

**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. 10/PAT/2015
Assessment Year: 2009-2010**

***Income Tax Officer,..... Appellant
Ward-4(1), Patna***

-Vs.-

***M/s. Kumar Construction,.....Respondent
C-15, Vijay Nagar,
Near Petrol Pump,
Rukanpura, Baily Road,
Patna-800014
[PAN:AAGFM0031K]***

Appearances by:

*Shri Rupesh Agrawal, CIT, Sr. D.R., appeared on behalf of
the Revenue*

*Shri K.M. Mishra, Advocate, appeared on behalf of the
assessee*

Date of concluding the hearing : August 23, 2023

Date of pronouncing the order : October 18, 2023

O R D E R

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

The Revenue is in appeal before the Tribunal against the order of Id. Commissioner of Income Tax (Appeals)-3, Patna dated 28.01.2015 passed for A.Y. 2009-10.

2. Grounds No. 1, 2 & 3 are inter-connected grounds therefore we first take these grounds of appeal.

3. In these grounds, the Revenue has pleaded that ld. CIT(Appeals) has erred in rejecting the books of account and estimating the profits, whereas ld. Assessing Officer has specifically made disallowances of Rs.1,44,87,045/- and Rs.1,43,10,424/- under sections 40A(3) and 40(a)(ia) of the Income Tax Act. The ld. CIT(Appeals) has erred in deleting both these additions by holding that books of account of the assessee are not reliable, therefore, instead of making specific disallowance under these sections, the profit of the assessee deserves to be estimated.

4. Brief facts of the case are that the assessee is a firm derives income as a civil contractor. It has filed its return of income on 12.10.2009 showing total income of Rs.36,09,014/- on a total turnover of Rs.9,71,11,489/-. 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 ld. Assessing Officer has issued questionnaires under section 142(1) on 13.06.2011. A perusal of the finding of ld. Assessing Officer on page 2 of the impugned order would reveal that the assessee was not very cooperative with the ld. Assessing Officer for submitting the requisite details. The

ld. Assessing Officer has initiated the penalty under section 271(1)(b) for non-compliance of the notices at the end of the assessee. Ultimately the ld. Assessing Officer gone through the books of account submitted before her and made these two additions by recording the following finding:-

“Addition u/s 40A(3) for payments exceeding Rs.20,000/- through bearer cheques:-

On perusal of Books of A/c of the assessee, it was noted that the payments for various expenses, including material and diesel purchase to various parties on different dates, were done in excess of Rs. 20,000/-. On verification from banks, it was found that these payments were made through bearer cheques. The detail of such payments is as given below:

Name of the person	Date	Name of the bank	Cheque Number	Amount (In Rs.)
Arvind Sharma	22-04-2008	PNB-9926	821329	7,00,000/-
Bantu Kuamr	05-01-2009	Dena-285	975936	4,90,000/-
Ajay Kumar	04-06-2008	PNB-9926	817898	2,80,000/-
Ajay Kumar	16-06-2008	PNB-9926	821347	3,50,000/-
Ajay Kumar	18-02-2009	PNB-9926	797751	1,00,000/-
Ajay Kumar	18-02-2009	PNB-9926	797754	2,00,000/-
Ajay Kumar	14-03-2009	PNB-9926	797758	40,000/-
Anirudh Yadav	13-05-2008	SBI-347	735708	4,15,000/-
Arvind Kr. Singh	09-04-2008	PNB-9926	821327	2,80,000/-
Arvind Kr. Singh	21-06-2008	PNB-9926	797753	1,75,000/-
Arvind Kr. Singh	09-08-2008	PNB-9926	797756	5,00,000/-
Arvind Kr. Singh	30-08-2008	PNB-9926	821348	1,00,000/-
Arvind Kr. Singh	06-09-2008	PNB-9926	797768	5,30,000/-
Arvind Kr. Singh	12-11-2008	PNB-9926	821350	5,00,000/-
Arvind Kr. Singh	22-01-2009	PNB-9926	547423	25,000/-
Jaidam Singh	24-03-2009	Dena-285	975983	2,00,000/-
Kamdhenu	22-04-2008	PNB-9926	821328	8,00,000/-
Kamdhenu	24-06-2008	PNB-9926	797757	94,000/-
Kamdhenu	13-08-2008	PNB-9926	797760	4,00,000/-

