

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, KOLKATA

**BEFORE SHRI RAJESH KUMAR, AM
AND
SHRI PRADIP KUMAR CHOUBEY, JM**

**ITA Nos.521 to 526, 527, 1094, 918/KOL/2024
(Assessment Years: 2008-09 to 2013-14, 2015-16, 2016-17,
2020-21)**

Barik Biswas
Sangrampur, Basirhat, North 24
Parganas, West Bengal, 743422

(Appellant)

vs.

ACIT, CIRCLE-49(1)&(2),
Kolkata, West Bengal

(Respondent)

PAN No. AHYPB7479F

Assessee by : S/Shri S.M. Surana, Adv &
Sunil Surana, ARs
Revenue by : Shri Subhendu Datta &
Ankur Goel, DR

Date of hearing: 11.02.2025
Date of pronouncement : 02.04.2025

ORDER

Per Rajesh Kumar, AM:

These are appeals preferred by the assessee against the orders of the National Faceless Appeal Centre, Delhi (hereinafter referred to as the "Ld. CIT(A)") dated 12.01.2024, 16.01.2024, 14.03.2024 and , 24.02.2024 for the AY 2008-09 to 2013-14, 2015-16, 2016-17 & 2020-21.

ITA Nos. 521 to 526/KOL/2024

02. The facts and circumstances in ITA Nos. 521 to 526/KOL/2024, are factually identical, hence, for the sake of convenience, we first take ITA No. 521/Kol/2024 and decide the issue.

03. At the time of hearing the Id. Counsel for the assessee drew the attention of the Bench to application dated 11.01.2025, wherein the counsel of the assessee has raised an additional ground and also revised the grounds of appeal taken originally in the memorandum of appeal. The issue raised in ground no.1 is a legal issue, challenging the assessment framed in pursuance of the revisionary order passed u/s 263 of the Act, when the order passed u/s 263 of the Income-tax Act, 1961 (the Act), revising the assessment u/s 143(3) of the Act, itself is bad in law. The ground raised is as under:-

"1. For that the assessment in pursuance of the order u/s 263 of the Act is bad in law in view of the fact that the order passed u/s 263 of the Act revising and setting aside the order u/s 143(3)/ 147 itself was bad in law."

04. The Id. Counsel at the outset submitted that the legal issue raised goes to the root of the matter and could not be taken earlier due to inadvertence. The Id. Counsel for the assessee further submitted that all the facts qua the said ground are available on record and no further verification of facts is required to be made from many quarters whatsoever. The Id. Counsel for the assessee therefore submitted that the same may be admitted for adjudication for relying on the decisions of Hon'ble Apex Court in the case of Jute Corporation of India Ltd. Vs CIT in 187 ITR 688 , ii) National Thermal Power Co. Ltd v. CIT [1998] 229 ITR 383 and also by the decision of Hon'ble Calcutta High Court in PCIT vs. Britannia Industries Ltd. [2017] 396 ITR 677 (Cal).

05. The Id. DR on the other hand submitted that the assessee has not taken this legal issue before either of the authorities below and this ground is being raised for the first time before this forum, therefore, at this stage it would be unfair to admit the same for adjudication. However, requested the bench to restore the same to either of the authorities below so that the same could be decided.

06. After hearing the rival contentions and perusing the material on record, we find that the assessee has raised an additional ground challenging the assessment framed in the set aside proceedings to be invalid as the revisionary order revising the assessment was itself invalid and nullity. In our opinion the issued raised in the additional ground is a purely a legal issue which goes to the root of the issue qua which all the facts are available in the appeal folder and no further verification of facts are required from any quarter whatsoever. In our considered view the assessee is at liberty to raise any legal issue before any appellate authority for the first time even when the same has not been raised before the lower authorities. The case of the assessee is squarely covered by the decisions of the Apex court in the case of i) Jute Corporation of India Ltd. Vs CIT (supra) ii) National Thermal Power Co. Ltd v. CIT (supra) and also by the decision of Hon'ble Calcutta High Court in PCIT vs. Britannia Industries Ltd. (supra). Therefore, we are inclined to admit the same for adjudication.
07. The facts in brief are that the return filed on 24.03.2009 declaring total income of ₹160,930/-. The case of the assessee was reopened u/s 147 of the Act by issuing notice u/s 148 of the Act on 12.03.2015. The assessee complied with the said notice by filing return of income on 04.09.2015 declaring total income of ₹12,34,640/-. The above assessment was reopened u/s 147 of the Act, on the ground that there was a huge cash deposits in the bank account of the assessee and therefore, the Id. AO has reason to belief that there was an escapement of income of more than 1 lac. The assessment was framed u/s 143/147 of the Act vide order dated 25.03.2016 accepting the returned income.

