

आयकर अपीलीय अधिकरण "G" न्यायपीठ मुंबई में।

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

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.3386/Mum/2018

(निर्धारण वर्ष / Assessment Year : 2010-11)

M/s. Solaris Speciality Chemicals Pvt. Ltd., A-510/513, Crystal Plaza, New Link Road, Andheri (W), Mumbai-400053	बनाम/ v.	Principal CIT-11, Mumbai.
स्थायी लेखा सं./PAN:AACCA6673J		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri. Kapil K. Jain	
Revenue by:	Shri. B.B. Rajendra Prasad, CIT-DR	

सुनवाई की तारीख /**Date of Hearing** : 15.11.2018

घोषणा की तारीख /**Date of Pronouncement** : 08.02.2019

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member:

This appeal, filed by the assessee, being ITA No. 3386/Mum/2018, is directed against order dated 21.03.2018 passed by learned Principal Commissioner of Income Tax-11, Mumbai (hereinafter called "the Pr. CIT") u/s 263 of the Income-tax Act, 1961 (hereinafter called "the Act") for assessment year (AY) 2010-11.

2. The grounds of appeal raised by Assessee in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

“ 1. On the Facts and Circumstances of case, The Learned Principal Commissioner of Income Tax has erred in law by passing order u/s. 263 and setting aside the Assessment Order passed u/s. 143 (3) r.w.s.147 for fresh assessment to be made for examining the issue in the light of the provisions of section 69C of the Income Tax Act.

The Learned CIT failed to appreciate that AO has concluded the assessment after examining all the evidences and setting aside of the Assessment Order is merely a change of opinion based on existing set of facts.”

3. The brief facts of the case are that the assessee is engaged in the business of trading of chemicals. The assessee is supplying chemicals to various Government and Public Sector Undertakings and other Private concerns. The assessee filed its return of income on 11.10.2010 declaring total income of Rs. 5 24,94,418/- which was processed by Revenue u/s. 143(1) of the Act on 06.06.2011. Later on based upon the information received by the AO from Sales Tax Department through the office of DGIT (Inv), Mumbai , that the assessee is beneficiary of accommodation entries by way of bogus purchases from M/s. S.M Trading Company aggregating to Rs. 1,16,50,190/- during impugned assessment year and the said M/s. S.M Trading Company is hawala dealer engaged in issuing bogus bills without supplying any material, led the AO to reopen the concluded assessment by invoking provisions of Section 147 of the 1961 Act wherein notice dated 09.03.2015 u/s. 148 of the 1961 Act was issued by the AO to the assessee . The assessee submitted letters dated 08.03.2016 and 15.03.2016 before the AO during reassessment proceedings wherein the assessee co-related said alleged bogus purchases with that of sale and also submitted copies of purchases bills, ledger account, bank statement etc. with the AO in reassessment proceedings. The AO had earlier issued notice dated 23.02.2016 u/s 133(6) to M/s. S.M Trading Company which returned un-served . The assessee could not produce this party before the AO nor could provide correct address before the AO which finally led to additions to the income of the assessee to the tune of 12.5% of the alleged bogus

purchases aggregating to Rs. 1,16,50,190/- from said M/s S.M.Trading Company and the additions to the tune of Rs. 14,56,274/- were made by the AO to the income of the assessee, vide re-assessment order dated 15.03.2016 passed by the AO u/s. 143(3) read with Section 147 of the 1961 Act. This aforesaid addition to the income of the assessee as was made by the AO vide reassessment order dated 15.03.2016 attained finality as assessee chose not to further litigates on this issue before higher appellate forums and accepted additions as were made by the AO in order to buy peace and avoid protracted litigation with Revenue. So far so good as there is no dispute remaining between rival parties till this stage.

4. But, the learned Pr. CIT not being satisfied with the re-assessment framed by the AO vide reassessment orders dated 15.03.2016 passed by the AO u/s 143(3) r.w.s. 147 of the Act bringing to tax additional income to the tune of 12.5% of alleged bogus purchases, issued show cause notice to the assessee u/s. 263 of the Act, by treating said assessment dated 15.03.2016 as erroneous and prejudicial to the interest of Revenue and proposing to setting aside/cancelling the same.

