
>
> *2. On the facts and circumstances of the case and in law, the Ld. Pr. CIT erred in passing the order u/s 263 by giving directions to the Assessing Officer on an issue which was not raised in the show-cause notice dated 8th February, 2018."*

3. Under the above mentioned issues, the sole question has been raised by assessee that the order passed us/ 263 of the Act is wrong against law and facts specifically on the ground that the Principal Commissioner of

Income Tax did not give an opportunity of being heard to the assessee in the show-cause notice dated 08.02.2018 in connection with reopening the assessment on the basis of the bogus purchase. Before going further, we deem it necessary to advert the copy of notice dated 08.02.2018 on record.:-

To
M/s. True Value Steels,
Mulund West, Mumbai-400080

Sub: Notice u/s 263 of the Income Tax, 1961 in your case for A.Y. 2011-12- regarding

In this case, assessment was completed u/s 143(3) r.w.s. 147 of the I.T. Act, 1961 ('the Act' on 17.03.2016 on the total income of Rs.56,57,320/-. On going through the records, it is noticed as under:

2. **Bogus Purchase-** The assessee is engaged in the business of trading in Iron and Steel Scraps. The case was reopened u/s 147 of the I.T. Act, 1961 on account of bogus purchases. The only addition made was an amount of Rs.39,29,422/- being bogus purchase. The Internal Audit has made the following observation with regards to non-deduction of TDS on various expenses debited to P&L Account.

> "It is seen from the P&L account for accounting year 2010-11, there are many expenses debited to P&L account which are liable for TDS, such as commission paid, interest paid on loan, profession fees, rent paid etc. However, due to non-availability of TDS return filed along with annexure is not available on record to verify the same. Also, in 3CD report, which is placed on record, as per column 27(a), whether the assessee has complied with the provisions of chapter xvii-B regarding deduction of tax at source and regarding the payment thereof to the credit of the Central Government, nothing is mentioned by the Auditor against this column, neither yes nor no against Col. No. 27(b) 1,2,3, also not mentioned anything. It is not verifiable whether TDS deducted or not and if deducted whether deposited or not. This needs verification. If assessee has not complied with the provisions of Chapter xii-B, all the expenses liable for TDS needs to be added back to the Net Profit of the assessee. This may be looked into."

3. Further on perusal of the P&L account, it is seen that the assessee has `` debited the following expenses, which are subjected to deducted of TDS:

S. No.	Expenses claimed	Rs.
1	Commission paid	1380000
2	Interest paid on loans	297353
3	Rent paid	162000
4	Loading and unloading charges	1345134
5	Transport charges	3896824

It is seen from the records that during the course of assessment proceedings, the assessee has not filed either the details of any of the above expenses debited to P&L account, or the details of TDS deducted and paid thereof. Copy of TDS Return and its annexures were also not filed before the Assessing Officer. The Auditors have also not many any remarks regarding deduction and payment of TDS in item no. 26(a), (b) and (c) of the Tax Audit Report and these columns were kept blank.

4. In view of the above, it is not verifiable as to whether the assessee has deducted any TDS out of these expenses or paid such TDS deducted into the Government Account as required under the provisions of Chapter XVII-B and the ..

5. In addition to the bogus purchases, donation of Rs.21,500/- debited to P&L account was not added back to the total income. As per individual Transaction Statement (TAN details) assessee is in default of Short Deduction Amount of Rs.30,900/-. Reconciliation of the same was not available on `

> record, as a result of which the Assessing Officer failed to make addition to this extent. Also copy of Partnership Deed s not filed to verify the genuineness of remuneration paid.
>
> 6. On failure on the part of the Assessing Officer to inquire and examine the allowability of the expenses and other additions to be made, the order has been rendered as erroneous in so far as it is prejudicial to the interest of revenue, in view of the clause (a) of Explanation 2 below subsection (I) of section 263 of the l.T. Act, 1961 and ills proposed to invoke powers u/s. 263 of the Act in this regard.
>
> 7. You are hereby required to show cause in person or through authorized representative on 20.02.2018 at 01.00 p.m. as to why the assessment order being erroneous and prejudicial to the interest of revenue, should not be set-aside and an order as deemed fit to be passed. you do not wish to appear in person, a written reply may be sent by e-mail."

