

**IN THE INCOME TAX APPELLATE TRIBUNAL
PATNA BENCH AT KOLKATA**

[Virtual Court]

Before

**SHRI GEORGE MATHAN, JUDICIAL MEMBER
&
SHRI RAKESH MISHRA, ACCOUNTANT MEMBER**

**I.T.A. No.: 239/PAT/2024
Assessment Year: 2017-18**

ACIT, Central Circle, Muzaffarpur	Vs.	Ajit Kumar
(Appellant)		(Respondent)
PAN: BNUPK8087K		

Appearances:

Department represented by : Rajat Datta, CIT(DR).

assessee represented by : G.P. Tulsiyan, FCA.

Date of concluding the hearing : 10-September-2025

Date of pronouncing the order : 29-September-2025

ORDER

PER RAKESH MISHRA, ACCOUNTANT MEMBER:

This appeal filed by the Revenue is against the order of the Commissioner of Income Tax (Appeals)-3, Patna [hereinafter referred to as Ld. 'CIT(A)'] passed u/s 250 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') for AY 2017-18 dated 30.11.2023, which has been passed against the assessment order u/s 143(3)/147 of the Act, dated 30.12.2019.

2. The Revenue is in appeal before the Tribunal raising the following grounds of appeal:

"1. That on the facts and in the circumstances of the case and in law, the Ld. CIT(A)-3, Patna erred in deleting Addition of Rs. 3,52,82,071/- holding that though the entries of the impounded documents were out of books

transactions of the assessee, the same were not claimed in the P&L A/c of the assessee. Hence, the provisions of section 40A(3) are not applicable.

2. That on the facts and in the circumstances of the case and in law, the Ld. CIT(A)-3, Patna erred in not Including the Issue In the remand order Issued by him for examination of the undisclosed receipt from business of the assessee.

3. That on the facts and in the circumstances of the case and in law, the Ld. CIT(A) failed to appreciate that the said day books (impounded document) were the part of the assessee's books of accounts as the figures of receipt and expenses claimed in his audit reports are also from these day books. Hence, claim of the assessee that the said day books were not the part of his books is not correct.

4. That on the facts and in the circumstances of the case and in law, the Ld. CIT(A), erred in not appreciating the fact that the assessee failed to explain the source and also the genuineness of the expenses as to how these expenses were the integral part of his business activities and also business exigency for which the expenses were made.

5. That on the facts and in the circumstances of the case and in law, Ld. CIT(A) failed to appreciate that expenses in question should have been treated as unexplained expenditure u/s 69 of the Act for which taxes should have been charges as per provisions of u/s 115BBE.

6. That the order of the Ld. CIT (A) being erroneous in law and on facts to be vacated and the order/ notice of the A.O. be restored.

7. That the applicant craves leave to add, alter, delete, and modify the grounds of appeal before the Hon'ble ITAT.”

3. Brief facts of the case as mentioned in written submission filed by the assessee are as under:

“1. The assessee is a food grain dealer cum manufacturer of rice, situated in Narkatiyaganj West Champaran, Bihar.

2. A survey was conducted on 30.08.2017, in the business premises of the assessee. Loose sheets marked as JKJ-10, JKJ-41 and JKJ-42 were impounded during survey containing the details of business transactions in a day book from January 2017 to July 2017.

3. On the basis of impounded material and ITR filed by the assessee for AY:2017-18, a notice u/s 148 was issued and thereafter scrutiny proceedings started.



4. During the reassessment proceedings, the AO analyzed the impounded materials. Books of accounts produced by the assessee, were also examined. Thereafter an order u/s 143(3) was passed on 30.12.2019. Following additions were made to the declared income of the assessee of Rs 11,85,340/- in return filed in compliance to u/s 148 of as below:

(a) On the basis of seized material, the out of books turnover of the assessee was estimated as Rs 85,88,93,756/-. After deducting the turnover declared by the assessee in his return filed Rs.4,14,88,856/-, a turnover of Rs.81,74,04,900/- was considered as out of books turnover, on which @5.39% rate of net profit was applied to determine the out of books profit as ₹.4,40,58,124/-. This profit of Rs.4,40,58,124/- was added to the returned income.

(b) Further, on the basis of cash payments exceeding Rs 20,000/- appearing in the loose sheets, the AO jotted down total such cash payments as Rs.3,52,82,071/-and added it to the returned income as disallowed u/s 40A(3).

(c) Further, the AO estimated Rs. 10,00,000/- as the capital required to do out of books business. This sum of Rs. 10,00,000/- was also added it to returned income.

Accordingly a total income of Rs.8,15,25,535/- was determined in the order so passed, raising a demand of Rs 3,79,60,958/-.