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M/s. Kumar Construction

Kamdhenu	18-08-2008	PNB-9926	797762	3,00,000/-
M.K Singh	05-06-2008	SBI-347	735721	4,88,000/-
M.K Singh	03-07-2008	SBI-347	735726	2,44,500/-
M.K Singh	02-08-2008	SBI-347	735729	2,37,000/-
M.K Singh	22-01-2009	SBI-347	735744	3,17,000/-
Natraj Filling Station	25-08-2008	PNB-9926	797764	3,00,000/-
Natraj Filling Station	05-09-2008	PNB-9926	797766	3,00,000/-
Natraj Filling Station	10-09-2008	PNB-9926	797769	4,75,000/-
Natraj Filling Station	03-10-2008	SBI-436	297098	5,00,000/-
Natraj Filling Station	03-10-2008	SBI-436	297099	5,00,000/-
Natraj Filling Station	03-10-2008	SBI-436	297100	4,00,000/-
Natraj Filling Station	03-10-2008	SBI-436	297097	4,00,000/-
Nishant Kumar	07-01-2009	Dena-285	975935	4,80,000/-
Nishant Kumar	20-02-2009	Dena-285	975960	5,00,000/-
P. Kumar	26-02-2009	SBI-436	297115	1,00,000/-
P. Kumar	18-03-2009	SBI-436	297122	2,00,000/-
Om Prakash Kumar	06-11-2008	Dena-285	975921	1,35,000/-
Om Prakash Kuamr	27-11-2008	SBI-436	297105	69,000/-
Omkar Kumar	05-01-2009	Dnea-285	975937	4,30,000/-
R.S. Kumar	17-06-2008	SBI-347	735724	4,70,000/-
Satyendra Sharma	26-03-2009	Dena-285	975985	96,000/-
Subhash Kumar	31-05-2008	PNB-9926	821336	1,50,000/-
Subhash Kumar	08-09-2008	PNB-9926	797767	5,00,000/-
Subodh Kumar	08-07-2008	SBI-347	735727	6,11,600/-
Vinod Chandra	14-07-2008	Dena-285	975914	1,47,000/-
Vinod Kumar	20-11-2008	PNB-9926	797772	2,00,000/-
			TOTAL	1,44,87,045/-

Signed and stamped copy of ledgers of above parties in assessee's books is placed on record.

7. *In order to verify, whether the bills for above payments were in excess of Rs. 20,000/- or not, the assessee was repeatedly asked to furnish the bills for these expenses during entire assessment proceeding. In fact, vide letter dated 23-09-2011, it was*

specifically asked to furnish the bills for material purchase or any other transaction with above parties. However, as discussed in Para - 2 to 5 above, the assessee kept seeking adjournments, instead of furnishing bills. In fact, the bills were never produced during entire period of assessment proceeding. Therefore, it is concluded that the expenditure incurred for above payments, too, is in excess of Rs. 20,000/- as the contrary is not established in absence of bills. Therefore, it is concluded that these were not consolidated payments for expenses less than Rs.20,000/-.

8. *As per the documents available on record i.e. the Books of A/c, these payments are not covered by exceptions mentioned in Rule 6DD. So, 100% of the above amount of Rs.1,44,87,045/-- is liable to be disallowed u/s 40A(3). The assessee was pointed out this fact vide order sheet entry dated 25-10-2011. The extract of order sheet entry of this date is being reproduced:*

"It is seen from the Books of A/c and the bank statements that payments to these persons, as mentioned in the list , for various expenses, in excess of Rs. 20,000/- has been made through bearer cheques Rs.20,000/-. He is required to explain why these expenses should not be disallowed u/s 40A(3). "

9. *On next date, i.e. 08-11-2011, assessee's A.R, Mr. Dilip Kr. Singh, C.A. appeared and furnished a written submission but no documentary evidence, whatsoever, were furnished in support of submissions made in the written reply. The submission is being reproduced below:*

"These are some payments made by bearer cheque to suppliers due to non-availability of bank accounts of those suppliers and to execute work in hand successfully issue of bearer cheque becomes compulsory."

10. *It is pertinent to note here that as per Sec. 40(A)(3), the exceptional circumstances in which payment above Rs. 20,000/- for expenditure above Rs. 20,000/- is allowed through mode other than account payee cheque or draft, are provided in Rule 6DD and suppliers not having bank account is not included as exceptional circumstance in Rule 6DD. Further,. Rule 6DD(j), which earlier provided for exceptional & unavoidable circumstances and practicability, is no longer operative since A.Y. 1996-97. Therefore, assessee's submission, as noted above, is not accepted.*

11. *Hence, on the basis of above discussion, it is concluded that the payments done by the assessee for various expenses, including material and diesel purchase in excess of Rs. 20,000/- through bearer cheques, definitely comes within the purview of Sec. 40A(3) read with Rule 6DD. Therefore, total such payments amounting to Rs. 1,44,87,045/- is being disallowed and added back to the income of the assessee.*

12. *Disallowance u/s 40(a)(ia):- On perusal of Books of account of the assessee, particularly the ledger of 'Hire Charges', it is seen that the assessee has booked hire charges amounting to Rs. 1,43,10,424/- in the name of following 5 persons. Signed and stamped copy of ledger account of 'Hire charge' is enclosed as 'Annexure-1'*

	<u>Sl. No.</u>	<u>Name</u>	<u>Amount</u>	<u>(in Rs.)</u>
1.	Sri	Pappu Singh	37,63,600/-	
2.	Sri	Janak Kumar Singh	43,30,000/-	
3.	Sri	Baramdev Yadav	28,60,400/-	
4.	Sri	Ashok Yadav	32,56,424/-	
5.	Sri	Manish Kumar	1,00,000/-	
			<hr/>	
			Total: 1,43,10,424/-	
			<hr/>	

13. *It is pertinent to mention here that the assessee has not shown this expense separately, in its audit report. Had the books of A/c not perused thoroughly, this fact would have gone unnoticed. As this expense is in the nature of rent, therefore, it was liable for deduction of tax u/s 1941. In order to verify this, the assessee was asked to furnish the supporting document for tax deducted & deposited for 'hire charges', vide letter dated 23-09-2011. The extract of the letter is being reproduced below:*

".....please explain whether tax has been deducted on it. If yes, furnish your Form 26Q and challan showing the payment of tax deducted. If not, please explain, why it should not be disallowed u/s 40(a)(ia). "

14. *In response, the assessee in its reply, submitted on 08-11-2011, accepted that tax has not been deducted on this rent. The submission of the assessee is being reproduced below:*

"Rs. 1,43,10,424.00 is included in Earth Work Expenses in the Profit and Loss Account under Direct Expenses Head and TDS has not been deducted on aforementioned amount. "

15. *As per Sec. 40(a)(ia), if any rent is liable for tax deduction u/s 1941 and tax has not been deducted, the expense is not allowable. Therefore, Rs. 1,43,10,424/- is disallowed u/s 40(a)(ia) and added back to the income of the assessee. It is pertinent to mention here that the addition on same ground has been done in the case of assessee for A.Y. 2008-09 also.*

5. Dissatisfied with the assessment order, the assessee carried the matter in appeal before the ld. CIT(Appeals). The assessee submitted written submissions and ld. 1st

Appellate Authority has called for a remand report. The Id. 1st Appellate Authority has perused the record carefully and thereafter observed that accounts of the assessee are not reliable from whom true income could be deduced and, therefore, rejected them. The Id. CIT(Appeals) thereafter estimated the profit at 08% of gross receipts. The finding of the Id. CIT(Appeals) reads as under:-

“Appellate findings and decision:

On the basis of analysis of findings in the assessment order, assessee's submission made during assessment proceedings, remand report of the A.O. and various submission and case laws filed by the appellant at the time of appellate proceedings, following issues emerge :

- (i) The assessee has claimed that the whole of payments disallowed u/s 40A(3) by the A.O., was not incurred by way of payment to the suppliers. This claim has been supported by way of affidavits which were verified by the A.O. during the remand proceeding. In the remand report, the A.O. has not disputed the claim of the assessee that Rs.1,11,30,600/- out of total disallowance of Rs.1,44,87,045/- were withdrawals by the employee of the assessee for incurring expenses. In the remand report A.O. has disputed the credibility of affidavits by citing difference in father's name in the ID proof and affidavit even though the addresses were same. No comments have been given as regards incurring of expenditure in excess of Rs.20,000/- by these employees.*
- (ii) As regards the balance amount of Rs.33,56,405/- paid directly to the supplier, the remand report of the A.O. does not comment about the payment made in excess of Rs.20,000/-. The A.O. has mentioned in the remand report that no bills was produced for payment made to various persons for daily expenditure.*
- (iii) As regards the disallowance of expenses u/s 40(a)(ia) the remand report of the A.O. reiterates the stand taken by the A.O. at the original assessment stage. At the appellate stage, the assessee has contended that the ledger copy of hire charges are nothing but payment for purchase of materials and has also submitted affidavit of the person whose name appear in the hire charges,*

ledger account list attached with the assessment order. In the remand report, AO has not commented on the affidavits of the persons appearing in the hire charges ledger who have stated that they supplied materials to the assessee.

- (iv) *The assessee has been able to controvert the finding of the A.O. that there was lack of proof for conclusion by the AO regarding payment in excess of Rs.20,000/- incurred to attract disallowance u/s 40A(3) as no bills/ vouchers of expenses were produced at the time of assessment proceedings or at the time of remand proceedings. Similarly, in respect of section 40(a)(ia) disallowance, the assessee has been able to controvert the finding of the A.O. by way of producing affidavit to show that hire charges were nothing but payment for purchase of materials. AO did not comment on such claim of the assessee in his remand report.*

In view of these facts and circumstances, it is apparent that assessee's books of account are not reliable and should have been rejected by the A.O. by applying the provisions of section 145(3) of the Act. In the appellate proceeding the assessee has submitted that the books of accounts of the assessee may be rejected and estimate should be made for computing total income. The assessee has placed reliance on judgment in the K. Srinivas Naidu Vs. ACIT, of Hyderabad ITAT as discussed (supra).

On the issue of power of the CIT(A) in appellate proceedings, following observations of the Supreme Court in the case of Jute Corporation of India Limited Vs. CIT reported in 187 ITR 688 is relevant;

the Bombay High Court considered the question in detail in Narrondas Manordass v. CIT [1957] 31 ITR 909 and held that the AAC was empowered to correct the ITO not only with regard to a matter which had been raised by the assessee but also with regard to a matter which may have been considered by the ITO and determined in the course of the assessment. The High Court observed that since the AAC had been the revising authority against the decisions of the ITO; a revising authority not in the narrow sense of revising those matters, which the assessee makes a grievance but the subject-matter of the appeal not only he had the same powers which could be exercised by the ITO. These observations were approved by this Court in CIT v. McMillan & Co. [1958] 33 ITR 182 the AAC on an appeal preferred by the assessee had jurisdiction to invoke, for the first time provisions of rule 33 of the Indian Income-tax Rules, 1922, for the purpose of computing the income of a nonresident even if the ITO had not done so in the assessment proceedings.

In CIT v. Kanpur Coal Syndicate [1964] 53 ITR 225 , a three- judge Bench of this Court discussed the scope of section 31(3)(a) of the 1922 Act, which

is almost identical to section 251(1)(a) of the 1961 Act. The Court held as under:

"...If an appeal lies, section 31 of the Act describes the powers of the Appellate Assistant Commissioner in such an appeal. Under section 31(3)(a) in disposing of such an appeal the Appellate Assistant Commissioner may, in the case of an order of assessment, confirm, reduce, enhance or annul the assessment; under clause (b) thereof he may set aside the assessment and direct the Income-tax Officer to make a fresh assessment. The Appellate Assistant Commissioner has, therefore, plenary powers in disposing of an appeal. The scope of his power is co-terminus with that of the Income-tax officer. He can do what the Income-tax Officer can do and also direct him to do what he has failed to do." [Emphasis supplied] (p.229)

The above observations are squarely applicable to the interpretation of section 251(l)(a). The declaration of law is clear that the power of the AAC is co-terminous with that of the ITO, if that be so, there appears to be no reason as to why the appellate authority cannot modify the assessment order on an additional ground even if not raised before the ITO. No exception could be taken to this view as the Act does not place any restriction or limitation on the exercise of appellate power. Even otherwise an appellate authority while hearing appeal against the order of a subordinate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed by the statutory provisions. In the absence of any statutory provision the appellate authority is vested with all the plenary powers which the subordinate authority may have in the matter. There appears to be no good reason and none was placed before us to justify curtailment of the power of the AAC in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the ITO.

The Hon'ble Hyderabad Tribunal in the case of N. Rama Chandra Reddy ITA No.1372 of 2007, was seized with the situation wherein the books of accounts were defective but not rejected by the A.O. and disallowance were made u/s 40(a)(ia). The Hon'ble ITAT observed that in the appellate proceeding, the assessee proposed before the CIT(A) to reject the books of accounts for the defects and discrepancy noticed and the estimate net income from the contract @13% of gross receipt. Even though the A.O. had not rejected the books and estimated the income, since the power of the CIT(A) are coterminous those of A.O. the CIT(A) was competent and justified in rejecting the books maintained by assessee and proceeding to determined the income @proposed by the assessee.

In view of the above judicial decision of the Apex Court as well

As High Court and the Tribunal and considering the factual matrix of this case as discussed above, I am inclined to accept the assessee's proposition to reject the books of accounts and estimate income on gross receipts of the contract. It is noticed from the submission that the assessment for A.Y. was completed by the A.O. by rejecting the books of accounts and estimating income @8% of gross contract receipt subject to allowance of depreciation and interest / remuneration to the partners. In the current year gross contract receipts of the assessee is Rs.9.71.11.489/-. Applying the same net profit rate of 8% (as in the assessment year 2010-11 in assessee's own case) net profit work out to Rs.77,68.919/-. The appellant has claimed depreciation of Rs.9,42,162/-, which will be allowed along with interest and remuneration to partners allowable. The disallowances made by the A.O. u/s 40A(3) and section 40(a)(ia) are hereby deleted and income is estimated at the end of discussion of all other grounds of appeal”.

6. The ld. Sr. D.R. took us through the assessment order. He submitted that perusal of section 40A(3) would indicate that any assessee incurring expenditure exceeding Rs.20,000/- on an individual transaction during the year without account payee cheque, then, the assessee will not be entitled to claim those expenditures. He further submitted that ld. Assessing Officer has verified the Bank statement, payment details, annexed copies of those documents as annexure to the assessment order and thereafter demonstrated that payments to certain individuals were made through bearer cheques. The details of these payments are reproduced in paragraph no. 6 of the assessment order. A payment through bearer cheque is just equivalent to a payment in cash, because the Department cannot cross verify the details of the recipients. Similarly he pointed out that in the books of account, the assessee has been maintaining a ledger under the head “hire charges’. The

assessee had made payment of Rs.1,43,10,424/- under the head 'hire charges' and failed to deduct TDS on such payment, therefore, these payments are not to be allowed as a deduction to the assessee under section 40(a)(ia) of the Income Tax Act. He further submitted that effort at the end of the assessee was to frustrate the ld. Assessing Officer for conducting proper inquiries in its accounts. The assessee kept on changing the stand on the point of hire charges. It has first debited the expenditure under the head 'hire charges' but later on changed the stand that these expenses were incurred for procuring material.

7. The ld. Counsel for the assessee, on the other hand, submitted that during the remand proceeding called for by the ld. CIT(Appeals), the assessee has filed copies of the affidavits in connection with all these expenditures. The ld. CIT(Appeals) after going through all these details observed that profit of the assessee cannot be deduced and, therefore, it is to be estimated.

8. We have duly considering the rival contentions and gone through the record carefully. We are of the opinion that section 145 has a direct bearing on the controversy therefore, we deem it appropriate to take note of this section, which reads as under:-

"Method of accounting.

'145. (1) Income chargeable under the head "Profits and gains of business or profession" or "Income from other sources" shall, subject to the provisions of sub-section (2), be computed in accordance with either

cash or mercantile system of accounting regularly employed by the assessee.

(2) The Central Government may notify in the Official Gazette from time to time accounting standards to be followed by any class of assesseees or in respect of any class of income.

(3) Where the Assessing Officer is not satisfied about the correctness or completeness of the accounts of the assessee, or where the method of accounting provided in sub-section (1) or accounting standards as notified under sub-section (2), have not been regularly followed by the assessee, the Assessing Officer may make an assessment in the manner provided in section 144”.

9. A bare perusal of this section would indicate that sub-clause (1) contemplates that income chargeable under the head “profit and gains of business or profession’ or “income from other sources” shall be determined according to the method of accountancy followed by the assessee, but such method ought to be in accordance with the conditions enumerated in sub-clause (2) of this section. The sub-clause (2) further provides that Central Government would notify in its Official Gazette from time to time the standard of accountancy and those standards are to be followed by any class of assessee or in respect of any class of income.

10. It is pertinent to observe that sub-clause (3) provides that where the ld. Assessing Officer is not satisfied about the correctness or completeness of the accounts of the assessee or where the method of accounting followed by the assessee. In other words, if the ld. Assessing Officer was not able to deduce true

income of an assessee from the accounts, then he has to reject the book result and determine the taxable income of an assessee on an estimate basis.