08. Thereafter the Id. Pr.CIT exercised the revisionary jurisdiction u/s 263 of the Act on the ground that the Id. AO has failed to examine the genuineness of the cash purchases and also failed to examine whether there was any violation of provisions of Section 40A(3) of the Act. The Id. PCIT noted that according to clause (a) to explanation 2 to section 263 of the Act with effect from 01.06.2015, order passed without making enquiries/ verifications, which should have been made, shall be deemed to be erroneous and prejudicial to the interest of the Revenue. The Id. Pr. CIT finally passed the order u/s 263 of the Act on 20.11.2017, revising the assessment framed u/s 143/147 dated 25.03.2016, with a direction to pass fresh assessment order and compute the total income as per the provisions of the Act after due examination of issue of violation of provisions of Section 40A(3) of the Act after giving a reasonable opportunity of hearing to the assessee. Thereafter in the set aside proceedings, the Id. AO issued notice to the assessee calling for certain details and information which were duly furnished by the assessee and finally, made an addition of ₹1,25,32,915/- on account of disallowances u/s 40A(3) of the Act in respect of purchase of coal and bricks.
09. Thereafter, the assessee preferred the appeal before the Id. CIT (A) and the Id. CIT (A) also confirmed the addition by upholding the order of the Id. Assessing Officer.
010. Now, the Id. Counsel for the assessee vehemently submitted before us that the assessment order framed u/s 144/ 263 dated 20.12.2018 in pursuance of the order passed by Pr.CIT u/s 263 of the Act is bad in law on the ground that the order passed by the Id. PCIT u/s 263 of the Act dated 20.11.2017, is itself invalid and bad in law. The Id. Counsel for the assessee submitted that the assessee is within its rights to challenge the validity of the revisionary order passed u/s 263 of the

Act dated 20.11.2017 in the collateral proceedings by relying on the decision of Hon'ble Apex Court in the case of PCIT Vs. Bulbul Agrawal petition for Special Leave to appeal (C) No. 26629/2023 order dated 19.02.2025, wherein the Hon'ble Apex Court while dismissing the SLP also referred to the order of co-ordinate Bench in Para 14 and 15 and thus, dismissed the SLP after considering the merit. The Id. AR submitted that the Cuttack Bench vide order dated 18.08.2022, passed in ITA No. 72/DDK/2021 for A.Y. 2013-14 in case of Binay Kumar Jindal and Ors, has held that the issue with regard to validity of the order can be taken in the collateral proceedings and thereafter vide para no. 14 and 15, held that the reopening of assessment u/s 147 of the Act is bad in law. The Id. AR further submitted that the Tribunal vide para no. 16 had quashed the order passed u/s 263 of the Act passed by Id. Pr.CIT and the Revenue after losing the same in the High Court preferred SLP before Supreme Court.

011. The Id. AR further submitted that the revisionary order u/s 263 of the Act dated 28.11.2017, was itself is bad in law as vide that order the Id. PCIT has sought to set aside the assessment framed u/s 143(3)/147 of the Act dated 25.03.2016, wherein the issue is only the cash deposited into the bank of the assessee as is apparent from the reasons recorded. A copy of which is available at page no.1 and 2 of the paper book. The Id. AR submitted that in the revisionary order the Id. Pr. CIT sought to raise the issue that AO has failed to examine the payment for cash purchases, etc. and applicability of Section 40A(3) of the Act. Therefore, the Id. Counsel for the assessee submitted that the issue raised by the Id. Pr.CIT in the revisionary order was not subject matter of the reopening of assessment u/s 147 of the Act nor was it ever came to the notice of the Id. AO during the re-assessment proceedings. Therefore, the Id. PCIT could not have validly revised the

