

**IN THE INCOME TAX APPELLATE TRIBUNAL  
CIRCUIT BENCH, VARANASI**

**BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER  
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

ITA No. 49/Vns/2018  
Assessment Year: 2012-13

The Assistant Commissioner of Income Tax, Circle-1, Aayakar Bhawan, Civil Lines, Gorakhpur 273001, Uttar Pradesh	v.	Shri Bajrang Bahadur Singh, Marhatha, Campierganj, Gorakhpur-273001, Uttar Pradesh
		PAN: AFXPS6284G
(Appellant)		(Respondent)

Assessee by:	None
Revenue by:	Shri Ramendra Kumar Vishwakarma, CIT, DR
Date of hearing:	23.05.2022
Date of pronouncement:	31.05.2022

**ORDER**

**PER SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER:**

This appeal, filed by Revenue, being ITA No.49/Vns/2018, is directed against appellate order dated 28.06.2018 passed by Id. Commissioner of Income-tax , Gorakhpur (hereinafter called " the CIT(A)"), the appellate proceedings before Id. CIT(A) has arisen from assessment order dated 12.12.2017 passed by Id. Assessing Officer (hereinafter called " the AO") under Section 143(3) read with Section 263 of the Income Tax Act, 1961 (hereinafter

called “ the Act” ) . This appeal was heard in Open Court proceedings through physical hearing mode.

2. The grounds of appeal raised by the Revenue in memo of appeal filed with Income Tax Appellate Tribunal, Varanasi (hereinafter called “ the tribunal” ) , reads as under :

- “1. That the order of the Ld. CIT (A) is perverse and bad in law.*
- 2. That Ld. CIT (A) erred in law and fact in deleting the specific disallowances u/s 40A(3) of Rs.5,80,12,836/-(related to material consumed) and of Rs.1,81,47,450/-(related to labor payment) ignoring that the assessee failed to establish its genuineness and also failed to specify any mitigating circumstances for making such payment in cash in contravention of the provision of section 40A(3) of the I.T. Act, 1961.*
- 3. The CIT(A) also erred in taking stand that addition made under any specific provision u/s 40A(3) of the IT. Act, case be overridden/substituted by general provision of I.T. Act by invoking section 145(3) of the I.T. Act.*
- 4. The CIT(A) erred in not adjudicating ground no. 6 which is related to disallowance of depreciation of Rs.3,37,520/- which was wrongly mentioned in his order at Rs.33,75,200/-.*
- 5. The appellant craves right to add alter or amend any ground which may be taken at the time of hearing.”*

3. This appeal filed by Revenue is almost four years old. This appeal was first fixed for hearing before Division Bench(DB) on 17.10.2109 , when none appeared on behalf of the assessee nor any adjournment application was moved, and the appeal was adjourned by DB. Thereafter, this appeal came up for hearing before DB on 23.03.2022 , again none appeared on behalf of the assessee before the DB when this appeal was called for hearing nor any adjournment application was moved, and directions were issued by the Bench

to issue notice to the assessee through RPAD and by email, and the appeal was adjourned. This appeal again came up for hearing before DB on 20.4.2022, and again none appeared on behalf of the assessee but however adjournment application was moved in writing by the assessee, and the DB was pleased to adjourn the hearing . When this appeal again came up for hearing before the Bench on 23.05.2022 , none appeared on behalf of the assessee nor any adjournment application was moved. Thus, it is abundantly clearly that the assessee is not interested in pursuing this appeal. The DB declined to grant adjournment when this appeal came for hearing on 23.05.2022 , and the DB proceeded to adjudicate this appeal after hearing ld. CIT-DR and after perusing material available on record.