11. A perusal of the impugned order would reveal that ld. CIT(Appeals) has rejected the book result and estimated net profit rate at 8% of the gross receipts, which worked out to a profit of Rs.77,68,919/-. The Revenue is aggrieved with this exercise and emphasized that ld. Assessing Officer has made specific disallowances under sections 40A(3) and 40(a)(ia) of the Income Tax Act. A perusal of the assessment order would indicate that to some extent, the exercise adopted by the ld. Assessing Officer is justifiable because the assessee failed to submit the complete details as asked for by the ld. Assessing Officer. The ld. Assessing Officer has reproduced certain withdrawals of the Bank in paragraph no. 6 of the assessment order. We have also extracted that part of the assessment order in our order. The stand of the assessee on these withdrawals was that it has been constructing the roads in rural site. Roads were constructed under the supervision of the State Government. It is a controlled activity. The expenses were required at the site and these withdrawals are made by the employees of the assessee. The amounts were taken to the site and day to day expenses were made. It is not the case that a single payment is being made, for

example, Ajay Kumar has withdrawn most of the time, say 4th June, 2008 withdrew Rs.2,80,000/-. This is not payment. This is withdrawal by an employee of the assessee. The payment might be to different persons and may not exceed Rs.20,000/-. Similarly the other disallowance is made under section 40(a)(ia) on account of non-deduction of taxes from the head 'hire charges'. The Id. Assessing Officer ought to have appreciated what is the machinery, which must have been used by the assessee in its business whether role of the machinery from different person could be such, where more than 10% of the gross contractual receipt would have been incurred by the assessee. On a detailed analysis of both the orders alongwith the audited accounts placed before us, we are of the view that it appears that the assessee was not functioning in a very organized manner. It might be a small time contractor, who has been building roads in a rural area without specific help of good Accountant and Tax Consultant. While appreciating all these activities, Id. Assessing Officer ought to have appreciated that an addition of Rs.4,02,18,000/- was proposed and made. If this be a profit element embedded in the gross receipt of Rs.9,71,00,000/-. It is to be appreciated that whether in the construction of roads, element of profit of this much was embedded. Even if we exclude other smaller amount, then the two major additions are of roughly Rs.3,02,95,000/- .Could the State Government

be paying the contractors where element of profit was more than 30%. The Revenue ought to have put itself in the arm chair of a contractor, whose affairs are not managed by mathematical precision. The ld. 1st Appellate Authority when appreciated the facts probably with this angle was satisfied that instead of picking one or two minor lacunae in the books, it is to be visualise as to how much profit could have been earned by the assessee. Therefore, after an examination of the finding of ld. 1st Appellate Authority, we are satisfied that no interference is called for in the finding of ld. CIT(Appeals). The first three grounds of appeal are rejected.

12. In Ground No. 4 of this appeal, the grievance of the Revenue is that ld. CIT(Appeals) has erred in deleting the addition of Rs.2,10,000/-, which was added by the ld. Assessing Officer with the aid of Section 68 of the Income Tax Act.

13. Brief facts of the case are that three partners, namely Shri Jai Kumar Sharma, Shri Rakesh Kumar and Shri Vinay Kr. Singh have introduced a total capital of Rs.7,10,000/-. Shri Rakesh Kumar and Shri Vinay Kr. Singh have contributed Rs.2,50,000/- each. Shri Jay Kumar Sharma has introduced Rs.2,10,000/-. The ld. CIT(Appeals) confirmed the addition of Rs.5,00,000/- on the ground that these two partners Shri Rakesh Kumar

and Shri Vinay Kr. Singh are not filing their income-tax returns. They were not having PAN at the relevant time. Therefore, they could not explain the sources. As far as the contribution of Shri Jay Kumar Sharma is concerned, the ld. CIT(Appeals) has deleted the addition as the partner has been filing the return and assessed to tax. Therefore, to the extent of contribution of Rs.2,10,000/-, it is to be construed as made from explained sources.

14. We have duly considered the rival contentions and gone through the record carefully. The only reason assigned by the ld. CIT(Appeals) is that Shri Jay Kumar Sharma has been filing return of income but neither in the assessment proceeding nor before the appellate authority, it was demonstrated what was the profit received from the firm in earlier year and how capital was accumulated with him, having a PAN would not absolved the assessee for explaining the creditworthiness of the capital contributor. Therefore, this finding of the ld. CIT(Appeals) is set aside and addition of Rs.2,10,000/- is confirmed.