assessment framed u/s 143/ 147 of the Act dated 25.03.2016. The Id. AR further submitted that the limitation to pass the revisionary order u/s 263 of the Act in respect of the order passed u/s 143(1) of the Act had already expired on or before 31st March, 2017. The Id. AR submitted that the reopening of assessment u/s 147 of the Act was made for cash deposits in the bank account, whereas the issue in 263 was purchases made in violation of section 40A(3) of the Act. The Id. AR prayed that the same is bad in law by relying on the decision of Hon'ble Apex Court in the case of CIT vs. Alagendran Finance Ltd (2007) 293 ITR 1 (SC). The Id. AR further submitted that the said decision of the Apex Court has been followed in the case of Lark Chemicals Ltd. (2014) 368 ITR 655 (Bom), wherein the original assessment was u/s 143(1) then reopened u/s 147 of the Act wherein the issue for which 263 done was not there in the re-assessment proceedings. The Hon'ble Bombay High Court held that limitation has to be reckoned from the date of the intimation u/s 143(1) and not from order passed u/s 143(3) r.w.s.147 of the Act. The Id. AR submitted that the aforesaid judgement was followed by the Hon'ble Calcutta High Court in Keshab Narayan Banerjee Vs CIT & Another (1999) 238 ITR 694 (Cal). The Id. AR therefore, prayed that the revisionary order passed u/s 263 of the Act was invalid and so was the order passed u/s 144/ 263 of the Act and therefore may kindly be quashed.

012. The Id. DR on the other hands strongly relied on the orders of the lower authorities.

013. After hearing the rival contentions and perusing the materials available on record, we find that in this case, the assessment was framed u/s 143/ 147 of the Act vide order dated 25.03.2016 after the case was reopened u/s 147 of the Act. We note that the issue in the

said reopening of assessment as recorded in the reasons to believe was with regard to cash deposited in the assessee's bank account. Thereafter the Id. Pr. CIT revised the said assessment order vide its revisionary order u/s 263 of the Act dated 20.11.2017, directing the Id. AO to pass the assessment afresh after examining the issue of violation of section 40A(3) of the Act with regard to purchases. We note that the issue on which the reopening was made vis a vis the issue on which the revisionary order was passed were two different issues and therefore, the assessment framed u/s 143(3)/147 dated 25.03.2016 is not amenable to revision u/s 263 of the Act, as the issue on which the reopening was made was completely different. Therefore, we find merit in the contention of the assessee that the revisionary jurisdiction exercised by the Id. PCIT u/s 263 of the Act and the order passed consequently dated 20.11.2017 were bad in law. Consequently all the proceedings, thereafter are also invalid and bad in law. Thus, the case of the assessee find support from the decision of Hon'ble Apex court in the case of CIT vs. Alagendran Finance Ltd (supra), wherein the Hon'ble Apex court has held that the order u/s 263 of the Act on an issue which was not subject matter of reassessment order. Moreover, if the order which was to be revised was the order passed u/s 143(1) and not u/s 143(3)/147 of the Act but that has become barred by limitation as on 31st March 2017. We also note that the decision of the Hon'ble Apex Court was followed by Hon'ble Bombay High Court in the case of CIT Vs Lark Chemicals Ltd. (supra) and also by Hon'ble Calcutta High Court in case of Keshab Narayan Banerjee Vs CIT & Another (supra). Therefore, we are inclined to hold that the assessment framed u/s 144/263 of the Act dated 20.12.2018 is invalid and is hereby quashed on the ground that the same was framed in pursuance to invalid revisionary order passed u/s 263 of the Act. The Hon'ble Apex Court in the case of PCIT Vs.

Bulbul Agrawal (supra), wherein the Hon'ble Court dismissed petition for Special Leave to appeal (C) No. 26629/2023 order dated 19.02.2025, wherein the Hon'ble Apex Court while dismissing the SLP referred to the decision of the co-ordinate Bench in Para 14 and 15, whereby the Tribunal held that the validity of order can be taken in the collateral proceeding and in Para 16 quashed the order u/s 263 of the Act. Similarly, considering the facts and circumstances of the case and in the light of aforesaid decisions, we quash the assessment u/s 144/263 of the Act. The appeal of the assessee is allowed on legal issue.

014. The issue raised in all these appeals namely ITA Nos.522 to 526/KOL/2024 by way of additional ground is identical to one as decided by us in ITA No. 521/KOL/2024. Therefore, our decision in ITA No. 521/KOL/2024 would, mutatis mutandis, apply to these appeals of assessee in ITA Nos.522 to 526/KOL/2024. Accordingly, additional ground raised by the assessee are allowed by quashing the assessment framed u/s 144/ 263 of the Act.