(d) Aggrieved by the order the A.O., the assessee preferred an appeal before CIT(A) on 05.02.2020. The Ld., CIT-A, considered the facts of the case, submissions and arguments made by the assessee. CIT-A passed an order u/s250 on 30.11.2023 partly allowing the appeal. Following reliefs were granted in CIT-A Order:—

1. Addition under 4(a) - A relief of Rs 1,86,64,512/- was granted.

II. Addition under 4(b) - A relief of Rs 3,52,82,071/- was granted.

III. Addition under 4(c) - A relief of Rs 10,00,000/- was granted.

5. The assessee preferred an appeal before the Hon'ble ITAT-Patna on 22.01.2024 against the order of the CIT-A and it was admitted as 1TA no. 221/PAT/2024.

6. Since the above appeal with ITAT-Patna was pending, the assessee opted for DTVSV 2024 scheme of Income Tax for settlement of its dues on 22.01.2024. The dispute was settled as the assessee paid in FORM-3 and finally FORM-4 was issued on 11.06.2025 (A copy enclosed.).



7. In the meanwhile, the income tax department also preferred an appeal before ITAT-Patna on 02.02.2024, against the partial relief order of CIT-A and the issue raised was deletion of disallowance u/s 40A(3) of Rs.3,52,82,071/-. The present appeal is ITA NO: ITA 239/PAT/2024 fixed for hearing on 30.06.2025 as above.”

4. Subsequent to the additions made by the Ld. AO for the profit on the sales estimated for the entire year on the basis of the documents found for 3 months and other additions, the assessee filed an appeal before the Ld. CIT(A) who called for a remand report of the Ld. AO, analysed the excess sales out of the books of account which were estimated at ₹58,14,57,285/-, allowed a credit of ₹11,03,32,756/- on account of bank contra entries, estimated the undisclosed turnover at ₹47,11,24,529/- and reduced the consequential addition to ₹2,53,93,612/- instead of ₹4,40,58,124/- made by the Ld. AO. He also deleted the additions of ₹3,52,82,071/- made under section 40A(3) of the Act as the transactions in the impounded documents were out of books and these expenses had not been claimed as a deduction in the books of account and further as the GP had been estimated at the rate of 5.39% of the entire unaccounted turnover the assessee, therefore, no further addition under section 40A(3) of the Act was liable to be made and granted relief to the assessee. As regards the addition on account of capital employed for doing out of books business, he gave the relief by holding as under:

“I have considered the entire facts of this issue. The addition has been made by the AO as he was of the opinion that a certain amount of capital was required to achieve such transactions. The AO estimated this amount at Rs. 10,00,000/- and made ad hoc addition. However, there is no evidence available on record to back the addition. Therefore, the addition made by the AO is purely based on his estimation. The judgements have been delivered by Hon'ble Supreme Court and various High Courts that the addition made cannot be sustained unless backed by concrete documentary evidence. In this case Gross Profit of Rs. 2,53,93,6127- has been estimated



and upheld while adjudicating Ground no.1 which is much more than addition of Rs. 10 lacs made by the AO on account of capital employed to achieve unaccounted turnover. Accordingly, I find that the addition made by the AO without any basis and cannot be sustained. Therefore, the addition of Rs. 10,00,000/- is deleted and the ground is allowed.

5. In the result, the appeal is partly allowed.”

5. Thus, the appeal was partly allowed. Aggrieved with the order of the Ld. CIT(A), the Revenue has filed the appeal before the Tribunal.

6. Rival contentions were heard and the submissions made have been examined. In this case, a survey was carried out and subsequent to the survey, income of ₹11,85,340/- was declared in the return of income filed in response to the notice issued under section 148 of the Act. The Assessing Officer (hereinafter referred to as Ld. 'AO') estimated the sales from the documents found during the course of the survey and estimated the gross profit ratio which was applied and the Ld. CIT(A) directed the Ld. AO to apply the net profit rate of 5.39% on the turnover estimated by him, which was recalculated on the basis of the facts of the case and the remand report. The Ld. AR also submitted that in this case at the stage of assessment, the provisions of section 40A(3) of the Act were invoked by the Ld. AO and an addition of ₹3.28 Crore was made on the basis of the impounded documents which were part of the assessee's books of account. It was submitted that once the gross profit ratio was taken, there was no further question of invoking section 40A(3) of the Act. A reference was made to page 11 of the assessment order and page 26 of the Ld. CIT(A)'s order. The written submission filed in this regard are as under:

“1. The assessee at the time of hearing before CIT(A) had submitted in respect of the disallowance u/s 40A(3) as below:-