4. The factual position is this that the assessee filed the return of income for the A.Y. 2011-12 declaring total income to the tune of Rs.17,28,901/- on 21.09.2011. The return was processed u/s 143(1) of the IT Act. Thereafter, the case of the assessee was reopened in view of the provisions u/s 147 of the Act on account of information received from the DGIT(Inv.), Mumbai in which it was conveyed that the assessee managed the bogus purchase from the different parties in sum of Rs.3,14,27,381/-. Thereafter, the matter was proceeded and finalized to restrict the addition to the extent of 12.5% by virtue of order dated 17.03.2016. Subsequently, the Principal Commissioner of Income Tax has invoked the provisions u/s 263 of the Act by taking the 4 grounds vide which 3 grounds have not been challenged. The assessee has challenged only one ground of bogus purchase to which show-cause notice was not given. In fact the notice was given on 08.02.2018 in which the said specific reason for reopening the Assessement on the basis of bogus purchases was not mentioned. The basic contention of the assessee is that the no show-cause notice was given to the assessee, therefore, the case of the assessee was not liable to be reopened u/s 263 of the Act on the point of bogus purchase. At the time of argument, the Ld. Representative of the assessee has placed reliance upon the law settled in the case of **Sanghavi Diamonds Pvt. Ltd. Vs. Pr. CIT ITA. No.3178/M/2018 and Rajal Enterprises Vs. Pr. CIT ITA.**

No.2273/M/2018 and Ambuja Cements Ltd. Vs. CIT ITA. No.3563/M/2016 dated 10.11.2017. The Ld. Representative of the Department has refuted the said contention and argued that the Pr. CIT has rightly invoked the provisions of section 263 of the Act in view of the law settled in case of **Amitabh Bachchan Vs. CIT (2016) 69 taxmann.com 170 (SC) and Arvee International Vs. ACIT ITA. No.3543/M/2003.** The notice dated 08.02.2018 has been reproduced above which clearly speaks that the no show cause notice was issued in connection with bogus purchase of the assessee. Now it is to be seen that the Pr. CIT has rightly invoked the provisions u/s 263 of the Act or not. The matter of controversy has come up before the ITAT and other courts in which it is specifically held that if no show-cause notice was given to the assessee in connection with any specific ground, therefore, the Pr. CIT is not justifiable to invoke the provisions u/s 263 of the Act. In brief, if the notice has not been given in connection with the ground of bogus purchase so in these circumstances, the order passed u/s 263 of the Act is not liable to be sustainable in the eyes of law. The facts of the present case is quite similar to the fact of the case decided by Hon'ble ITAT **in ITA. No.3563/M/2016 dated 10.11.2016 Ambuja Cements Ltd. Vs. CIT LTU.** The relevant finding is hereby reproduced as under.: -

> *"6. Against such a decision assessee is in appeal before the Tribunal. At the time of hearing, the learned representative of the assessee has made various submissions, but a pertinent point has been raised, which is based on the ratio of the judgment of Hon'ble Supreme Court in the case of CIT vs. Amitabh Bachchan [384 ITR 200]. It is sought to be emphasized that the basis on which the Commissioner has found the assessment order to be erroneous in his order is quite different from the point raised in the show cause noticed issued u/s. 263 of the Act, and that in fact the error finally established in the impugned order was not put to the assessee at all. On this basis, it has been argued that the order of the Commissioner is untenable in law. In support of his proposition, he has relied upon the following discussion in para 11 of the judgment of Hon'ble Supreme Court in the case of CIT vs. Amitabh Bachchan (supra)*
>
> > *"11. It may be that in a given case and in most cases it is so done a notice proposing the revisional exercise is given to the assessee*

> *indicating therein broadly or even specifically the grounds on which the exercise is felt necessary. But there is nothing in the section (section 263) to raise the said notice to the status of a mandatory show-cause notice affecting the initiation of the exercise in the absence thereof or to require the Commissioner of Income-tax to confine himself to the terms of the notice and foreclosing consideration of any other issue or question of fact. This is not the purport of section 263. Of course, there can be no dispute that while the Commissioner of Income-tax is free to exercise his jurisdiction on consideration of all relevant facts, a full opportunity to controvert the same and to explain the circumstances surrounding such facts, as may be considered relevant by the assessee, must be afforded to him by the Commissioner of Income-tax prior to the finalisation of the decision."*