5. The learned Pr. CIT was of the view that there are no provision u/s. 69C of the Act to disallow unexplained expenditure on proportionate basis and once the amount involved in such bogus purchase was held as unexplained , the entire amount is to be disallowed and by this analogy the Ld. Pr CIT was of the view that the entire alleged bogus accommodation entries of purchase to the tune of Rs. 1,16,50,190/- taken by the assessee company from M/s. S.M Trading Company was required to be brought to tax as against 12.5% of such purchases being Rs. 14,56,274/- as added by AO u/s. 69C of the Act. The show cause notice was issued by Ld. Pr. CIT to the assessee on 02.02.2018 and the assessee submitted details such as copies of purchase bills from M/s. S.M Trading Company, Stock Register , Ledger Account of S.M.Trading Company etc which as

admitted by Ld. Pr. CIT in his order u/s 263 , were duly submitted by the assessee even before the AO during reassessment proceedings. The Ld. Pr. CIT rejected the contentions of the assessee that 12.5% disallowance is justified under these circumstances, vide orders dated 21.03.2018 passed by Ld. Pr. CIT u/s. 263 of the 1961 Act, wherein learned Pr. CIT held as under:-

“ 10. *The submission of the assessee has been duly considered but found not acceptable for the reasons enumerated hereunder:*

a) The undisputable fact of the case is that S.M Trading Company was an accommodation entry provider issuing bogus purchase and sale bill without actual delivery of goods. It never sold any goods to the assessee but merely issued bogus bills. The said fact was confirmed by the investigation conducted by the Sales Tax Department, Govt. of Maharashtra and was subsequently shared with the Income Tax Department. The name of S.M. Trading company was listed in the data compiled by the Sales Tax Department, Gov of Maharashtra and shared with the Income Tax Department. The AO during the course of the assessment proceedings had issued notices under section 133(6) of the Income Tax Act, 1961 to M/s. S.M Trading Co., however, the same were returned by the postal authorities with the remark 'refused', hence further strengthening the case, that S.M. Trading company avoided appearing before-the Income Tax Department. This clearly indicates that it is only engaged in the business of providing accommodation bills and no physical delivery of goods took place.

b) Now the assessee submits that the he has sold the goods purchased from S.M Trading Company to buyers which are duly reflected in his books and confirmations from parties to whom these goods were sold were submitted during the course of reassessment proceedings. The AO was required to thoroughly enquire the source of such purchases and the genuineness of the sales claimed by the assessee by exercising powers u/s. 133(6) and 131 of the Income Tax Act, 1961.

c) The AO should also have examined the possibility that the goods may have been purchased from grey market in cash, which was available with the assessee but was unaccounted for. The source of such cash paid to the undisclosed parties at the time of purchase if remains unexplained, it is required to be examined and if need be added in to under section 69C of the Act. The entire amount of unaccounted cash which was used to fund these grey market purchases should be added back to the total income of the assessee under section 69C of the Income Tax Act, 1961 by the AO.

d) The assessee's contention that 'a part thereof can only be added under section 69C holds no merit. The Honourable Supreme Court Of India in recent judgement of N.K. Proteins Pvt Ltd vs Deputy Commissioner of Income Tax has held that bogus purchases should be disallowed at 100% of such amount.

11. In light of the above facts and circumstances and after examining all the facts of the case before me and after taking due cognizance of the submissions made by the assessee during the course of proceedings under section 263 of the Income Tax Act, 1961, it is held that the assessment order dated 15.03.2016 passed u/s 143(3) of the Act was same is hereby set aside and the assessing officer is directed to re-examine the issue in light of the provisions of Section 69C of the Income Tax, Act and the recent judgement by the Hon'ble Supreme Court of India and pass a speaking order after due analysis, in accordance with law."

