

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
KOLKATA-PATNA 'e-COURT', KOLKATA  
[Virtual Court Hearing]**

**Before Shri Rajpal Yadav, Vice-President (KZ)  
&  
Shri Rajesh Kumar, Accountant Member**

**I.T.A. No. 27/PAT/2022  
Assessment Year: 2017-2018**

***M/s. Banke Bihari Foods (P) Limited,..... Appellant  
Digha Ghat, Patna-800011, Bihar  
[PAN:AABCB8470F]***

***-Vs.-***

***Principal Commissioner of Income Tax-1,..Respondent  
Patna,  
Central Revenue Building, 2<sup>nd</sup> Floor,  
Bir Chand Patel Marg,  
Patna-800001, Bihar***

**Appearances by:**

*Shri A.K. Rastogi, Sr. Advocate, appeared on behalf of the  
assessee*

*Smt. Rinku Singh, CIT (D.R.), appeared on behalf of the  
Revenue*

Date of concluding the hearing : January 03, 2023

Date of pronouncing the order : March 13, 2023

**O R D E R**

**Per Rajpal Yadav, Vice-President (KZ):-**

The assessee is in appeal before the Tribunal against the order of ld. Principal Commissioner of Income Tax, Patna-1 dated 08.03.2022 passed under section 263 of the Income Tax Act, 1961 for A.Y. 2017-18.

2. The assessee has taken 13 grounds of appeal, but its grievances revolve around a single issue, namely Id. CIT has erred in taking cognizance under section 263 of the Income Tax Act and thereby setting aside the assessment order dated 08.06.2019 passed under section 143(3) with a direction to pass a *denovo* assessment and in rest of the grounds, the assessee has raised peripheral arguments *qua* the center point in dispute.

3. Brief facts of the case are that the assessee is a Private Limited Company engaged in manufacturing and trading business of wheat products (Flour Mill). It has filed its return of income on 31.08.2017 declaring total income of Rs.1,44,56,270/- . The case of the assessee was selected for scrutiny assessment and a notice under section 143(2) was issued and served upon the assessee. The basic reason for selecting the case for scrutiny under CASS was –

“High Revenue from operations (including other income) and no scrutiny in preceding five assessment years - business expenses”.

4. This was the reason for selecting the case for scrutiny assessment. The Id. Assessing Officer thereafter issued a questionnaire under section 142(1) on 15.04.2019. The copy of

the questionnaire is available on pages no. 11 to 16 of the paper book. After conducting inquiry, he passed the scrutiny assessment under section 143(3) on 08.06.2019. He accepted the returned income of the assessee.

5. The ld. Commissioner perused the assessment record and formed an opinion that “assessment order is erroneous as much as it is prejudicial to the interest of the revenue”. He issued a show-cause notice under section 263 and the copy of the show-cause notice is available on page H of the paper book. In brief the ld. Commissioner has assigned the following reasons:-

*“During examination of cash book, sales invoices and comparison chart, following points were noted:*

*(a) Sales invoices for the period 01.11.2016 to 08.11.2016 were submitted to justify the cash deposit. Out of 8 days, there was one closing day on 06.11,2016. Out of these 7 days, you furnished exactly 50 sales invoices per day for 6 days (starting from sales invoice no. 2801) and 75 sales invoice for one day,*

*(b) Scrutiny of cash book reveals that in the month of October, 2016, maximum opening balance was Rs.31,28,556/- on 26.10,2016 and minimum opening balance was Rs. 1,77,342/- on 10.10.2016. Further, it was noticed that the closing balance on 31.10.2016 was Rs.28,38,585/- but thereafter a sudden increase upto Rs.1,56,89,056/- on 08.11,2016 was seen i.e closing balance of cash book increased by Rs.1,28,50,471/- in a period of 8 days.*

*3. You are requested to show cause in writing as to why an order u/s 263 of the I.T. Act, 1961 should not be made in your case”.*

6. In response to the above show-cause notice, the assessee has filed a detailed reply running into 10 pages alongwith the details filed during the course of assessment proceedings. The reply of the assessee has been reproduced by the Id. Commissioner. However, he did not accept the contentions of the assessee and set aside the impugned order. The finding recorded by the Id. Commissioner in this regard reads as under:-

*“8. After exhaustively examining the records and reply of the assessee filed in response to the show cause notice dated 11.01.2022, the findings are discussed as under:-*