4. The assessee is a civil contractor. This assessee filed its return of income declaring total income of Rs.64,87,970/-, on 29.09.2012 . The assessment was completed by the Assessing Officer by assessing total income of Rs.67,43,840/- in original assessment proceedings , vide assessment order dated 29.09.2012 passed by AO u/s 143(3) of the 1961 Act, wherein certain expenses were disallowed by the AO . The ld. Pr. CIT, Gorakhpur invoked the revisionary powers u/s. 263 of the Act , and set aside the assessment order dated 29.09.2012 passed by AO u/s 143(3) by treating the same as erroneous and so far as prejudicial to the interest of Revenue and directed AO to frame fresh assessment, vide revisionary order dated 29.03.2017 passed by ld. Pr. CIT u/s 263 of the 1961 Act, by holding as under:

*“From the above it clear that assessment was completed without due proper and adequate enquiries, making the order erroneous and prejudicial to the interest of revenue, and he also did not cooperate in the assessment proceedings as noted by the*

*AO in his order, and therefore, I set is aside to the file of the AO to be done afresh.”*

5. It transpires from the assessment order dated 12.12.2017 passed by the Assessing Officer in consequence of revisionary order passed by Id. Pr. CIT u/s. 263 of the Act , dated 29.03.2017 , that the assessee did not produced books of account in the original assessment proceedings as also that the assessee did not produced any books of account even during the assessment proceedings conducted by the Assessing Officer in consequence of the revisionary order passed by Id. Pr. CIT u/s. 263 of the Act. The AO observed that the assessee has wrongly stated in his reply that books of accounts were produced before the AO during original assessment proceedings, while no books of accounts were infact produced by the assessee in original assessment proceedings , as found mentioned in the order sheet entry dated 24.02.2015. The AO further observed that no books of accounts were also produced in the assessment proceedings conducted by AO in consequence of the revisionary order passed by Id. Pr. CIT u/s 263. The AO further observed that no bills and vouchers were produced by the assessee during assessment proceedings conducted by AO in pursuance to revisionary order passed by Id. Pr. CIT u/s 263, and it was noted by AO in his order that except written submissions, nothing else was produced by the assessee. The AO observed that even in original assessment proceedings, the assessee has filed merely photocopies of some ledgers, while no bills and vouchers were produced by the assessee. The AO observed that the assessee has submitted ledger account of material purchases ,and it was observed by the AO that the assessee has made payments of Rs. 5,80,12,836/- towards material purchases which were paid in cash. The AO further observed that the ledger account submitted in

original assessment proceedings and in the assessment proceedings in pursuance to revisionary order passed by Id. Pr. CIT , the assessee has submitted two different sets of material consumed ledger accounts, which were enclosed by the AO as annexure A and annexure B, both enclosed to the assessment order. The AO observed that the assessee has tried to bifurcate these cash payments to bring down cash payments in a day to below the threshold limit of Rs. 20,000/- . The AO observed that the assessee has not produced cash book, any receipt book , any bill or voucher so that the payments could be verified. The AO observed that the assessee has changed the ledger account of material consumed to bring down cash payments within threshold limit of Rs. 20,000/- , in order to avoid being hit by provisions of Section 40A(3). The AO observed that in the material consumed ledger filed by assessee during assessment proceedings consequent to the revisionary order passed by Id. Pr. CIT , even names of the payee is changed. Further, the AO observed that the none of the cash payments towards material purchases made by the assessee are supported by vouchers. This led to the additions to the tune of Rs.5,13,57,520/- being made by the AO to the income of the assessee on account of such payments been made in cash otherwise than account payee cheque, by invoking provisions of Section 40A(3) by the AO during assessment proceedings conducted by AO u/s 263 read with Section 143(3), and the material consumed to the tune of Rs. 5,13,57,520/- was added to the income of the assessee.