6. Aggrieved by the order dated 21.03.2018 passed by learned Pr. CIT u/s 263 of the 1961 Act, the assessee has now filed an appeal before the tribunal and it is vehemently argued by the Ld. Counsel for the assessee that there is an allegation of bogus purchases made by the assessee from alleged hawala dealer namely S.M. Trading Company to the tune of Rs. 1.16 crore based upon Information received from Maharashtra VAT authorities. It was submitted by learned counsel for the assessee that based upon the said information received by the AO, reassessment proceedings were conducted by the AO against the assessee u/s. 143(3) r.w.s. 147 which led to the addition to the tune of 12.5% of the alleged bogus purchases, which is accepted by the assessee in order to buy peace and to avoid protracted litigation. It is submitted that the assessee is trader in chemicals and the assessee purchase and sell chemicals to Government/Semi Government entities and private entities. It was submitted that stock Register was produced before the AO as well as before learned Pr. CIT and there was one to one co-relation between these purchases made from M/s. S.M Trading Company and sales made by the assessee. It was submitted that the purchases were made from M/s. S.M Trading Company which were sold by the assessee on profits. It was submitted that notices issued u/s. 133(6) by the AO to

said M/s. S.M Trading Company was returned un-served it was submitted that assessee could not produce said party before the AO nor could submit the correct address before the AO and additions were made to the tune of 12.5% of the alleged bogus purchase by the AO which was accepted by the assessee to buy peace and avoid protracted litigation. It was submitted that provisions of Section 69C was invoked by the AO to make additions while passing reassessment order dated 15.03.2016. It was submitted that now learned Pr. CIT has invoked provision of Section 263 of the 1961 Act by treating such reassessment framed by the AO as erroneous and prejudicial to the interest of revenue and calling for additions to the tune of 100% of alleged bogus purchases. It was submitted that the said reassessment order dated 15.03.2016 passed by the AO u/s 143(3) read with Section 147 was neither erroneous nor prejudicial to the interest of revenue as purchases made from said M/s S.M.Trading Company were duly co-related with sales and the sales had been accepted by revenue which were duly brought to tax. It was submitted that all evidences such as purchase and sale bills, stock records , co-relation of sale with purchase from M/s. S.M Trading Company were made and payments were made to said M/s S M Trading Company by cheques which were all produced before the AO during reassessment proceedings. Our attention was drawn to page no. 10 of the paper book wherein ledger account of M/s S M Trading Company is placed to show that all purchases were duly accounted for and payments for these purchases were made by cheque. Our attention was also drawn to page no. 31 of the paper book to show that these fire resistant fluids purchased from M/s S M Trading Company were supplied to MAHAGENCO, Vedanta Aluminium Limited, Durgapur Projects Limited , Nasik Thermal Power Generation Company Limited and Sipat Thermal Power Project. Thus it was submitted that all the purchases and sales were co-related and the AO has rightly estimated profits embedded on these alleged bogus purchases on the grounds that the assessee could not produce the party before the AO and also

that incriminating information was received from the M-VAT authorities. It was submitted that in order to buy peace and to avoid protracted litigation with Revenue, the assessee accepted the said additions to the income of the assessee were made by the AO during the course of reassessment proceedings . It was also submitted that learned CIT(A) has in assessee case upheld the addition of 12% with respect to alleged bogus purchases for assessment year 2009-10 and the appellate order dated 03.04.2017 passed by Ld. CIT(A)-18,Mumbai (Appeal No. CIT(A)-18/IT-158/DC-11(2)(2)/15-16) is placed in file . It is submitted that the assessee has accepted the estimated profits embedded in these alleged bogus purchases as assessed by Revenue for AY 2009-10 and 2010-11 .On the other hand , it was submitted by Ld. CIT-DR that once Section 69C is invoked then 100% of the alleged unexplained expenditure is to be brought to tax as income of the assessee. It was submitted by learned CIT-DR that learned Pr. CIT has rightly invoked provisions of Section 263 as the reassessment order passed by the AO u/s 143(3) read with Section 147 was erroneous and prejudicial to the interest of Revenue. The Ld. Counsel for the assessee in rejoinder submitted that the learned Pr. CIT is only making roving and fishing inquiries by invoking provisions of Section 263 of the 1961 Act .It was submitted by learned counsel for the assessee that AO had duly applied its mind before upholding additions to the tune of 12.5% of alleged bogus purchases.