7. In order to appreciate the point sought to be raised by the assessee, we may refer to the relevant contents of the show cause notice dated 26.02.2016, as under:

> *"2. ... verification of records revealed that the assessee had debited a provision of ` 52.80 crore for slow moving inventories. Vide Schedule P read with notes 18 to the accounts, it is stated that consequent of change in policy of recognizing, provisions for slow moving inventories of spares, based on the age of inventories, the company has made a provision of Rs.52.80 crore for slow moving inventories. This provision was created for the first time having effect on profit for relevant assessment year. Further, the provision is meant for temporary diminution in the value of spares meant for plant and machinery and related to capital in nature. The same was allowed by the Assessing Officer in the order under reference. The incorrect allowance of this provision led to under assessment of income of Rs.52.80 crore, involving tax effect of Rs.17.95 crore. As a result, the order passed by the A.O., seems to be erroneous in so far as it is prejudicial to the interest of revenue."*

In terms of the aforesaid, what the Commissioner has sought to make out is that the Provision for slow moving inventories of spares is 'Capital in nature' and, therefore, it has been incorrectly allowed by the Assessing Officer in the assessment order dated 28.02.2014 (supra). Thus, in the show cause notice, the Commissioner had found the assessment order erroneous in so far as it is prejudicial to the interests of the Revenue for the aforesaid reason.

8. Now, we may touch upon the manner in which the Commissioner has justified the fulfilment of conditions prescribed in section 263 of the Act in his order. Pertinently, and as has also been explained by the Hon'ble Supreme Court in Malabar Industrial Co. Ltd. vs. CIT [243 ITR 83], invoking of section 263 of the Act can be justified only on satisfaction 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. It is trite position of law that even if one of the aforesaid conditions is absent in a given case, then invoking of section 263 of the

Act would be untenable in law. In this background, we may now examine the manner in which the Commissioner has dealt with the conditions prescribed u/s. 263 of the Act in his order. The relevant discussion is contained in para 4 & 5 of his order, which reads as under:
"4. I have carefully considered the issue and perused the records. The allegation of the AR that revisiting the inventory for its categorization amounts to taking alternative view, is ill founded. Unlike reopening of assessment u/s 148 beyond 4 years, there is no requirement u/s 263 that the item should not have been in place before the AO in original assessment proceedings. There is no doubt that the provision is wrongly made for inventory and the same is accepted by the AO, resulting in prejudice caused to the Revenue. The conditions for Section 263 are fulfilled and the same is rightly invoked. Coming to the merits of the case, it is seen that the assesses places reliance on Dr. Aswath N. Rao's case to say that spare parts purchase for existing machineries has to be treated as revenue expenditure as these spare parts are purchased for maintenance of existing equipments. But at the same time, part of spare parts are capitalized and in the name slow moving inventory, provision of 30%, 50% or 80% is made. The assessee does not have any scientific basis for fixing the percentage of which provision is made. Such provisioning is not supported by Accounting Standard, and hence deserves to be disallowed, The AO is directed to withdraw the allowance of such provisions." Ostensibly, in para 4, the Commissioner concludes that the provision has been wrongly accepted by the Assessing Officer and the reason advanced is that 'There is no doubt that the provision is wrongly made for inventory and the same is accepted by the AO, resulting in prejudice caused to the Revenue'. In so far as discussion in para 5 is concerned, he refers to the judgment of Hon'ble Karnataka High Court relied upon by the assessee before him in the case of Dr Aswath N Rao vs. ACIT [326 ITR 188]. The assessee had relied upon the said judgment for the proposition that the cost of spare parts procured for the maintenance of the existing machineries were to be treated as revenue expenditure. The Commissioner notes that part of the spares are capitalized and that assessee was also making the provision for slow moving inventories of spares, which were being debited to the Profit & loss account. The Commissioner concludes that there is no scientific basis for fixing the percentage on which the provision has been made and, therefore, he inferred that the provision deserves to be disallowed. It is this finding of the Commissioner, which has formed the basis for the learned representative to argue before us that such a basis for treating the assessment order as erroneous was not put to the assessee and, therefore, no opportunity was allowed to the assessee to explain the circumstances in which the assessment has been held to be erroneous in so far it was prejudicial to the interests of the Revenue ultimately. 9. When the aforesaid was put across to the learned CIT-DR, at the time of hearing, his only plea was that the said aspect was very much emerging from the show cause notice u/s. 263 dated 26.02.2016 (supra), and, therefore, it cannot be said that the assessee was not made aware about such a point. The aforesaid plea of the learned DR, in our view, is quite contrary to the factual situation in as much as the non-satisfaction of the