5.2 Similarly, the AO observed that the assessee has made payment to the tune of Rs. 2,16,67,364/- towards labour charges. The AO observed from the ledger of labour payments, that cash payments in excess of Rs. 20000/- in a day were

made towards labour charges, to the tune of Rs. 1,81,47,450/- . The details are extracted by AO in its assessment order dated 12.12.2017 passed u/s 143(3) read with Section 263, at page 4 and 5. The AO asked assessee to explain these cash payments. The assessee submitted muster roll before AO, and it was observed by the AO that there are several inconsistencies in muster roll and further details of payees are not there. The AO further observed from muster roll that it is an afterthought by the assessee. The AO rejected muster roll by observing as under:

*“1. On going through the muster roll it is seen that numbers of labour employed by the assessee in a day is more than 20. The assessee has not paid any ESI, Gratuity, etc. as required under labour laws. Had this much strength of labours the assessee should have certainly taken permission of the concerned authority of labour department.*

*2. From this muster roll it is not clear that the same actually belong to the assessee. Even the assessee has not certified that the same pertains to him.*

*3. On these muster role the payments have been made at the end of the month only. However, in labour charges payment ledger it is seen that apart from the above payment of Rs. 1,81,47,450/- the remaining payment of Rs. 35,19,914/- has also been made on different dates other than month ending. This muster role does not contain the details such of payments made dates other than month ending. Therefore, this muster role is not reliable.*

*4. The work has been conducted on three or four sites , who has supervised the work or who has made such payment to labours is not clear.*

*5. It has also not been clarified by the assessee that he has made payments to somebody who disbursed the amounts to the labours concerned.*

*6. It seems that this muster roll is an afterthought of the assessee.”*

The AO observed that the assessee has not produced books of accounts, and hence availability of cash in hand cannot be verified. The AO observed that the payments have been made exceeding Rs. 20000/- in cash on single day, and no explanation has been offered by the assessee, which led AO to invoke provisions of Section 40A(3) and cash payments to the tune of Rs. 1,81,47,450/- towards labour payments stood added by the AO to the income of the assessee , vide assessment order dated 12.12.2017 passed by AO u/s 143(3) read with Section 263 of the 1961 Act.

5.3 There were other addition being made by the AO to the tune of Rs. 3,37,200/- on account of disallowance of depreciation claimed by the assessee, vide assessment order dated 12.12.2017 passed by AO u/s 143(3) read with Section 263 of the 1961 Act. The AO observed that the assessee has shown addition in the fixed assets in Plant and Machinery (Tippers 3 Numbers) at Rs. 44,96,000/- , but the assessee did not submitted any proof of purchase of such plant and machinery or the date when the same was put to use.

6. Aggrieved by assessment order dated 12.12.2017 passed by AO u/s 263 read with Section 143(3) , the assessee filed first appeal before Id. CIT(A), who was pleased to partly allow appeal of the assessee, by rejecting books of account u/s. 145(3) of the Act , as in view of Id. CIT(A), the AO was not able to verify books of accounts as the same were not produced before the AO and only photocopies of some ledger accounts were submitted. The Id. CIT(A) observed that additions made by the AO resulted into net profit percentage of more than 75% which as per Id. CIT(A) is impossible in any line of business. The Id. CIT(A) observed that the assessee is a civil contractor and

has shown gross receipt of Rs.10,18,28,011/-. The ld. CIT(A) observed that the nature of work of the assessee required purchasing of sand, grit, soil, morang etc. and hire labour on day to day basis in a large amount, the payments were made in cash which cannot be made through cheque as the cash payment is made to building material suppliers and labours. The ld. CIT(A) observed that the suppliers of building material are generally truck drivers who do not accept cheques and labour also does not accept cheques. The ld. CIT(A) observed that if payment is otherwise genuine, then Section 40A(3) has no applicability even if the cash payment in a day is in excess of threshold limit. The ld. CIT(A) also gave finding that during original assessment proceedings u/s 143(3), the books of accounts were produced by the assessee, which were not rejected by AO u/s 145(3) of the 1961 Act. The ld. CIT(A) referred to Section 40A(3) and Rule 6DD of the Income-tax Rules, 1962. The ld. CIT(A) referred to decisions of the Courts and observed that ratio of law laid down by Hon'ble High Courts is that the object of Section 40A(3) is to check evasion of taxes so that payment is made from disclosed sources. It presupposes that the transaction must be a genuine transaction. The ld. CIT(A) observed that Rule 6DD relaxes the rigours of Section 40A(3) , in a genuine and bonafide cases to avoid harassment and hardship. It was observed by ld. CIT(A) that the practicability of Rule 6DD (j)(2) is to be judged from the point of view of businessmen and not from the point of Revenue. The ld. CIT(A) observed that where the payment is made in cash, the AO has to see that the transaction is genuine and allow the deduction. The ld. CIT(A) further observed that circular of Board is not exhaustive but illustrative, and the AO has to see the surrounding circumstances , consideration of business expediencies and the facts of each particular case. The ld. CIT(A) finally

rejected books of accounts by invoking provisions of Section 145(3) of the 1961 Act and estimated net profits of the assessee @ 6% of gross receipts of Rs.10,18,28,011/- , which as per ld. CIT(A) was fair and judicious. The miscellaneous income of Rs. 11,45,654/- disclosed by assessee in its books of accounts were directed to be brought to tax , separately in addition to the income estimated by ld.CIT(A) @6% of gross turnover.

6.2 The ld. CIT(A) did not adjudicated on the issue of disallowance of depreciation of Rs. 3,37,200/- by the AO, however in the grounds of appeal( ground no. 6) raised by the assessee, as reproduced by ld. CIT(A) in its appellate order, the figure of disallowance of depreciation is erroneously mentioned at Rs. 33,75,200/- as against the correct figure of Rs. 3,37,200/- , although it is observed by us in form no. 35 filed by the assessee with ld. CIT(A), the figure of Rs. 3,37,200/- is correctly mentioned by the assessee in its ground of appeal raised with ld. CIT(A).

7. Now, it was the turn of Revenue to be aggrieved by the appellate order passed by ld. CIT(A) , and the Revenue has now filed this appeal before the tribunal. None appeared on behalf of the assessee when this appeal was called for hearing before the Division Bench nor any adjournment application was moved on behalf of the assessee , on 23.05.2022. As we have elaborately discussed in para 3 above, that this is an old appeal pending for adjudication for last almost four year, the DB declined to adjourn the hearing on 23.05.2022 and proceeded to adjudicate this appeal after hearing ld. CIT-DR and perusing the material on record. The ld. CIT -DR submitted that ld. Pr. CIT invoked provisions of Section 263 of the 1961 Act, and the assessment order originally passed by the AO u/s 143(3) was considered as erroneous so far as

prejudicial to the interest of Revenue and was accordingly set aside. The Id. CIT-DR submitted that the assessee did not produced books of accounts in the original assessment proceedings as well during assessment proceedings conducted by AO in consequence to the revisionary order passed by Id. Pr. CIT u/s 263 of the 1961 Act. The Id. CIT-DR submitted that additions were made by the AO u/s. 40A(3) , as the assessee made cash payments exceeding Rs. 20000/- in a day towards material purchases as well as labour payments. The Id. CIT-DR submitted that Id. CIT(A) rejected books of account u/s. 145(3) and assessed income of the assessee @ 6% of the gross receipt of Rs.10,18,28,011/-.

8. We have heard the contentions of the Id. CIT-DR and perused the material on record. The brief facts of the case are that assessee is a civil contractor. This assessee filed its return of income declaring total income of Rs. 64,87,970/-, on 29.09.2012 . The assessment was completed by Assessing Officer by assessing total income of Rs.67,43,840/- in original assessment proceedings conducted u/s 143(3) read with Section 143(2), vide assessment order dated 29.09.2012 passed u/s 143(3) of the 1961 Act , wherein certain expenses were disallowed by the AO . The Id. Pr. CIT, Gorakhpur invoked revisionary powers u/s. 263 of the Act , and set aside the assessment order dated 29.09.2012 passed by the AO u/s 143(3) by treating the same as erroneous so far as prejudicial to the interest of Revenue and directing AO to conduct fresh assessment, vide revisionary order dated 29.03.2017 passed by Id. Pr. CIT u/s 263 of the 1961 Act, by holding as under:

*“From the above it clear that assessment was completed without due proper and adequate enquiries, making the order erroneous and prejudicial to the interest of revenue, and he also*

*did not cooperate in the assessment proceedings as noted by the AO in his order, and therefore, I set is aside to the file of the AO to be done afresh.”*

Perusal of the assessment order dated 12.12.2017 passed by the Assessing Officer in consequence to revisionary order passed by Id. Pr. CIT u/s. 263 of the Act , dated 29.03.2017 , categorically records that the assessee did not produced books of account in the original proceedings as also that the assessee did not produced any books of account even during the assessment proceedings conducted by the Assessing Officer in consequence of the revisionary order passed by Id. Pr. CIT u/s. 263 of the Act. The AO observed that the assessee has wrongly stated in his reply that books of accounts were produced before the AO during original assessment proceedings, while no books of accounts were produced by the assessee before AO in original assessment proceedings , as found mentioned in the order sheet entry dated 24.02.2015. The AO further observed that no books of accounts were also produced in the assessment proceedings conducted by AO in consequence of the revisionary order passed by Id. Pr. CIT u/s 263. The AO further observed that no bills and vouchers were produced by the assessee during assessment proceedings conducted by AO in pursuance to revisionary order passed by Id. Pr. CIT u/s 263, and it was noted by AO in his order that except written submissions, nothing else was produced by the assessee. The AO observed that even in original assessment proceedings, the assessee has filed merely photocopies of some ledger accounts, while no bills and vouchers were produced. The AO observed that the assessee has submitted ledger account of material purchases , and it was observed by the AO that the assessee has made

payments to the tune of Rs. 5,80,12,836/- towards material purchases which were paid in cash. **The AO further observed that the ledger account submitted in original assessment proceedings and in the assessment proceedings in pursuance to revisionary order passed by Id. Pr. CIT , the assessee has submitted two different sets of material consumed ledger accounts, which were enclosed by the AO as annexure A and annexure B, both enclosed to the assessment order.**The AO observed that the assessee has tried to bifurcate these cash payments to bring down below the threshold limit of Rs. 20,000/- per day. The AO observed that the assessee has not produced cash book, receipt book , bills or voucher(s), so that the payments could be verified. The AO observed that the assessee has changed the ledger account of material consumed to bring down cash payments within threshold limit of Rs. 20,000/- per day, in order to avoid being hit by provisions of Section 40A(3). The AO observed that in the material consumed ledger filed during assessment proceedings consequent to the revisionary order passed by Id. Pr. CIT, even names of the payee is changed. Further, the AO observed that none of the cash payments towards material purchases made by the assessee are supported by vouchers. This led to the additions to the tune of Rs.5,13,57,520/- being made by the AO to the income of the assessee on account of such payments been made in cash otherwise than through account payee cheque, by invoking provision of Section 40A(3) by the AO and the material consumed to the tune of Rs. 5,13,57,520/- was added to the income of the assessee. **We have carefully gone through these two different sets of ledger accounts, and observes that the assessee has manipulated and falsified the records by making wrong entries in the second set of ledger account filed in assessment proceedings conducted by AO in**

**consequences to revisionary order passed by Id. Pr. CIT, in order to bring itself out of clutches of provisions of Section 40A(3).** Similarly, the AO observed that the assessee has made payment to the tune of Rs. 2,16,67,364/- towards labour charges. The AO observed from the ledger of labour payments, that cash payments in excess of Rs. 20000/- in a day were made towards labour charges, to the tune of Rs. 1,81,47,450/- . The details are extracted by AO in its assessment order dated 12.12.2017 , at page 4 and 5. The AO asked the assessee to explain these cash payments. The assessee submitted muster roll before the AO, and it was observed by the AO that there are several inconsistencies in the muster roll and further the details of payees are not there. The AO further observed from the muster roll that it is an afterthought by the assessee. The AO rejected muster roll by observing as under:

*“1. On going through the muster roll it is seen that numbers of labour employed by the assessee in a day is more than 20. The assessee has not paid any ESI, Gratuity, etc. as required under labour laws. Had this much strength of labours the assessee should have certainly taken permission of the concerned authority of labour department.*

*2. From this muster roll it is not clear that the same actually belong to the assessee. Even the assessee has not certified that the same pertains to him.*

*3. On these muster role the payments have been made at the end of the month only. However, in labour charges payment ledger it is seen that apart from the above payment of Rs. 1,81,47,450/- the remaining payment of Rs. 35,19,914/- has also been made on different dates other than month ending. This muster role does not contain the details such of payments made dates other than month ending. Therefore, this muster role is not reliable.*

*4. The work has been conducted on three or four sites , who has supervised the work or who has made such payment to labours is not clear.*

*5. It has also not been clarified by the assessee that he has made payments to somebody who disbursed the amounts to the labours concerned.*

*6. It seems that this muster roll is an afterthought of the assessee.”*

The AO observed that the assessee has not produced books of accounts, the availability of cash in hand cannot be verified. The AO observed that the payments have been made exceeding Rs. 20000/- in cash on single day, and no explanation has been offered by the assessee, which led AO to invoke provisions of Section 40A(3) and cash payments to the tune of Rs. 1,81,47,450/- towards labour payments, stood added to the income of the assessee , vide assessment order dated 12.12.2017 passed by AO u/s 143(3) read with Section 263 of the 1961 Act.**The Id. CIT(A) has given erroneous finding that the books of accounts were produced by the assessee before the AO. Infact no vouchers, invoices, cash book, books of accounts were produced, and merely ledger accounts were produced and that too were changed by assessee in assessment proceedings conducted in consequences to revisionary order passed by Id. Pr. CIT u/s 263.**The assessee is claiming deduction towards material purchases and labour payments from its income chargeable to tax, and thus the onus is on the assessee to bring on record cogent material to substantiate the same , as well that compliances of statutory provisions such as Section 40A(3) were made, before being allowed deduction by Revenue. Reference is drawn to provisions of Section 40A(1) as was applicable for the relevant assessment year under consideration , which carries a non obstante clause, which reads as under:

*"Expenses or payments not deductible in certain circumstances.*

**40A. (1) The provisions of this section shall have effect notwithstanding anything to the contrary contained in any other provision of this Act relating to the computation of income under the head "Profits and gains of business or profession".**

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*(3) Where the assessee incurs any expenditure in respect of which a payment or aggregate of payments made to a person in a day, otherwise than by an account payee cheque drawn on a bank or account payee bank draft, exceeds twenty thousand rupees, no deduction shall be allowed in respect of such expenditure.*

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Section 40A(1) contain a non obstante clause, that provisions of Section 40A shall have effect not withstanding anything to the contrary contained in any other provisions of the 1961 Act , relating to computation of income under the head "Profits and Gains of Business or Profession" . Section 40A(3) requires that where the assessee incurs any expenditure in respect to which payment or aggregate of payments made to a person in a day, is made otherwise than by an account payee cheque drawn on a bank or account payee bank draft, exceeding Rs. 20000/- , then no deduction of such cash expenses shall be allowed in respect of such expenditure while computing income chargeable to tax . It transpires that the assessee has admittedly made cash payments exceeding Rs.20,000/- towards material purchases and labour payments in cash in a day, which clearly is made otherwise than through account payee cheque or account payee bank draft, and there is clearly an infringement of Section 40A(3). Thus, no deduction of these cash expenses exceeding threshold limit in a day , can be allowed, in view of clear infringement/violation of Section 40A(3) , wherein Section 40A(1) contains a non obstante clause which

stipulates that provisions of Section 40A(1) shall have effect notwithstanding anything to the contrary contained in any other provisions of the 1961 Act , relating to computation of income under the head “Profits and Gains of Business or Profession”. It was for the assessee to have led evidences to substantiate that no such cash payments in excess of Rs. 20000 in a day was made, rather the assessee in assessment proceedings conducted by AO u/s 263 read with Section 143(3) instead of explaining that these cash payments are not hit by Section 40A(3) read with Section 40A(1), falsified the record by bringing on record second set of ledger’s of material purchases and labour payments. The assessee has tried to wriggle out of clutches of Section 40A(3) by producing second set of ledger account in the assessment proceedings conducted by AO consequent to revisionary order passed by Id. Pr. CIT u/s 263. Once there is a clear infringement of provision of Section 40A(3) and the assessee is not able to demonstrate that its case falls under exceptions as contained in Rule 6DD of Income-tax Rules, 1962, the authorities are bound to make additions u/s 40A(3) , which is to be read with Section 40A(1) which carries a non obstante clause. It could not be demonstrated that the assessee case falls under exceptions as are contained in Rule 6DD of the 1961 Act, and by Id. CIT(A) erroneously granted relief to the assessee by applying Rule 6DD of the 1962 Rules although the assessee was not able to demonstrate that its case falls under exception as carved out in Rule 6DD of the 1962 Rules. The 1961 Act is an code in itself. In case of non compliances of various applicable provisions of the 1961 Act, consequential penal provisions are

prescribed in the 1961 Act itself which will get attracted and which has direct bearing on computing income chargeable to tax. The assessee has clearly infringed provisions of Section 40A(3) and made cash payments in excess of threshold limits with respect to material purchases and labour payments, and claimed these expenses as business expenses deductible from business income. It could not be demonstrated that the assessee case fell into exceptions as are contained in Rule 6DD of the 1962 Rules. The assessee also failed to produce books of accounts, cash book, vouchers and invoices, and merely ledger accounts of material consumed and labour payments made were produced, and further that two different sets of ledger accounts were produced by the assessee in two different assessment proceedings, firstly in original assessment proceedings wherein the assessee admitted to have made cash payments in a day of more than Rs. 20000/- in violation of Section 40A(3), towards material purchases and labour payments, secondly while in assessment proceedings consequent to revisionary order passed by Id. Pr. CIT u/s 263 of the 1961 Act, wherein the assessee produced different ledger accounts of material purchases and labour payments to show lower cash payments per day below threshold limit u/s 40A(3) to avoid being penalized u/s 40A(3). The AO rightly made additions u/s 40A(3), while Id. CIT(A) rejected books of accounts of the assessee and invoked provisions of Section 145(3) of the 1961 Act to frame best judgment assessment to bring to tax income @6% of gross receipts without any basis, despite clear mandate of Section 40A(3) read with Section 40A(1) which starts with non obstante clause. The Id. CIT(A) fell into an error in relying on Rule 6DD of the 1962 Rules and granting relief to the assessee, without appreciating that the assessee is not able to explain and make out its case for falling into exception as carved out by Rule 6DD of the 1962 Rules, and rather in fact the assessee instead of

explaining its case on merits, manipulated and came out with second set of ledger for material purchases and labour charges wherein it claimed that no cash payments exceeding Rs. 20000 was made in a day to a person, in assessment proceedings conducted by AO u/s 143(3) read with Section 263. While in first of ledger of material purchases and labour payments, filed by the assessee in original assessment proceedings conducted by AO u/s 143(3) read with Section 143(2), the assessee filed ledgers of material purchases and labour payments, where the cash payment in a day exceeding Rs. 20000/- in infringement of Section 40A(3) and no explanation was made rather the assessee falsified and manipulated the records by bringing altogether different set of ledger of material purchased and labour payments. The AO has enclosed both the sets of ledger accounts in its assessment order. It was for the assessee to have demonstrated that It did not infringe provisions of Section 40A(3) , or to make out its case to fall under exceptions under Rule 6DD of the 1962 Rule , but no such case was made out by the assessee, while ld. CIT(A) fell into an error by granting relief to the assessee by granting relief by applying Rule 6DD of the 1962 Rules, without any basis or justification or any material whatsoever on record. We do not find any infirmity in the order of the Assessing Officer , the ld. CIT(A) has misdirected itself by applying net profit rate , despite the assessee having admitted to have cash payment in violation of Section 40A(3) of the Act and the case also does not fall under exceptions as are provided in Rule 6DD of the 1962 Rules. Under these circumstances, the appellate order passed by ld. CIT(A) cannot be sustained and is reversed and the assessment order passed by the Assessing Officer is confirmed so far as additions disallowance u/s. 40A(3) with respect to material consumed and labour payments

are concerned. This disposes of ground number 2 and 3 raised by Revenue in its memo of appeal filed with tribunal , which stood allowed. We order accordingly.

9. So far as Ground No.4 raised by the Revenue in its memo of appeal filed with the tribunal, wherein Revenue was aggrieved that the ld. CIT(A) has erred in not adjudicating Ground No. 6 which is related to the disallowance of depreciation of Rs. 3,37,520/- which is wrongly mentioned in CIT(A) order as Rs. 33,75,200/- , it is observed that present appeal before us was filed by Revenue. The assessee filed its first appeal with ld. CIT(A), and in case if the ground no. 6 raised by assessee concerning disallowance of depreciation is not adjudicated by ld. CIT(A), the assessee stood prejudiced and it is not shown that the assessee has come in an appeal before tribunal to seek redressal of its grievance, nor it could be shown that C.O. is filed by the assessee being aggrieved by the decision of ld. CIT(A) in not adjudicating ground number 6 concerning disallowance of depreciation . But, however, it is observed that while reproducing grounds of appeal number 6 raised by the assessee bfore ld. CIT(A) , it was erroneously typed as Rs. 33,75,200/- instead of Rs. 3,37,520/-in the appellate order passed by ld. CIT(A), which is a mistake apparent from record , which we direct to correct the same at page number 2 of the appellate order passed by ld. CIT(A). To the extent of correcting aforesaid mistake apparent from record, we modify the order of ld. CIT(A) concerning this ground number 4 raised by Revenue before tribunal. This ground is partly allowed in favour of Revenue. We order accordingly.

10. Ground No. 1 and 5 raised by Revenue are general in nature and does not require separate adjudication by us, and hence these grounds stood dismissed. We order accordingly.

11. In the result, appeal filed by Revenue is partly allowed.

Order pronounced on 31/05/2022 at Allahabad, U.P, in accordance with Rule 34(4) of Income Tax (Appellate Tribunal) Rules, 1963

**Sd/-**  
[VIJAY PAL RAO]  
JUDICIAL MEMBER

Aks/-

DATED: 31/05/2022

**Sd/-**  
[RAMIT KOCHAR]  
ACCOUNTANT MEMBER

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1. Appellant – ACIT, Circle-1, Gorakhpur, Aayakar Bhawan, Civil Lines, Gorakhpur 273001, U.P.
2. Respondent -Sri Bajrang Bahadur Singh, Marhatha, Campierganj, Gorakhpur-273001, U.P.
3. The CIT(A), Gorakhpur,U.P.
4. The CIT, Varanasi, U.P.
5. Sr. DR , ITAT, Varanasi, U.P.

Sr. P.S.