8. We have considered rival contentions and have perused the material on record. We have observed that the assessee is trader and supplying chemicals to various Government , Public Sector Undertakings and other private clients. The assessee filed its return of income on 11.10.2010 decaling total income of Rs. 5,24,94,418/- which was processed by Revenue u/s. 143(1) of the Act on 06.06.2011. Later on based upon the information received by the AO from Sales Tax Department through the office of DGIT (Inv), Mumbai , that the assessee is beneficiary of accommodation entries by way of

bogus purchases from M/s. S.M Trading Company aggregating to Rs. 1,16,50,190/- during impugned assessment year and the said M/s. S.M Trading Company is hawala dealer engaged in issuing bogus bills without supplying any material, led the AO to reopen the concluded assessment by invoking provisions of Section 147 of the 1961 Act wherein notice dated 09.03.2015 u/s. 148 of the 1961 Act was issued by the AO to the assessee . The assessee submitted letters dated 08.03.2016 and 15.03.2016 before the AO in reassessment proceedings wherein the assessee co-related said alleged bogus purchases with that of sale and also submitted copies of purchases bills, ledger account, bank statements evidencing payments to M/s S.M. Trading Company by cheque ,stock records etc. with the AO in reassessment proceedings. The AO had earlier issued notice dated 23.02.2016 u/s 133(6) to M/s. S.M Trading Company which returned un-served . The assessee could not produce this party before the AO nor could provide correct address of M/s. S.M Trading Company before the AO which finally led to additions to the income of the assessee to the tune of 12.5% of the alleged bogus purchases aggregating to Rs. 1,16,50,190/- allegedly made by assessee from M/s S.M.Trading Company which led to the additions to the tune of Rs. 14,56,274/- as were made by the AO, vide re-assessment order dated 15.03.2016 passed by the AO u/s. 143(3) read with Section 147 of the 1961 Act. This attained finality as assessee chose not to further litigates on this issue before higher appellate forums and accepted additions in order to buy peace and avoid protracted litigation with Revenue. So far so good as there is no dispute remaining between rival parties till this stage. Now, the Revenue wants to treat the said reassessment order dated 15.03.2016 passed by the AO u/s 143(3) read with Section 147 as erroneous so far as prejudicial to the interest of Revenue by invoking provisions of Section 263 of the 1961 Act, vide order dated 21.03.2018 passed by learned Pr. CIT u/s 263 of the 1961 Act. The learned Pr.CIT is of the view that once Section 69C is invoked then 100% additions to the income is warranted on account of

unexplained expenditure and there is no provision calling for additions on proportionate basis within the mandate of Section 69C of the 1961 Act. Similar additions to the tune of 12% of the alleged bogus purchases were upheld by Ld. CIT(A) for AY 2009-10 vide appellate orders dated 03.04.2017 in appeal no. CIT(A)-18/IT-158/DC-11(2)(2)/15-16. The issue for AY 2009-10 also attained finality as the assessee accepted the said order passed by learned CIT(A). The learned CIT-DR could not controvert this position. Now, the Ld. Pr. CIT is contemplating revising reassessment framed by the AO u/s. 143(3) r.w.s. 147 by bringing to tax 100% of the alleged bogus purchases from M/s. S.M Trading Company to the tune of Rs. 1,16,50,190/- for AY 2010-11 as against 12.5% of said alleged bogus purchases amounting to Rs. 14,56,274/- brought to tax by the AO vide reassessment order dated 15.03.2016 passed u/s. 143(3) r.w.s. 147 on the grounds that when Section 69C is invoked then 100% additions are to be made of the alleged bogus purchases. We have gone through entire material on record and we are of the considered view that in the instant case information was received by the AO from Maharashtra VAT Department through DGIT(Inv) Mumbai, that assessee is beneficiary of a accommodation entries by way of alleged bogus purchases from M/s S.M. Trading Company to the tune of Rs. 1,16,50,190/- and on that basis assessment was reopened by invocation of Section 147 of the 1961 Act, which led to the issuance of notice u/s. 148 of the Act . The assessee has submitted complete details as to the purchases made from M/s S.M Trading Company and corresponding sales made out of the stock purchased from said M/s S.M. Trading Company . The payments to M/s S.M. Trading Company was made by cheque . Ledger account of this party was brought on record by the assessee before the AO and Ld. Pr. CIT along with stock records wherein the purchases and sale were reconciled. The purchase and sales bills were also brought on record to justify that the said purchases were duly accounting for in the books of the accounts, payments were made by cheque to said M/s S M Trading