Commissioner about the scientific basis of creating the provision, has not been referred to in the notice, dated 26.02.2016, at all, whose relevant portion has been reproduced by us in the earlier part of the order. Therefore, the preliminary point which is sought to be raised by the assessee based on the judgment of Hon'ble Supreme Court in the case of Amitabh Bachchan (supra) is very much applicable in the given facts of the present case. Notably, section 263(1) of the Act obligates the Commissioner to give the assessee an opportunity of being heard before passing of his order. No doubt the Commissioner is not disentitled to consider a point which is not stated in the notice so issued. However, the obligation to given an opportunity to the assessee of being heard on the point on the basis of which he finds it expedient to treat the assessment order erroneous in so far as it is prejudicial to the interests of the Revenue, is definitely cast on the Commissioner, as opined by the Hon'ble Supreme Court in the case of Amitabh Bachchan (supra). Considering the aforesaid, in our view, in the present case the basis on which the Commissioner has found the assessment order as erroneous in so far as it is prejudicial to the interests of the Revenue, namely, absence of any scientific basis for fixing the percentage to make the provision for slow moving inventories of spares, does not appear to have been put to the assessee, as is emerging from the material before us. Thus, on this point itself, we find the impugned order of the Commissioner to be untenable in the eyes of law. 10. The aforesaid proposition can also be understood in the present case from a different angle. As observed by us earlier, in the show cause notice the Commissioner considered the assessment to be erroneous in so far as it was prejudicial to the interests of the Revenue on the ground that the provision in question was capital in nature and, thus, the same was incorrectly allowed in the assessment order, dated 28.02.2014. Notably, while passing the impugned order, after considering the submissions of the assessee, the Commissioner find faults with the allowance of Provision because according to him there was no scientific basis for fixing the percentage for making the Provision. Notably, his earlier stand in the show cause notice of the Provision being capital in nature has been impliedly given a go-by. Ostensibly, the Commissioner found fault with the quantification/basis of making the Provision, which impliedly conveys that he accepted the plea of the assessee of the Provision being in the nature of revenue item charged to the Profit & loss account. Of course, the Commissioner is free to exercise his revisionary power u/s. 263 of the Act on any ground but what is of essence is that the assessee ought to have been allowed an opportunity to explain the circumstances on the ground formulated by the Commissioner to treat the assessment being erroneous in so far as it was prejudicial to the interests of the Revenue. The change in the stand of the Commissioner from that put to the assessee in the show cause notice and the basis which he has ultimately adopted to treat the assessment as erroneous and prejudicial to the interests of the Revenue, has not been put to the assessee and, thus, it is inconsistent with the understanding placed on section 263 of the Act by Hon'ble Supreme Court in the case of Amitabh Bachchan (supra), as detailed above. Therefore, the impugned order of the Commissioner is untenable in the eyes of law.

11. Before parting, we may also refer to the merit of the dispute in slight detail because the Commissioner has decided the issue on merits and held that the said provision is disallowable. In this context, the relevant facts are that the appellant is engaged in the manufacture of cement. In its submissions before the Commissioner, the assessee explained that in its line of business strict supervision of quality was required and, therefore, for regular up gradation of machineries used in the process of production, the assessee effected purchase of spares, which were of two kinds. Firstly the stores and spares which are meant for regular up-keep of plant and machinery and not relatable to any specific plant and machinery, for instance, nuts bolts, cables, washer, screws, filters, tubes, electrodes, spring etc. Such stores and spares, whenever issued were treated as revenue in nature and charged to Profit & loss account. With regard to the inventories of such type of spares, it made a provision of 30%, 50% and 80% depending upon the item of inventory, which is lying unused for more than one, two and three years respectively. It is this Provision, which is the subject matter of dispute. The second kind of spares were those which were specific to particular plant & machinery and their use was expected to be irregular and assessee had capitalized the purchase of such spares. In so far as the latter type of spares is concerned, there is no dispute and the only controversy is with regard to the stores and spares, which are not capitalized but are treated as part of the inventories and charged to Profit & loss account. The relevant discussion in the order of the Commissioner reveals that he has not disputed the factual matrix brought out by the assessee but has sought to deny the deduction only because, in his opinion, there was no scientific basis for fixing the percentage of provision. The objection of the Commissioner, in our view, is quite untenable in as much as the basis for making the provision was explained by the assessee to be the aging analysis of the spares lying in the inventory. Why and how the Commissioner does not find it to be a scientific basis is not elaborated. In fact, it is a case where the basis put forth by the assessee has been given a complete go-by without any cogent reasoning. Therefore, in our opinion, even the reason advanced by the Commissioner to treat the assessment order as erroneous is devoid of merit and does not deserve to be affirmed. We hold so.

