



**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"D" BENCH, MUMBAI**

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND**  
**SHRI M. BALAGANESH, ACCOUNTANT MEMBER**

ITA no.2367/Mum./2019  
(Assessment Year : 2009-10)

Mayur Rajnikant Shah  
21, A/B, 2<sup>nd</sup> Floor, Karia Indl. Estate  
M.K. Road, Mumbai 400 011  
PAN – AMYPS2230G

..... Appellant

v/s

PCIT of Income Tax  
Circle-21, Mumbai

..... Respondent

Assessee by : Shri dharmil Jhaveri  
Revenue by : Shri Abhishekh Patankar

Date of Hearing – 13.01.2020

Date of Order – 17.01.2020

**ORDER**

**PER SAKTIJIT DEY. J.M.**

The captioned appeal has been filed by the assessee challenging the order dated 26<sup>th</sup> February 2016, passed under section 263 of the Income Tax Act, 1961 (for short "*the Act*") by the learned Principal Commissioner of Income Tax (PCIT), Mumbai, pertaining to the assessment year 2009-10.

2. Brief facts are, the assessee, an individual, is engaged in the business of trading in diamond. For the assessment year under

dispute, the assessee filed his return of income declaring income of ₹ 5,64,630. Subsequently, the Assessing Officer received information from the DGIT(Inv.), Mumbai, that during the search and seizure operation conducted under section 132 of the Act in case of Rajendra Jain and his Group on 3<sup>rd</sup> October 2013, it was found that the said group is providing accommodation entries in the shape of bogus sales and bogus unsecured loans. It was found that the assessee has shown purchases of ₹ 37,32,250, from Shri Anoop Yogendra Jain (M/s Aadi Imoex) during the year under consideration who is affiliated to Shri Rajendra Jain Group. On the basis of such information, the Assessing Officer re-opened the assessment under section 147 of the Act. In the course of assessment proceedings, the Assessing Officer called upon the assessee to furnish various details to prove the purchases. Further, to verify the genuineness of purchases made from M/s Aadi Impex, the Assessing Officer issued notice under section 133(6) of the Act. After taking note of the information received and other material on record, the Assessing Officer was of the view that the assessee had not purchased the diamond from M/s. Aadi Impex, but has purchased them from grey market and to regularize such purchase has obtained accommodation bills from the concerned party. On the basis of such conclusion, the Assessing Officer estimated the gross profit @ 7% of the alleged non-genuine purchase worth ₹ 37,32,250, and added back

an amount of ₹ 2,61,258. Against the addition so made, the assessee preferred appeal before the first appellate authority which, as stated by the learned Authorised Representative, is still pending. Be that as it may, when the matter stood thus, learned PCIT in exercise of power conferred under section 263 of the Act, called for the assessment record and after examining it was of the view that the assessment order is erroneous and prejudicial to the interests of Revenue as the Assessing Officer without proper enquiry and application of mind has estimated the profit at 7% of the non-genuine purchases and made addition to that extent. In this context, the learned PCIT observed that the Hon'ble Gujarat High Court in case of N.K. Proteins Ltd. has confirmed 100% addition of non-genuine purchases which has been upheld by the Hon'ble Supreme Court. Thus, he issued a show cause notice to the assessee requiring him to explain why the assessment order should not be held as erroneous and prejudicial to the interests of Revenue and revised. As observed by learned PCIT, the show cause notice dated 6<sup>th</sup> February 2019, fixing the date of hearing on 18<sup>th</sup> February 2019, went without any response from the assessee. Accordingly, he proceeded to pass the impugned order under section 263 of the Act holding the assessment order to be erroneous and prejudicial to the interests of Revenue, as according to him, the Assessing Officer has passed such order without application of mind.

Thus, ultimately, the learned PCIT set aside the assessment order with a direction to the Assessing Officer to assess the income of the assessee afresh after following due procedure.

3. The learned Authorised Representative submitted, in the course of assessment proceedings the Assessing Officer has specifically enquired into the purchase transaction with M/s Aadi Impex by calling upon the assessee to furnish the relevant documentary evidences. Additionally, the Assessing Officer also conducted independent enquiry by issuing notice under section 133(6) of the Act to the selling party. He submitted, in pursuance to the notice issued under section 133(6) of the Act, the selling party not only confirmed of having effected the sales to the assessee, but furnished all supporting evidences. He submitted, after verifying the documentary evidences brought on record, the Assessing Officer, though, did not find any discrepancy, however, still he proceeded to treat the purchases as non-genuine and made addition of the profit element by estimating it @ 7%. He submitted, the aforesaid facts clearly indicate that the Assessing Officer has not only made enquiry with regard to the disputed purchases, but has passed the assessment order after due application of mind. He submitted, in the assessment year 2008-09 also, the assessee entered into similar transaction with four parties including M/s Aadi Impex and the Assessing Officer while completing the

assessment has made addition by estimate the gross profit @ 6% of the non-genuine purchases. He submitted, the assessment order passed under section 143(3) r/w section 147 on 23<sup>rd</sup> June 2016 has been accepted by the Department as it has not been subjected to any proceedings under section 263 of the Act. Thus, he submitted, the Revenue cannot take different stand on identical issue in respect of two different assessment years. Further, he submitted, the reliance upon the decision of the Hon'ble Supreme Court in N.K. Proteins (supra) is totally irrelevant as the said decision is factually distinguishable and not applicable to the facts of assessee's case. Thus, he submitted, the order passed under section 263 of the Act should be quashed. In support of such contention, learned Authorised Representative relied upon the following decision:-

