

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

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

**I.T.A. No. 29/PAT/2022
Assessment Year: 2015-2016**

**Ajay Kumar,..... Appellant
22, Nehru Nagar,
Patliputra Colony, Patna-800013,
Bihar
[PAN:AFHPK3925N]**

-Vs.-

**Principal Commissioner of Income Tax-1,..Respondent
Patna,
Central Revenue Building, 2nd Floor,
Birchand Patel Marg, Patna-800001, Bihar**

Appearances by:

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

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

Date of concluding the hearing : October 04, 2023

Date of pronouncing the order : October 18, 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 12.03.2021 passed under section 263

of the Income Tax Act, 1961 in Assessment Year 2015-16.

2. The assessee has filed a detailed statement of facts along with eleven grounds of appeal. In brief, his grievance is that the Id. Pr. Commissioner has erred in taking cognizance under section 263 and thereby setting aside the assessment order dated 26.12.2017 passed under section 143(3) in A.Y. 2015-16. He further pleaded that Id. Pr. Commissioner has erred in directing the Id. Assessing Officer to pass a fresh assessment order.

3. Brief facts of the case are that the assessee has filed his return of income electronically declaring total income at Rs.2,32,35,950/-. This return was selected for a limited scrutiny through CASS and the items, which are required to be scrutinized, are mentioned by the Id. Assessing Officer as under:-

- (i) Interest expenses;
- (ii) Sales turnover mismatch; and
- (iii) Increase in Capital.

The Id. Assessing Officer had issued show-cause notice under section 143(2), which was duly served upon the assessee and after hearing the assessee, he has passed the assessment order on 26.12.2017. He accepted the returned income disclosed by the assessee by passing a very brief assessment order. It is pertinent to note that

the assessee was a Consulting Physician by Profession carrying on professional activity in the name of Diabetic Care & Research Centre and he was also running a proprietorship concern in the name & style of M/s. Sudama Pharma (Medicine Shop). In the return filed for A.Y. 2015-16 on 26.09.2015, the assessee has disclosed income from profession as a Consulting Physician and income from Medicine Shop. He also disclosed income from house property and income from other source, namely interest etc. As observed above, the ld. Assessing Officer has examined all these details and thereafter finalized the assessment.

4. The ld. Pr. Commissioner on perusal of the assessment record formed an opinion that assessment order is suffering from an apparent error and, therefore, it has caused a prejudice to the interest of revenue. Accordingly ld. Commissioner has issued a show-cause notice. The reasons assigned by the ld. Pr. Commissioner in this show-cause notice are summarized as under:-

(i) Increase in Capital to Rs. 5,00,84,278/-, which is very high as compared to the preceding Asst. Years.

*AO appears to have accepted assess(*e*s submission that "the transaction of non-profession kept separately and as a result, an amount of Rs.3,40,35,173/- was not shown in the professional/ business balance sheet" without making inquiries or verifications etc.*

(ii) No evidence of basing a separate personal Balance Sheet was obtained and examined by the A.O.

5. The assessee, on the other hand, filed a detailed reply, which has been reproduced by the ld. Pr. Commissioner in the impugned order. The ld. Pr. Commissioner was not satisfied with the explanation of assessee. He set aside the assessment order by observing as under:-

“The contention of the assessee has been examined with reference to the material of record. It is claimed that the balance sheet of the sole proprietary concern was merged with the balance sheet of the assessee. The assessee did not file the return of income showing the assets and liabilities of the sole proprietorship concern. In the absence of a separate return of income in the case of proprietary concern the assessee being a sole proprietor of M/s Sudama Pharma should have included all the assets and liabilities as part of his balance sheet, which should have been forming part of return of income filed online by the assessee. As the assets and liabilities of sole proprietary concern disclosed as part of assessee’s balance sheet for the first time, the genuineness of all the entries of proprietary concern, merged with the balance sheet of the assessee as claimed by the assessee required verification and examination, which was not done the Assessing Officer.