15. The Revenue has filed revised ground of appeal whereby it has raised one more ground. In this ground, Revenue has pleaded that ld. CIT(Appeals) has erred in deleting the addition of Rs.66,99,500/-, which was added by the ld. Assessing Officer with the aid of Section 68 of

the Income Tax Act. The finding of the Id. CIT(Appeals) on this issue reads as under:-

“Ground No. 5: The assessee has contended that the AO has erred in making addition of Rs.66,99,500/- u/s 68 of the Act when the AO herself noted that the amount in question was withdrawn from the Bank account of the the assessee.

A.O's contention

In the course of assessment proceedings A.O. noticed discrepancy in the cash book entry and corresponding entry from the bank account. It was stated by the A.O. that the amounts withdrawn from the bank account through cheques have gone to various parties as confirmed from the banks by way of enquiry under section 133(6). However, the cash book of the assessee made entry of the same amount as cash receipts. In response to the query during the assessment proceeding the assessee submitted as under:

"Various cheques are issued in the name of working staff of the concern and taken in the cash book to meet various expenditure related to business. Hence, we want to clarify it that credit entries in our cash book mentioned in point No.1 of your letter was from our bank accounts and should not be treated as unexplained credit in cash book."

As the reply of the assessee was not clear as regards withdrawal from the bank and entry in the cash book, the A.O. added the total of such amount Rs.66,99,500/- as unexplained cash credit u/s 68 of the Act.

In the remand proceedings again, the A.O. has stated that no supporting details has been submitted as regards the amount transferred through account payee cheque to other account and the assessee has not explained cash credit in the cash book. The A.O. observed that even if, it is mistake of accountant, assessee is liable for explanation.

Assessee's contention :

Assessee has submitted that the issue of cash credit is nothing but error in the accounting in the books of account of the assessee. The cash book and bank book demonstrated only one entry regarding the disputed amount. The said entries in the bank account should have been reflected in the journal entry of the assessee's books rather than in the cash

book. This was another example of defects in the books of accounts of assessee.

Appellate findings and decision:

After verifying the bank statement and entry in the cash book, it is noticed that the amount of withdrawals from the bank account through account payee cheque are entered in the cash book as "cofttra entry". In fact the amount of withdrawal from the bank should have gone into the concerned party account, rather than the entry in the cash book. Thus the mistake is apparent in the sense that books of accounts entries are erroneous and there is no issue of unexplained cash receipts. All the 'contra' entries shown in the cash book are matching with the account payee cheques issued from the bank -account of the assessee. Exactly same amounts on same dates are entered in the cash book as cash receipts. Due to vague explanations on the part of assessee A.O. treated these amounts as unexplained cash credits. Based on the facts of entries seen from cash book and bank account, I am inclined to accept assessee's view point of erroneous entries in cash book. Therefore, the addition of Rs.66,99,500/- is hereby deleted.

16. With the assistance of Id. Representatives, we have gone through the record carefully. The Id. 1st Appellate Authority has held that basically it is not a cash credit rather these are entries in the Cash Book after withdrawal from the Bank. For example, while dealing with disallowance under section 40A(3), we have noticed the details. If certain employees have withdrawn this amount from the Bank and taken to the Cash Book, then it would not become separately an unexplained cash credit. The Id. CIT(Appeals) has taken note of these facts in the light of incompleteness of the accounts of the assessee. These are not the cash credits, which were introduced by taking a loan from some outsiders or under the head of Capital Contribution. These are the

aggregate amount available in the alleged Cash Book, which has been explained by the assessee as withdrawn from the bank and routed through cash book. Therefore, we do not find any reason to interfere with the finding of ld. CIT(Appeals) on this issue. This ground of appeal is rejected.

17. In the result, the appeal of the Revenue is partly allowed.

Order pronounced in the open Court on 18.10.2023.

Sd/-
(Rajesh Kumar)
Accountant Member

Sd/-
(Rajpal Yadav)
Vice-President

Kolkata, the 18th day of October, 2023

*Copies to :(1) Income Tax Officer,
Ward-4(1), Patna*

*(2) M/s. Kumar Construction,
C-15, Vijay Nagar,
Near Petrol Pump,
Rukanpura, Baily Road,
Patna-800014*

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

(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.