Company and sales were made against those purchases to MAHAGENCO, Vedanta Aluminium Limited, Durgapur Projects Limited, Nasik Thermal Power Generation Company Limited and Sipat Thermal Power Project. The AO issued notices u/s. 133(6) during the reassessment proceedings to M/s S.M Trading Company which returned unserved. The assessee could not furnish correct address of the said party before the AO neither the said party could be produced by the assessee before the AO. There is nothing on record which could evidence that the assessee received back cash from M/s S.M. Trading Company against cheque issued by the assessee but the fact remain that purchases are made by the assessee which are recorded in its books of accounts. The onus was on assessee to prove genuineness of these purchases and the assessee could not discharge its onus as the assessee could not produce this party M/s S M Trading Company before the AO nor could provide correct address of this party. Keeping in view factual matrix of the case, the AO brought to tax profits embedded in these purchases to the tune of 12.5% of the alleged bogus purchases from S.M Trading Company as an additional income of the assessee over and above declared by the assessee in its return of income. The assessee accepted the income as re-assessed by the AO vide reassessment order passed u/s 143(3) r.w.s 147 to buy peace and to avoid protracted litigation. We do not find any reason or justification for invocation of revisionary powers by learned Pr. CIT u/s 263 under these circumstances as the revenue has duly accepted the corresponding sale which were also made on profits. The said details are placed in paper book/page 31 filed by the assessee. Over and above profits declared by the assessee while filing of Return of income, the AO brought to tax income by way of profits embedded in these purchases to the tune of 12.5% of alleged bogus purchases. The Reference is drawn to the decision of Hon'ble Gujarat High Court in the case of CIT v. Bholanath Ploy Fab Private Limited reported in (2013) 355 ITR 290(Guj.), wherein Hon'ble Gujarat High Court held as under:

“6. We are of the opinion that the Tribunal committed no error. Whether the purchases themselves were bogus or whether the parties from whom such purchases were allegedly made were bogus is essentially a question of fact. The Tribunal having examined the evidence on record came to the conclusion that the assessee did purchase the cloth and sell the finished goods. In that view of the matter, as natural corollary, not the entire amount covered under such purchase, but the profit element embedded therein would be subject to tax. This was the view of this court in the case of Sanjay Oilcake Industries v. CIT [2009] 316 ITR 274 (Guj). Such decision is also followed by this court in a judgment dated August 16, 2011, in Tax Appeal No. 679 of 2010 in the case of CIT v. Kishor Amrutlal Patel. In the result, tax appeal is dismissed.”

Reference is also drawn to the decision of Hon’ble Supreme Court in the case of Kachwala Gems v. JCIT reported in (2007) 288 ITR 10(SC), wherein Hon’ble Supreme Court held as under:

11. It is well-settled that in a best judgment assessment, there is always a certain degree of guess work. No doubt the authorities concerned should try to make an honest and fair estimate of the income even in a best judgment assessment and should not act totally arbitrarily, but there is necessarily some amount of guess work involved in a best judgment assessment, and it is the assessee himself who is to blame as he did not submit proper accounts. In our opinion, there was no arbitrariness in the present case on the part of the income-tax authorities. Thus, there is no force in this appeal, and it is dismissed accordingly. No costs.”