12. Before parting, we may also refer to an argument put-forth by the learned CIT-DR based on the judgment of Hon'ble Gauhati High Court in the case of CIT vs. Shri Jawahar Bhattacharjee in ITA No.2 of 2009 and the order of Mumbai Bench of the Tribunal, dated 05.12.2012, in the case Alka Rajesh Agarwal vs. CIT in ITA No.5007/Mum/2009 for assessment year 2005-06. According to the CIT-DR there was no inquiry made by the Assessing Officer in the course of assessment proceedings on the points raised by the Commissioner and, therefore, invoking of section 263 was quite justified. On this point, we find enough potency in the rebuttal provided by the learned representative which was to the effect that the lack of inquiry by the Assessing Officer was not the basis formulated by the Commissioner to invoke the jurisdiction u/s. 263 of the Act. Therefore, in our view, the plea of the learned CIT-DR does not help the case of the Revenue in as much as what is required to be examined, at

> *this stage is the validity of assumption of jurisdiction by the Commissioner u/s. 263 of the Act on the basis of the error and prejudice brought out by him. The efficacy of the action of the Commissioner has to be tested only with respect to the basis adopted by him and cannot be further supplemented by the Revenue on any other new point. Thus, we find no merit in the submissions put forth by the learned CIT-DR, which is hereby rejected."*

5. The facts of the present case are also quite identical to the facts of the case **Sanghavi Diamonds Pvt. Ltd. Vs. Pr. CIT ITA. No.3178/M/2018** in which it is specifically held that the issue did not form the part of show-cause notice issued u/s 263 of the Act, cannot be the basis for revision of assessment order u/s 263 of the Act. In this regard, we also relied upon the decision of the Delhi High Court in the case of **Geometric Software Solutions Co. Ltd. Vs. ACIT (2009) 32 SOT 428 (Mum) and in the case of K. Sera Sera Productions Vs. CIT (2012) 27 taxmann.com 36 (Mum).** The facts of the case relied upon by the Ld. Representative of the revenue in case of **Amitabh Bachchan Vs. CIT (2016) 69 taxmann.com 170 (SC) as well as Arvee International Vs. ACIT ITA. No.3543/M/2003 (supra)** is quite unidentical because an opportunity of being heard or show-cause notice in any form regarding the issue has been given which was held to be justifiable but in the instant case no opportunity of being heard was given to the assessee nor the issue of bogus purchase was described and discussed in the show-cause notice dated 08.02.2018. When the issue of bogus purchase has not been discussed and described in the order u/s263 of the Act then how the order is erroneous and is prejudicial to the interest of revenue. By relying upon the law relied by Ld. Representative of the assessee (supra), we are of the view that the CIT is wrong in the eyes of law by invoking the provisions u/s 263 of the Act qua bogus purchases hence the order u/s 263 of the Act is not liable to be sustainable in the eyes of law. We ordered accordingly.