*(i) Cash deposit of Rs. 1,44,00,000/- during the demonetization period:-*

*The AO erred in accepting the submission of the assessee without making proper enquiries and verification as to the sources of cash deposited. Scrutiny of cash book, sales invoice and comparison chart, revealed the following:-*

*(a) The assessee had furnished sales invoice for the period 01.11.2016 to 08.11.2016 (8 days) to justify the cash deposit. Out of 8 days, there was one closing day on 06.11.2016. Out of these 7 days, the assessee had furnished exactly 50 sales invoices per day for 6 days (starting from sales invoice no. 2801) and 75 sales invoice for one day. The details are as follows:*

*(b)*

<i>Date</i>	<i>Sales invoice number</i>	<i>No. of sales invoice</i>	<i>Amount of invoices</i>
<i>01.11.2016</i>	<i>2801 to 2850</i>	<i>50</i>	<i>2285922</i>
<i>02.11.2016</i>	<i>2851 to 2900</i>	<i>50</i>	<i>2365800</i>
<i>03.11.2016</i>	<i>2901 to 2950</i>	<i>50</i>	<i>2341000</i>
<i>04.11.2016</i>	<i>2951 to 3000</i>	<i>50</i>	<i>1724000</i>
<i>05.11.2016</i>	<i>3001 to 3075</i>	<i>75</i>	<i>2904200</i>
<i>06.11.2016</i>	<i>Closing Day</i>	<i>Closing Day</i>	<i>Closing Day</i>
<i>07.11.2016</i>	<i>3076 to 3125</i>	<i>50</i>	<i>1879500</i>
<i>08.11.2016</i>	<i>3125 to 3175</i>	<i>50</i>	<i>1567750</i>

*The assessee had furnished cash book for the period 01.10.2015 to 31.12.2015 and 01.10.2016 to 31.1.2016. Scrutiny of cash book revealed that in the month of October, 2016, maximum opening balance was Rs. 31,28,556/- on 26.10.2016 and minimum opening balance was Rs. 1,77,342/- on 10.10.2016. Further, it was noticed*

*that the closing balance on 31.10.2016 was Rs. 28,38,585/- but thereafter a sudden increase upto Rs. 1,56,89,056/- on 08.11.2016 was seen i.e., closing balance of cash book increased by Rs. 1,28,50,471/- in a period of 8 days.*

*Upon scrutiny of cash book for the period 01.10.2015 to 31.12.2015 and to 31.12.2016, it was noticed that such type of enhancement of closing balance in just 8 days was never witnessed before. The assessing officer did not enquire at all into each debit and credit entry appearing in the cash book for the F.Y 2016-17 during the A.Y. in question.*

*Thus the AO erred in accepting the submissions of the assessee without making enquiries and investigations to ascertain the genuineness of Rs. 1,44,00,000/- culminating in an order erroneous and prejudicial to revenue.*

*9. In view of the fact that the AO completed the assessment without making enquiries, verifications and investigations regarding the aforesaid issue, the assessment order passed u/s 143(3) of the IT Act, 1961 dated 08.06.2019 for A.Y. 2017-18 has been found to be erroneous in so far it is prejudicial to the interests of the revenue within the meaning of section 263 of the Income Tax Act, 1961.*

*10. For the above referred reasons and the facts on record, I deem it fit to direct the Assessing Officer to make a assessment de novo taking into account the findings on the issue discussed herein above. The AO's order u/s 143(3) of the IT Act, 1961 dated 08.06.2019 for A.Y. 2017-18 is cancelled and set aside with a direction to the AO to make enquiries, verifications and investigations regarding the aforesaid issue and finalize the assessment in accordance with the provisions of the law.*

*11. The AO shall afford proper and reasonable opportunities of being heard to the assessee before passing the appropriate order in order to meet the ends of justice.*

*12. The order u/s 263 of the Income Tax Act, 1961 is passed accordingly”.*

7. The ld. Counsel for the assessee while impugning the above finding contended that the basic reason assigned by the ld. CIT is

that during demonetization period, assessee has made huge deposit, which are not conducive to its cash book and such a fact has been accepted by the Id. Assessing Officer without making any inquiry. The Id. Counsel for the assessee further contended that the Id. Commissioner has failed to appreciate the record in right perspective and has recorded factually incorrect finding. In order to demonstrate that a proper enquiry was conducted by the Id. Assessing Officer, he took us through questionnaire issued on 15.04.2019 under section 142(1) of the Income Tax Act. The copy of such notice is available on page no. 11 of the paper book. The Id. Assessing Officer has annexed Annexure-A along with this questionnaire and invited explanation of the assessee on 14 points. We deem it appropriate to take note of these points, which read as under:-

- (1) Please state briefly the nature of business activity;*
- (2) Complete Set of Income Tax Return along with ITR-V;*
- (3) Computation of income for F.Y. 2016-17 relevant to AY 2017-18;*
- (4) Copy of Financial Statement i.e. Tax Audit Report including Form-3CA & 3CD along with Balance Sheet, Profit & Loss Account, Form-26AS for FY 2016-17;*
- (5) Details of all Bank Account along with Bank Account Statement for FY 2016-17;*
- (6) Complete ledgers of all expenses claimed in Profit & Loss Account with ledger of addition of fixed assets made during FY 2016-17;*
- (7) Details of Unsecured Loan raised during FY 2016-17 along with name, PAN, address, ITR, amount, ledger, confirmation and bank account statement of lenders;*
- (8) Details of Share Premium raised during FY 2016-17 along with name, PAN, address, ITR, amount, ledger,*

*confirmation and bank account statement of shareholders;*

- (9) Details of Sundry Creditors for FY 2016-17 along with name, PAN, address, amount, ledger, confirmation and bank account statement showing payment to such creditors in subsequent year;*
- (10) Details of Loans and Advances shown in Balance Sheet for FY 2016-17;*
- (11) The Cash Book, Bank Book and Ledger of cash transactions for FY 2016-17 to verify the large value of cash deposits during demonetization period along with their source of cash deposit;*
- (12) Please furnish all Bank Account Statement for FY 2016-17 maintained in the name of assessee;*
- (13) Supportive ledger of all interest expenses claimed in Profit & Loss Account for FY 2016-17;*
- (14) Please furnish ledger of fixed assets along with supportive bills & invoices. Also furnish ledger of all expenses and Form-26Q.*

8. The assessee has filed a detailed reply and copy of such reply is available on pages no. 14 to 16. In this reply, the assessee has submitted that certain books of account are voluminous in nature, hence it filed them separately. Thereafter the assessee has filed one more reply. Copy of such reply is also available. The Id. Assessing Officer apart from this questionnaire, had issued notices under section 142(1) on 13.05.2019 and 24.05.2019. He made specific enquiries about the details of bank statements, details of sundry creditors and also the deposits made during demonetization. A specific question has been raised under Point No. 11 in the show cause notice dated 15.04.2019.

At the cost of repetition, he invited our attention towards Serial No. 11, which reads as under:-

“The Cash book, Bank book and ledger of cash transactions for F.Y. 2016-17 to verify the large value of cash deposits during demonetization period along with their source of cash deposit”.

According to the assessee, the reply to this was submitted that details of cash deposit in all the four accounts along with source were explained.

9. The ld. Counsel for the assessee further submitted that before the ld. CIT, it was contended that cash sales during the period of October, November, December, 2015 meant for A.Y. 2016-17 is far more than in the corresponding period of year 2016 meant for A.Y. 2017-18, i.e. alleged period of cash deposits during demonetization. Such figures are being reproduced by the ld. CIT on page no. 6 of the impugned order. On the strength of above details, he submitted that ld. Commissioner failed to appreciate the controversy in right perspective under the ratio of law laid down in various authoritative pronouncements namely- (i) CIT -vs.- Gabriel India reported in 203 ITR 108 (Bom.); (ii) Malabar Industries -vs.- CIT reported in 243 ITR 83 (SC); (iii) Laxmi Rice Mills -vs.- CIT reported in 97 ITR 258 (Patna). He submitted that the impugned order is not sustainable.

10. On the other hand, ld. CIT(DR) contended that no finding is discernable *qua* verification of these details at the end of ld. Assessing Officer in the impugned assessment order. Therefore, ld. Commissioner has every right to find out as to whether a proper inquiry was made by the ld. Assessing Officer or not. He relied upon the order of the ld. CIT.

11. We have heard the ld. Representatives and with their assistance gone through the record carefully. Before we embark upon an enquiry on the facts and issues agitated before us to find out whether the action u/s 263 of the Act, deserves to be taken against the assessee or not, it is pertinent to take note of this section. It reads as under:-

*“263(1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.*

*[Explanation.- For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,-*

*(a) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include-*

*(i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income Tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A;*

*(ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner authorized by the Board in this behalf under section 120;*

*(b) "record shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Commissioner;*

*(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.*

*(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.*

*(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court.*

*Explanation.- In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded.”*

12. A bare perusal of the sub section-1 would reveal that powers of revision granted by section 263 to the learned Commissioner have four compartments. In the first place, the learned Commissioner may call for and examine the records of any proceedings under this Act. For calling of the record and examination, the learned Commissioner was not required to show any reason. It is a part of his administrative control to call for the records and examine them. The second feature would come when he will judge an order passed by an Assessing Officer on culmination of any proceedings or during the pendency of those proceedings. On an analysis of the record and of the order passed by the Assessing Officer, he formed an opinion that such an order is erroneous in so far as it is

prejudicial to the interests of the Revenue. By this stage the learned Commissioner was not required the assistance of the assessee. Thereafter the third stage would come. The learned Commissioner would issue a show-cause notice pointing out the reasons for the formation of his belief that action u/s 263 is required on a particular order of the Assessing Officer. At this stage the opportunity to the assessee would be given. The learned Commissioner has to conduct an inquiry as he may deem fit. After hearing the assessee, he will pass the order. This is the 4th compartment of this section. The learned Commissioner may annul the order of the Assessing Officer. He may enhance the assessed income by modifying the order. He may set aside the order and direct the Assessing Officer to pass a fresh order. At this stage, before considering the multi-fold contentions of the ld. Representatives, we deem it pertinent to take note of the fundamental tests propounded in various judgments relevant for judging the action of the CIT taken u/s 263. The ITAT in the case of Mrs. Khatiza S. Oomerbhoy Vs. ITO, Mumbai, 101 TTJ 1095, analyzed in detail various authoritative pronouncements including the decision of Hon'ble Supreme Court in the case of Malabar Industries 243 ITR 83 and has propounded the following broader principle to judge the action of CIT taken under section 263.

(i) The CIT must record satisfaction that the order of the AO is erroneous and prejudicial to the interest of the Revenue. Both the conditions must be fulfilled.

(ii) Sec. 263 cannot be invoked to correct each and every type of mistake or error committed by the AO and it was only when an order is erroneous that the section will be attracted.

(iii) An incorrect assumption of facts or an incorrect application of law will suffice the requirement of order being erroneous.

(iv) If the order is passed without application of mind, such order will fall under the category of erroneous order.

(v) Every loss of revenue cannot be treated as prejudicial to the interests of the Revenue and if the AO has adopted one of the courses permissible under law or where two views are possible and the AO has taken one view with which the CIT does not agree. It cannot be treated as an erroneous order, unless the view taken by the AO is unsustainable under law.

(vi) If while making the assessment, the AO examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determine the income, the CIT, while exercising his power under s 263 is not permitted to substitute his estimate of income in place of the income estimated by the AO.

(vii) The AO exercises quasi-judicial power vested in him and if he exercises such power in accordance with law and arrive at a conclusion, such conclusion cannot be termed to be erroneous simply because the CIT does not feel stratified with the conclusion.

(viii) The CIT, before exercising his jurisdiction under s. 263 must have material on record to arrive at a satisfaction.

(ix) If the AO has made enquiries during the course of assessment proceedings on the relevant issues and the assessee has given detailed explanation by a letter in writing and the AO allows the claim on being satisfied with the explanation of the assessee, the decision of the AO cannot be held to be erroneous simply

because in his order he does not make an elaborate discussion in that regard.

13. A perusal of the impugned order would suggest that it is based on two-fold of reasoning. In the first-fold of reasoning, ld. Commissioner has doubted the very claim made by the assessee about sales which has generated the alleged cash. In paragraph no. 8, clause (a), he has reproduced the sales invoice number, number of sales and amount of invoices. His suspicion is why exact identical numbers of sale invoices (i.e. 50 each day) were entered by the assessee on seven days. In other words, the assessee has shown fifty sale invoices continuously for seven days.

14. The next suspicion expressed by him is about the cash balance available in the cash book in the year 2015, vis-à-vis in the year 2016. On due consideration of the above reasoning, we are of the view that ld. Commissioner has not analytically examined the details. Firstly, the ld. Assessing Officer has not rejected the book result. Neither the ld. Commissioner has doubted the books of account of the assessee. Just for the sake of assigning the reason, he has raised a suspicion about the sale invoices. If he has such a doubt, then instead of referring the number of sales, he should have examined the sale deals and should have examined those parties to whom sales were made, whether they have purchased or not. He should also make

enquiry about the stock available with the assessee and if assessee has stock, which has been sold, then how the similarity of sale invoices would cause a doubt on the books of the assessee. He just touched certain issues in order to create a doubt only, otherwise analytically not examined those details for arriving at a conclusion. Whatever may be the suspicion of the Id. Commissioner but on that basis of suspicion, scrutiny assessment cannot be set aside for a fresh round of assessment proceeding.

15. The second aspect, which has been assumed by the Id. Commissioner, is that Id. Assessing Officer has not enquired. He has totally ignored the questionnaire issued by the Id. Assessing Officer and the replies were submitted by the assessee. The assessee has produced sales invoice, stock details, details of income accounts and all other relevant details required for the determination of its taxable income. The Id. Commissioner did not find any fault to those details.

16. Under the next reasoning, he made comparison of cash books in the year 2015 vis-à-vis in the year 2016. In this comparison, he has just made a narration what was the maximum opening balance and minimum opening balance available. We fail to appreciate the relevancy of this comparison. If an assessee has a stock and he sold the stock, then how

minimum or maximum cash balance in the cash book would be used to doubt those sales.

17. The next reason harbored by the ld. Commissioner is that it appears assessee has shown undue sales in the year 2016. The assessee has submitted comparative chart. The cash sales in the year 2015 are more than the 2016. The ld. Commissioner did not compare these figures available on page 6 of the impugned order rather he chose to compare the cash balance in the Cash Book. The stand of the assessee is that deposits were made out of cash sales. If the ld. Commissioner has a doubt about these sales, then course of enquiry ought to be different.

18. The ld. Assessing Officer has gone into all these details. The assessee has no control over the Assessing Officer in drafting the assessment order. If ld. Assessing Officer has recorded a finding dealing with these all inquiries, then it is an ideal situation. But if he failed to record such details, then before doubting the result, it is to be appreciated what questionnaire was issued, what replies were given by the assessee. There might have some oral discussion before accepting the results. Thus ld. Commissioner ought to have gone through those details. He cannot say that inquiry was not made. Once a questionnaire is raised and replies are there on the record, it is to be construed that inquiry was made. The Hon'ble Delhi High Court in the case of ITO -vs.- D.G. Housing Project reported in 343 ITR page 329 has propounded

that ld. Commissioner is required to record a finding demonstrating as to how order is erroneous. This part he cannot relegate to the ld. Assessing Officer to find out in the fresh inquiry. He has to record a specific finding and only thereafter the assessment could be set aside. Merely by raising suspicion *qua* certain aspects, he cannot relegate the remaining enquiry endlessly *qua* the assessee before the ld. Assessing Officer. Thus we are of the view that ld. Commissioner has failed to appreciate the controversy in right perspective. Therefore, we allow this appeal and quash the order passed under section 263 of the Income Tax Act by the ld. Commissioner dated 08.03.2022 in A.Y. 2017-18.

**19. In the result, the appeal of the assessee is allowed.**

Order pronounced in the open Court on 13.03.2023.

<b>Sd/-</b> <b>(Rajesh Kumar)</b> <b>Accountant Member</b> <b>Kolkata, the 13<sup>th</sup> day of March, 2023</b>	<b>Sd/-</b> <b>(Rajpal Yadav)</b> <b>Vice-President</b>
--	---

*Copies to : (1) M/s. Banke Bihari Foods (P) Limited,  
Digha Ghat, Patna-800011, Bihar*

*(2) Principal Commissioner of Income Tax-1,  
Patna,  
Central Revenue Building, 2<sup>nd</sup> Floor,  
Bir Chand Patel Marg,  
Patna-800001, Bihar*

(3) *Commissioner of Income Tax (Appeals)-* ,

(4) *Commissioner of Income Tax-* ,

(5) *The Departmental Representative*

(6) *Guard File*

*TRUE COPY*

*By order*

*Assistant Registrar,  
Income Tax Appellate Tribunal,  
Kolkata Benches, Kolkata*

***Laha/Sr. P.S.***