As could be seen from the decision of Hon’ble Supreme Court in the case of M/s. Kachwala Gems(supra) and decision of Hon’ble Gujarat High Court in the case of Bholanath Poly Fab Private Limited(supra), under these circumstances there should be fair and honest estimation of profits embedded in purchases and the AO had made an estimation of additional income to the tune of 12.5% of alleged bogus purchases to be brought to tax in the hands of the assessee which in our considered view is fair and reasonable view taken by the AO and which cannot be faulted with as it is one of the plausible and reasonable view taken by the AO and , thus , in our considered view revisionary order passed by Ld. Pr. CIT u/s. 263 is not sustainable in the eyes of law as reassessment order passed by the AO cannot be called as erroneous so far as prejudicial to the interest of Revenue. There is one more aspect of the matter that the revenue has accepted sales corresponding to the purchases and on the touch stone of equity

and fair play if purchases are to be disallowed to the tune of 100% then corresponding sales are to be excluded as it is not established by learned Pr. CIT that purchases from M/s S M Trading Company is fictitious purchases not backed with sales. The Revenue cannot be allowed to blow hot and cold at the same time. There is no incriminating evidence brought on record by Revenue that the assessee has received back cash against the payment made by it to M/s S.M Trading Company by cheque or payments were made in cash for purchases from grey market. The whole edifice of the Revenue case hinges upon information received from Maharashtra VAT authority that M/s S.M Trading Company is engaged in providing bogus accommodation entries and notices issued by AO to M/s S.M Trading Company u/s. 133(6) returned un-served and the assessee having failed to produce the said party before the AO nor could provide correct address to the AO. M/s S.M. Trading Company had also not stood the test of cross examination by the assessee nor statement of S M Trading Company was recorded by the Revenue . The Revenue is relying on the information received by it from Maharashtra VAT Authorities. No doubt purchases are recorded in the books of the assessee and the onus is on the assessee to produce the said party to prove the genuineness of the purchases . Now to restart the whole process to find out whether the assessee received back cash against cheque issued or made payments in cash for purchasing material from grey market is like finding black cat in dark which may not be there. The reliance of learned Pr. CIT on the decision of Hon'ble Supreme Court in the case of M/s N K Proteins Limited v. DCIT (2017) 84 taxmann.com 195(SC) wherein SLP filed by the taxpayer stood dismissed by Hon'ble Supreme Court against decision of Hon'ble Gujarat High Court is not warranted as factual matrix in the said case was entirely different than factual matrix in the instant appeal before us. In the said case of N K Proteins(supra), searches were conducted by Revenue and falsity of entries of fictitious invoices for purchases in books of accounts of the tax-payer were proved . In the said case

blank cheque books , blank bills and vouchers of bogus hawala entry operators were found during the course of search from the office premises of tax-payer having blank endorsements at the back of cheques . Under those circumstances of clinching evidences , additions to the tune of 100% of alleged bogus purchases were upheld. In the instant case before us, no such conclusive evidences were on record to justify additions to the tune of 100% of alleged bogus purchases. Thus, keeping in view the entire factual matrix of the case as discussed by us in the preceding paras of this order we are of the view that the decision taken by AO during reassessment proceedings cannot be faulted with and does not require revisionary intervention by learned Pr. CIT u/s 263 of the 1961 Act. Thus the order dated 21.03.2018 passed by the Ld. Principal CIT u/s. 263 is set aside and quashed. The appeal of the assessee stood allowed. We order accordingly.

9. In the result appeal in ITA no. 3386/Mum/2018 filed by the assessee for AY 2010-11 stood allowed.

Order pronounced in the open court on 08.02.2019.

आदेश की घोषणा खुले न्यायालय में दिनांक: 08.02.2019 को की गई

Sd/

(SAKTIJIT DEY)
JUDICIAL MEMBER

Sd/-

(RAMIT KOCHAR)
ACCOUNTANT MEMBER

Mumbai, dated: 08.02.2019

Nishant Verma
Sr. Private Secretary
copy to...

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench,
6. Master File

// Tue copy//

BY ORDER

DY/ASST. REGISTRAR
ITAT, MUMBAI

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