*i) Yogesh C. Lakkad v/s ITO, ITA no.2464-2466/Mum./2019, dated 16<sup>th</sup> August 2019; and*

4. The learned Departmental Representative strongly relying upon the observations of learned PCIT submitted, the observations / conclusion of the Assessing Officer with regard to the non-genuine purchases is contradictory and conflicting. He submitted, once the Assessing Officer has treated the purchases as non-genuine, there is no reason why he restricted the addition to the gross profit rate of 7%. Thus, he submitted, the Assessing Officer has passed the assessment

order without proper application of mind. In this context, he specifically drew our attention to the observations of learned PCIT in Para-5 of the impugned order. Further, he submitted, as per Explanation-2 to section 263(1) of the Act, if the Assessing Officer has passed the order without making enquiry or verification which he should have made, learned PCIT is empowered under the Act to revise the assessment order. Thus, he submitted, there is no reason to interfere with the order passed under section 263 of the Act.

5. We have considered rival submissions in the light of the decisions relied upon and perused the material on record. A reading of the impugned order passed under section 263 of the Act by the learned PCIT makes it clear that he has considered the assessment order to be erroneous and prejudicial to the interests of Revenue primarily for the reason that the Assessing Officer without applying his mind and without enquiry has passed the assessment order. Of course, while doing so, he has also referred to the decision of the Hon'ble Gujarat High Court in N.K. Proteins, subsequently confirmed by the Hon'ble Supreme Court. Keeping in perspective the aforesaid reasoning of learned PCIT if we delve into the facts arising from record, it can be seen that the Assessing Officer initiated proceedings under section 147 of the Act having reason to believe that the purchases worth ₹ 37,32,250, claimed to have been made from Anoojj Yogendra Jain, is

non-genuine. In the course of assessment proceedings, the Assessing Officer enquired into the aforesaid aspect by calling upon the assessee to furnish documentary evidence to prove the purchase of goods. As it transpires from the record, in response to the query raised by the Assessing Officer, the assessee furnished various documentary evidences such as stock register, re-sale identification statement, quantitative tally of purchases and sales, bank statement indicating payment to supplier/seller, etc. It is further evident, with an intention to independently verify the genuineness of the aforesaid purchases, the Assessing Officer conducted enquiry with the selling dealer by issuing notice under section 133(6) of the Act. In Para-7 of the assessment order, the Assessing Officer has specifically stated that in response to the said notice, the selling dealer, M/s Aadi Impex vide letter dated 29<sup>th</sup> August 2016, confirmed the transaction. Even, on the face of such confirmation received from the selling dealer, the Assessing Officer relying upon the information gathered by Investigation Wing of the Department, in his own wisdom, chose not to accept the sales as genuine. However, presumably because the assessee had furnished the stock register, quantitative details of purchase and sales, bank statement reflecting payment, etc., the Assessing Officer concluded that the assessee may not have purchased the goods from the declared source, but from the grey market and for

regularizing such sales has obtained accommodation bills from the selling dealers. On the basis of the aforesaid reasoning, the Assessing Officer, thought it prudent to estimate the gross profit on such purchases at 7% and added back to the income of the assessee. Thus, from the aforesaid facts it is very much clear that during the assessment proceedings, the Assessing Officer has not only enquired into the alleged purchase transaction, but has applied his mind to the materials brought on record. In fact, the disputed purchase is the sole reason for which the assessment was re-opened under section 147 of the Act. In view of the aforesaid factual position, the observations of learned PCIT that the Assessing Officer has not applied his mind or has not made enquiry which he should have made, in our view, is without any factual basis. More so, when the selling dealer has responded to notice issued under section 133(6) by the Assessing Officer and has confirmed the sales made to the assessee. As regards the decision rendered in case of N.K. Proteins we must observe, in the facts of the said case, a search and seizure operation was conducted in the premises of the assessee and in the course of such search and seizure operation blank cheque books, bill books, letter heads in the name of various parties were found and seized. However, no such facts are involved in the present appeal. Even otherwise also, learned PCIT has not expressed any opinion as to whether the entire purchase should

have been disallowed or only profit element has to be added. He has again left the issue open for the decision by the Assessing Officer while directing him to make afresh assessment. When the Assessing Officer has already passed the assessment order after making necessary enquiry and applying his mind to the materials brought on record, it is not understood what more can be achieved by setting aside the assessment order and restoring the issue to him for making a fresh assessment without any specific direction. In the aforesaid facts and circumstances, we hold that exercise of power under section 263 of the Act in the facts of the instant case is not valid. Accordingly, we quash the order passed under section 263 of the Act and restore the assessment order. Grounds are allowed.

6. In the result, assessee's appeal is allowed.

Order pronounced in the open Court on 17.01.2020

**Sd/-**  
**M. BALAGANESH**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**SAKTIJIT DEY**  
**JUDICIAL MEMBER**

**MUMBAI, DATED: 17.01.2020**

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

*Pradeep J. Chowdhury*  
*Sr. Private Secretary*

True Copy  
By Order

Assistant Registrar  
ITAT, Mumbai