6. So far as the merit is concerned, we observed that the assessee filed the return of income on 21.09.2011. declaring total income to the tune of Rs.17,28,901/- which was processed u/s 143(3) of the Act. Thereafter, the case of the assessee was reopened by issuance of notice u/s 147 of the Act on the basis of an information received from the DGIT(Inv.), Mumbai in which the assessee has shown to be one of the beneficiary of bogus purchase entries from the 9 parties total in sum of Rs.3,14,27,381/-. Subsequently, the AO restricted the addition to the extent of 12.5% of the total bogus purchase by virtue of order dated 17.03.2016. The Pr. CIT invoked the provision u/s 263 of the Act by saying that the AO has not applied the decision of Supreme Court in the case of **N.K. Protein.** In this regard the matter of controversy has been adjudicated by Hon'ble ITAT in the case of **Rajal Enterprises Vs. Pr. CIT ITA. No.2273/M/2018.** The relevant finding has been given in para no. 5 which is hereby reproduced as under.: -

> *"5. We have considered rival submissions and perused material on record. Factual matrix of the case reveals that on the basis of specific information received indicating that the purchases made by the assessee are bogus, the Assessing Officer reopened the assessment under section 147 of the Act. It is also evident, in course of assessment proceeding the Assessing Officer has conducted necessary inquiry by calling for various information from the assessee as well as independently to ascertain the genuineness of the purchases made by the assessee. After examining the material available on record the Assessing Officer, though, was of the view that the assessee has failed to prove the genuineness of purchases made, however, he found that not only the assessee has shown the purchases made in the books of account but has also recorded the corresponding sales effected. Thus, he proceeded to make addition of the profit element embedded in the bogus purchases by estimating the same at 10%. Thus, a reading of the assessment order makes it clear, the Assessing Officer not only has conducted due inquiry to ascertain the genuineness of the purchases made by the assessee but has made addition on account of bogus purchases in terms with the principle laid down in various judicial precedents. It is observed, learned PCIT has held the assessment order to be erroneous and prejudicial to the interest of revenue primarily for two reasons. Firstly, due to non-consideration of the decision of hon'ble Supreme Court in case of N. K. Protein (supra) and secondly, due to lack of proper inquiry. As regards the second allegation of the PCIT, we are unable to agree with the same. The*

assessment order clearly reveals that the Assessing Officer made necessary inquiry to find out genuineness of purchases. As regards the allegation of non-consideration of the decision in case of N.K. Protein (supra), it is relevant to note, the said decision was rendered by the hon'ble apex court on 16.01.2017 which is much after the completion of assessment on 02.03.2016. Therefore, there is no occasion on the part of the Assessing Officer to consider the said decision. That being the case, the exercise of power under section 263 of the Act for non-consideration of the aforesaid decision of the hon'ble apex court is wholly misconceived. In any case of the matter, the addition to be made on the basis of bogus purchase is a purely factual issue and varies from case to case depending upon the facts of each case. In case of N.K. Protein (supra) the facts involved clearly reveal that there was a search and seizure action carried out in case of N.K. Protein during which various incriminating material including blank cheque books in the name of different entities were found which conclusively proved that the assessee had not made any purchases. Thus, in the context of those facts 100% addition on account of bogus purchases was upheld. Whereas, in the case of the present assessee no such facts are involved. In any case of the matter, when the assessee was able to link the purchases with corresponding sales, the logical conclusion which one can arrived at is, the assessee might not have purchased goods from the declared source but from some other parties. In that event, only the profit element embedded in the bogus purchases can be considered for addition. Therefore, the decision of the Assessing Officer to restrict the addition to 10% of the bogus purchases is in tune with the consistent view of the tribunal and different high courts in similar nature of cases. That being the case, in our view, the exercise of power under section.263 of the Act in the facts of the present case is invalid. Accordingly, the impugned order passed by the leaned PCIT under section 263 of the Act deserves to be quashed. Accordingly, we do so. Consequently, the order passed by the Assessing Officer is restored."

7. The facts of the present case is quite similar to the facts of the case described above i.e. **Rajal Enterprises.** By honouring the decision of the co-ordinate bench in the case of **Rajal Enterprises,** we are of the view that the invoking the provisions u/s 263 of the Act is not justifiable by taking the plea of non application of the judgment of **N.K. Protein(supra).** In this regard the matter has been described and discussed above which nowhere required to be repeated again. Accordingly, invoking the provisions u/s 263 of the Act qua merit also is not sustainable in the eyes of law. Accordingly, both issues are decided in favour of the assessee against the revenue.

8. In the result, the appeal of the assessee is hereby ordered to be allowed.

Order pronounced in the open court on this 26/06/2019

Sd/-	Sd/-
(M. BALAGANESH)	**(AMARJIT SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai; Dated 26/06/2019
Vijay

<u>Copy of the Order forwarded to</u> :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai