

**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. 24/PAT/2022
Assessment Year: 2017-2018**

***Divya Prakash,..... Appellant
S/o. Jai Prakash Nr. Singh,
Vill. Bhagwan, Bhojpur, Bihar-802203
[PAN:BRYP7874F]***

-Vs.-

***Principal Commissioner of Income Tax,....Respondent
Patna-1,
Central Revenue Building,
Birchand Patel Marg, Patna-800001, Bihar***

Appearances by:

*Shri K.N. Prasad, Advocate, appeared on behalf of the
assessee*

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

Date of concluding the hearing : August 23, 2023

Date of pronouncing the order : October 12, 2023

ORDER

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 17.02.2022 passed under section 263 of the Income Tax Act in Assessment Year 2017-18.

2. The assessee has taken twelve grounds of appeal, but they are argumentative in nature and not in consonance with Rule 8 of Income Tax Appellate Tribunal Rules. In brief, the grievance of the assessee is that Id. Pr. Commissioner has erred in taking cognizance under section 263 and thereby setting aside the assessment order passed by the Id. Assessing Officer under section 143(3) of the Income Tax Act on 18.11.2019.

3. Brief facts of the case are that the assessee has filed his return of income on 23.09.2017 declaring total income of Rs.6,98,537/-. The case of the assessee was selected for scrutiny assessment and assessment order passed under section 143(3) on 18.11.2019. It is a very brief assessment order, which reads as under:-

“The assessee has filed his return of Income on 23/09/2017 showing gross total Income of Rs.6,98,537/-. This case was selected for scrutiny through CASS to examine the issue of cash deposit in his bank account during demonitization period Accordingly Notice u/s 143(2) and 142(1) was issued and served to the assessee. In response to the notice Sri Rajiv Ranjan, adv and the assessee himself appeared to represent the case. During the course of proceedings it was submitted that the assessee is engaged in the business of sale of liquor . The assessee was asked to produce statement of all bank account, all books of account along with all bills and vouchers and other evidences, He was also asked to explain the source of cash deposit in his bank account during demonetization period. It was submitted that the cash sale was the main source of cash deposit in his bank account during demonetization period. In support of his claim statement of bank account, books of accounts and sale and purchase bills and invoices were produced. Books of account so produced were cross checked and examined on test check basis. The case was

discussed and heard with him. His total incomes determined as under:

Travelling & Conveyance:- From the perusal of profit and loss account it was seen that the assessee has incurred expenditure on travelling and conveyances of Rs.54,000/-. However in course of verification of books of account it was seen that the expenditure were internally vouched which were not verifiable. Hence 50% of expenditure i.e. Rs27,000/- is disallowed and added back to the total income of the assessee.

Staff Welfare:- It was further seen that the assessee has incurred Rs.21,600/- on staff welfare for which were vouched internally, moreover the expenditure incurred is not associated to his business expenditure as well as it is not verifiable at all Hence expenditure of Rs.21,600/- Is disallowed and added back to the total income of the assessee.

Under the facts and circumstances, his total income Is assessed u/s 143(3) of the. Income Tax Act at total income of Rs.7,47,137/-. Allowed deduction u/s 80C of Rs.21000/- of the Act. Issue demand notice and challan accordingly”.

4. The ld. Principal Commissioner perused the assessment record and formed an opinion that assessment order is erroneous as well as prejudicial to the interest of revenue. He found that the assessee has made cash payment amounting to Rs.31,23,315/- in excess of Rs.20,000/- on each day to a single party as per the cash book in contravention of the provision of section 40A(3) of the Income Tax Act. In other words, during the year, the assessee has made payment in cash to a single party exceeding Rs.20,000/- on a day. The details of all these 43 transactions carried out from 2nd of April, 2016 to 11th January, 2017 are reproduced in the impugned order from pages no. 5 to 8. The ld. Commissioner invited the explanation of the assessee. In response to the show-cause notice received from the ld.

Commissioner, assessee has filed written submission, which has been reproduced in the impugned order from page no. 2 onwards. The case of the assessee is that a scrutiny assessment was completed under section 143(3) on 18.11.2019. The ld. Assessing Officer has gone through all these details and thereafter accepted the return of the assessee. However, ld. Commissioner was not satisfied with the explanation of the assessee and set aside the impugned assessment order and relegated the matter to the ld. Assessing Officer for a fresh investigation regarding the payment in cash exceeding Rs.20,000/- and finalisation of the assessment order in accordance with law.

5. The ld. Counsel for the assessee while impugning the order of ld. Pr. CIT took us through pages no. 9 to 15 of the paper book and submitted that ld. Assessing Officer has issued specific show-cause notice not only under section 143(2) but under section 142(1) also. The assessee has fully complied with those notices. It was further contended that the assessee was holding a liquor licence at that time. The liquor could only be purchased after availing a license from Excise Department from the State Government and it could be purchased in cash after making full payments at the spot, therefore, as and when it required liquor for its business, then it has to make payments in cash. The case of the assessee is that

his transaction falls within the exceptional clause of Rule 6DJJ. The transaction of the assessee is a genuine one because it has to pay excise for those purchases to the State Government. These are duly scrutinised by the Excise Department of the State Government, Therefore, there cannot be any non-genuineness of the claim of expenditure. One of the arguments taken before the ld. Commissioner was that assessee was not well versed with the mode of payment through account payee cheque. When he undertook this exercise, he is a new entrepreneur and this is the first year in this line of business.

6. On the other hand, ld. D.R. submitted that it is a case of complete scrutiny. There is no dispute with regard to the fact that purchase was made in cash and complete table has been reproduced in the ld. CIT's order. Therefore, it can safely be construed that ld. Assessing Officer failed to make any inquiry about any benefit available to the assessee under Rule 6DDJ. It is an argument raised by the assessee before the ld. Commissioner only. Otherwise it is a case where no inquiry on this point has been made by the ld. Assessing Officer. She took us through the assessment order and submitted that neither in the questionnaire nor in the assessment order, any issue is available regarding an inquiry for 40A(3).

7. We have duly considered the rival contentions and 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.”

8. 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.

9. In the light of above, we have gone through the record carefully. We find that in the paper book from pages no. 40 to 111, the assessee has placed on record

six judgments, out of which one of the judgments is of Hon'ble Patna High Court in the case of CIT -vs.- Mukul Kumar, which has been placed on page no. 40. The other judgments are of ITAT. We have gone through the judgments also but basic broad principle for adjudicating the issue of 263 has been culled out by us in the upper part of this order. A perusal of the Hon'ble jurisdictional High Court's decision in the case of Mukul Kumar, it revealed that Hon'ble High Court did not interfere in the order of the ITAT on the ground that ITAT has set aside the order of the ld. Commissioner passed under section 263 of the Act on appreciation of the pure question of fact. Thus there is no specific proposition in this judgment, which is required to be followed. Hon'ble High Court did not entertain the appeal of the Revenue simply for the reason that no question of law is involved in it. A perusal of questionnaire placed on record by the assessee on page no. 13 and Annexure on page 14, nowhere reveals that any specific query was asked by the ld. Assessing Officer about the disallowance under section 40A(3), therefore, no inquiry has been made by the ld. Assessing Officer while accepting the accounts of the assessee. Ld. Commissioner has rightly exercised power under section 263 of the Income Tax Act. Accordingly this appeal devoids of any merit, hence dismissed.

10. In the result, the appeal of the assessee is dismissed.

Order pronounced in the open Court on 12.10.2023.

**Sd/-
(Rajesh Kumar)
Accountant Member**

**Sd/-
(Rajpal Yadav)
Vice-President**

Kolkata, the 12th day of October, 2023

*Copies to :(1) Divya Prakash,
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Vill. Bhagwan, Bhojpur, Bihar-802203*

*(2) Principal Commissioner of Income Tax,
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Central Revenue Building,
Birchand Patel Marg, Patna-800001, Bihar*

*(3) Commissioner of Income Tax- ,
(4) The Departmental Representative
(5) Guard File*

TRUE COPY

By order

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

Laha/Sr. P.S.