ITA No. 1094/KOL/2024 A.Y.2015-16

015. The only issue raised in various grounds of appeal is against the confirmation of addition by Id. CIT (A) of ₹1,07,37,641/- in respect of violation of Section 40A(3) of the Act for purchase of coal and bricks and ₹1,90,55,783/- u/s 40A(3) of the Act in respect of labour charges.

016. It was claimed before us that the Id. AO has wrongly made the addition by mis-appreciating the facts on record as the single payment was not exceeding ₹20,000/- in respect of purchase of coal as well as purchase of bricks for which the assessee placed before us the copies of Bricks purchase and Coal purchase during the year. We find that

the cash payment were not exceeding the limit as specified in section 40A(3) of the Act. It was stated before us that th4e assessee was under the wrong notion that 40A(3) covers single payment in a day and not to a single party. It was also stated that the payments were made to the producers of bricks without the aid of power who were ignorant about the provisions of the law and therefore the same may be may be allowed. Similarly, in respect of labour payment also it was claimed that the payment to the labour was less than 20,000/- per peron. We note that the Id. AO and CIT (A) has not gone into the issues in depth and decided the issue on the basis of the ledgers copies. The Id. Counsel of the assessee submitted that all the payments were made below the limit as specified in section 40A(3) of the Act. Accordingly, in the interest of justice and fairplay, we restore the issue to the file of the Id. AO with a direction to examine the same on the basis of evidences which the assessee may produce during the set aside proceedings after affording a reasonable opportunity of hearing to the assessee. Accordingly, the appeal of the assessee is allowed for statistical purposes.

ITA No. 527/KOL/2024 A.Y.2016-17

017. The only issue raised in various grounds of appeal is against the confirmation of addition by Id. CIT (A) of ₹15,49,50,054/- in respect of violation of Section 40A(3) of the Act for purchase of coal and bricks and ₹1,81,96,959/- u/s 40A(3) of the Act in respect of Carriage Inward and Rs. 4,97,26,457 u/s 40A(3) in respect of labour charges.
018. In this case also the Id. AO has disallowed the entire payment for purchase of bricks ₹15,49,50,054/ , Rs. 1,81,96,959/- for carriage inward and the entire labour payments of ₹ 4,97,26,457/-, by stating the same to be in violation of the provisions of Section 40A(3) of the

Act. We note that the books of accounts were already audited and there was no such remarks to this effect by the auditors in the audited report and it was also pointed out before us with reference to the bank statements and other supporting records that the substantial amount out of the above payments were made by cheques and almost all the payments made in cash were below the limit as specified in Section 40A(3) of the Act. Therefore, we feel that the same needs verification at the end of the Id. AO and accordingly, we restore the issue back to the file of the Id. AO with a direction to frame the assessment de-novo after affording reasonable opportunity of hearing to the assessee. The appeal of the assessee is allowed for statistical purposes.

ITA No. 918/KOL/2024 A.Y.2020-21

019. We note that the Id. AO has made an addition in respect of disallowance of expenses and royalty u/s 40A(3) of the Act and unexplained cash credit u/s 68 of the Act when the assessee did not respond to the various notices issued. Similarly, the appeal was dismissed by the Id. CIT (A), when the assessee failed to explain the delay of 48 days in filing the appeal before the Id. CIT (A). In our opinion, the end of justice would be well served if the appeal is restored back to the file of the Id. AO to examine and deciding the issue de-novo after taking into account the evidences and contention of the assessee. Accordingly we restore the appeal to the file of the AO with a direction to decide the same de-novo after allowing a reasonable opportunity to the assessee.

020. In the result, the appeals of the assessee in ITA No. 521 to 526/Kol/2024 for A.Y.2008-09 to 2013-14 are allowed while appeals

in ITA No. 1094,527 & 918/Kol/2024 for A.Y. 2015-16, 2016-17 and 2020-21 are allowed for statistical purposes.

Order pronounced in the open court on 02.04.2025.

Sd/-
(PRADIP KUMAR CHOUBEY)
(JUDICIAL MEMBER)

Sd/-
(RAJESH KUMAR)
(ACCOUNTANT MEMBER)

Kolkata, Dated: 02.04.2025

Sudip Sarkar, Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT
4. DR, ITAT,
5. Guard file.

BY ORDER,

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Kolkata