6. *In view of the fact that the AO completed the assessment with making enquiries, verification and investigation on the issues discussed above, the assessment order passed u/s 143(3) of the Income Tax Act, 1961 ca: 26.12.2017 was found to be erroneous in so far as it is prejudicial to the interests of the revenue within the meaning of section 263 of the Income Tax Act, 1961.*

7. *For the above referred reasons and the facts on record, I deem it to cancel and set-aside the assessment order u/s 143(3) of the IT Act 1961 dated 26.12.2017 passed by the AO without making enquiries and verification, which is should have been made on the following issues:*

Increase in Capital to Rs.5,00,84,278/-. The claim of the assessee that h kept the transaction of non-profession separately was not examined. As result, an amount of Rs.3,40,35,173/- was not shown in the professional business balance sheet.

No evidence of personal balance sheet was obtained and examined by the A.O.

Accordingly, the assessment order passed u/s. 143(3) of the I.T. Act 1961 dated 26.12,2017 is cancelled and set-aside with direction to the AO to frame the assessment denovo by making fresh enquiries, investigation and verification regarding the issues referred above and finalize assessment in accordance with provision of law”.

6. The ld. Counsel for the assessee while impugning the impugned order has contended that the ld. Pr. Commissioner has misconstrued and misread the facts. It is incorrect at his end to observe that the ld. Assessing Officer has not made inquiry. He drew our attention towards show-cause notice issued by the ld. Assessing Officer on these items and the reply submitted by the assessee, copies of these documents are placed on record at pages no. 7 & 8 of the paper book. He further contended that it is incorrect at the end of the ld. CIT to observe that the assessee did not file the return of income showing the assets & liabilities of the sole proprietorship concern. According to the ld. Counsel for the assessee, this observation in paragraph 5 of the ld. Pr. Commissioner is factually incorrect.

7. During the course of assessment proceeding, the ld. Assessing Officer has raised a specific question to the assessee regarding this aspect and the assessee has replied that question. The assessee has submitted the audited accounts of earlier year ending on 31st March,

2014, whereby all details relating to the balance-sheet of proprietorship concern, vis-a-vis professional are placed on the record of the ld. Assessing Officer.

8. The ld. CIT(DR), on the other hand, relied upon the order of ld. Pr. CIT and contended that the assessee did not file the return of income showing the assets and liabilities of the sole proprietorship concern. Thus ld. Commissioner has rightly observed that in the absence of a separate return of income in the case of proprietary concern, the ld. Assessing Officer could not examine it. Accordingly she relied upon the order of the ld Pr. CIT.

9. 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.”

10. 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 Id. 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.

11. In the light of above, let us examine the facts of the present case. It was submitted before us that the case of the assessee was selected for limited scrutiny and during the assessment proceedings ld. Assessing Officer has issued a notice inviting explanation of the assessee on the following items. The copy of the notice dated 08.11.2017 is available on page 7 of the paper book. The relevant

part of the information asked by the Id. Assessing Officer reads as under:-

“Sub.:- Scrutiny proceeding for the A.Y. 2015-16 - reg.

As per information available in our record in your case for the A.Y. 2015-16 it is found that the difference in sales turnover is Rs.59,19,200/- (as per ITR Rs.3,14,95,920/- and as per Audit Report Rs.2,55,76,720/-).

It is also found that capital for the A.Y. 2014-15 was Rs.1,21,13,056/- but in the A.Y. 2015-16 your capital is Rs.6,21,97,334/-. You are therefore, directed to explain the increase of capital for the A.Y. 2015-16 in comparison to A.Y. 2014-15.

You are also directed to submit Form 3C register during the period 2014-15 relevant to A.Y. 2015-16.

Compliance is solicited by 18.12.2017, failing which necessary action may be taken in accordance with the provisions of the Income tax act, 1961 for non-compliance.

You may send the compliance through E-mail - ashwani.k.singal@incometax.gov.in.

*Yours faithfully,
Sd/-
(Ashwani Kumar Singal)
ACIT, Circle-1, Patna*

12. The reply of the assessee reads as under:-

Date: 18.12.2017

The Assistant Commissioner of Income Tax
Circle-1
Patna

Sir,

Dr. Ajay Kumar
PAN: AFHPK3925N
AY: 2015-16

Reference to your letter No. ACIT/CIR-1/Pat/Scrutiny/2017-18/1117, we are to state as under:

- During the Financial Year 2013-14 (AY: 2014-15) we kept the transaction in nature of non- profession separately. As a result an amount worth Rs.3,40,35,173/- capital was not shown in the Professional/ Business Balance Sheet. The Personal Capital Account for the FY: 2013-14 is enclosed for your kind reference. The reconciliation statement to this effect is given below:-

<u>Detail of Income in FY: 2014-15</u>	
Balance as per last year(FY:13-14)	12113056.00(Business)
	<u>34035173.00(Personal)</u>
	46148229.00
Add: Profit from Medical Consultancy & Intt	15373605.00✓
Add: Profit from Sale of Medicine	7944079.00✓
Add: Received back from Insurance Maturity	137620.00✓
Add: Excess Home Loan HDFC Bank Ltd.	
Now adjusted as per audited return	<u>1223507.00*</u>
HDFC Home Loan 8835382.00	70827040.00
(Audited Figure) <u>10058889.00</u>	
	<u>1223507.00*</u>
Less: Drawings	<u>8629706.00</u> ✓
Balance as per ITR (AY: 15-16)	<u>62197334.00</u> #


- In the FY:2014-15 the above capital had been included in the main Balance Sheet.

- As per Audited Accounts total Revenue Income Shown as Rs.55468875/- and in the ITR it was shown Rs.55468875/-. As such there is no difference in the two figures mentioned.

<u>AY: 15-16</u>	<u>(as per ITR 4)</u>
Sale of Goods	29892155.00
(sale of medicine)	
Sale of Services-	22929839.00
(wrongly taken as other	
Income head)	
Other Income	<u>2646881.00</u>
	<u>55468875.00</u>

Hope you shall find the above in order.

Thanking you,
Yours faithfully,


Supriyo Sengupta
Authorised Signatory

13. A perusal of the query of the ld. Assessing Officer would reveal that ld. Assessing Officer has raised a specific question, wherein he observed that capital for A.Y. 2014-15 was Rs.1,21,13,056/- but in A.Y. 2015-16, it rose to Rs.6,21,97,334/-. The assessee has given reply. Thereafter the assessee has filed details in tabular form during the hearing before the ld. Commissioner and disclosed the availability of capital (non-business year-wise chart). This chart has been placed by him from A.Ys. 2004-05 to 2011-12. Upto A.Y. 2008-09, there is no additional property. Everything has been shown on the Diabetic Care & Research Centre. The addition in the capital account of the property, i.e. land, flat at Mumbai etc. has started from A.Y. 2009-10. All these accounts are duly disclosed by the assessee in the regular return of income filed by him. The income tax return of the proprietorship was embedded in his professional return because the assessee was the sole proprietor of the concern, namely M/s. Sudama Pharma, which is a Medical Store. On the other hand, ld. Commissioner has not recorded any finding on the details submitted by the assessee, rather simply observed that the assessment order is erroneous and prejudicial to the interest of revenue. There is no specific finding at the end of the ld. Commissioner demonstrating as to how the order is erroneous. He just narrated the fact and thereafter

conclusion without giving any reasoning on the submissions made by the assessee.

14. During the course of hearing, ld. Counsel for the assessee relied upon the judgment of the Hon'ble Patna High Court in the case of CIT -vs.- Mukul Kumar rendered in Tax Case No. 21 of 1998. The Hon'ble Court has rendered its decision on 23rd January, 2009. Copy of this decision has been placed on the record by the ld. Counsel for the assessee. In this case, it was demonstrated before the Hon'ble Court that the Tribunal has set aside the order of ld. Commissioner passed under section 263 of the Income Tax Act on the ground that ld. Assessing Officer has conducted inquiry and thereafter assessment order was passed. The ld. Pr. Commissioner had erroneously come to a finding that no inquiry was held by the ld. Assessing Officer before passing the assessment order. In the present case, ld. Assessing Officer has raised a specific query. The assessee gave a detailed reply wherein all concern details were submitted before the ld. Assessing Officer. The ld. Assessing Officer has not recorded a specific finding, but perusal of these details would demonstrate that he was satisfied with the explanation of the assessee. The ld. Pr. Commissioner has not rejected this submission in the impugned order and recorded the finding as to how the order is erroneous. Therefore, respectfully following the judgment

of the Hon'ble Patna High Court, we are of the view that the impugned order of the Id. Pr. CIT is not sustainable. It is quashed.

15. In the result, the appeal of the assessee is 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) Ajay Kumar,
22, Nehru Nagar,
Patliputra Colony, Patna-800013, Bihar*

*(2) Principal Commissioner of Income Tax-1,
Patna,
Central Revenue Building, 2nd Floor,
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.