“In respect of the additions on account of application of Section 40A(3) on the cash payment entries of, out of books purchases and sales recorded in

the day books seized, i.e., JK-41,42 & 44, the A.O. has disallowed a sum of Rs.3,52,82,071/- at S.No. 02 of his order. This is incorrect both primarily and legally. The A.O. has committed error in disallowing amount u/s 40A(3), from out of books day book entries, which was not the part of the audited accounts. Therefore, this disallowance is incorrect and cannot be sustained due to following reasons: -

(a) The disallowance of expenditure u/s 40A(3) of the Income Tax Act, 1961, is required only when, expenditures are charged to the P&L account, recorded in the books of accounts. In such circumstances, the net profit to determined and offered for taxation under the head INCOME FROM PROFIT & GAINSS OF BUSINESS, applying sections 28 to 43, is calculated by disallowing the cash payments of expenditures incurred exceeding the limit specified given in that section. The A.O. has not made any such disallowance from the results of audited accounts, where, total income declared by the assessee, Rs. 11,85,340/-has been accepted by A.O. as it is.

(b) From the seized day books, the A.O. has estimated the out of books sales as given in his remand report called for by CIT-A, at Rs.47,11,24,529/-. CIT-A directed A.O. to apply the net profit rate of 5.39% on this amount, to estimate the profit earned from out of books turnover. There were no regular books for such out of book's turnover. On a summary basis, the income under the head INCOME FROM PROFIT & GAINSS OF BUSINESS, has been estimated, based on estimated out of books turnover. Therefore, the question of disallowing cash payments for purchases narrated in JKJ-41, JKJ-42 & JKJ-44, exceeding specified limit u/s 40A(3), does not arise. The estimated income on out of Books turnover takes a wholistic care of every disallowance for that purpose.

(c) Due to the reason of estimation of out of books turnover, the summary Estimation of sales and subsequent application of net profit rate on that for determining the profit, takes care of all disallowances and again disallowing these expenditures u/s 40A(3), would lead to double taxation of the same amount, because those amounts have already been considered in the net profit.

(d) In this respect, the following judicial pronouncements which are in assessee's favour, are cited and enclosed as below:—

- i. CIT vs Smt. Santosh Jain (P&H HC) ITA No. 512 of 2005;
- ii. Puradakoppalu Battegowda Karigowda vs Dy. CIT (Bang-Trib.) ITA No. 1021 to 1024/Bang/2022.



Therefore, the addition of Rs.3,52,82,071/-. As above u/s 40A(3), is requested to be deleted.”

2. On considering the facts and circumstances, the Ld. CIT appeal gave his findings as below:-

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.....

From the provisions of section 40A(3) of the Act, it is clear that any payment in cash exceeding Rs. 20,000/- shall not be allowable for deduction which clearly means that the said deductions must have been claimed in the books of the assessee. Since all the transactions of the impounded documents are out of books and these expenses have not been claimed as deduction in the books of account of the appellant, I agree that the provisions of section 40A(3) are not applicable in this case. NET PROFIT has already been estimated at 5.39% on the entire unaccounted turnover of the assessee, hence any further addition u/s 40A(3) on the basis of same impounded material is not warranted as the estimation of Net Profit has taken care of all the expenses. This position has been affirmed in CIT Vs Sint Santosh Jain ITA No 512 of 2005 (Punjab & Haryana) and Puradakoppalu Battegowda Karigowda Vs DCIT ITAT Bangalore ITA No. 1021 of 2022. Accordingly, the addition of Rs. 3,52,82,071/- is deleted and the ground is allowed.”

3. In the reassessment proceedings after survey, in the order of the AO, the AO himself has distinguished the book income shown in the regular audited books of accounts as Rs 11,85,340/- offered by the assessee in the 1TR filed and estimated the out of books profit generated from the out of books transactions noted down in the loose sheets as Rs.8,03,40,195/- passing order of total taxable income of Rs 8,15,25,535/-

4. From the texts of section 40A(3) reproduced by the CIT-A, it is crystal clear that the business income of an assessee, which has to be determined applying section 28 to 43 of the ITA act, covers disallowance under section 40A(3) for the expenditure debited in the regular books of accounts only, where assessee maintains regular books of accounts.

5. In the instant case the AO, has not disallowed any amount u/s40A(3), out of income offered in the regular books of accounts, but arbitrarily, the out of books business entries, noted in the impounded materials were analyzed to invoke section 40A(3).

6. However, for determining, out of books business profits, the AO has estimated net profit @5.39% of the estimated turnover, which evidently takes care of all the expenses pertaining to that income, as determined for



out of books business. Therefore, as the profit from out of books business has not been determined by segregating expenditures in the loose sheets separately, there is no room for invoking section 40A(3) disallowance.

7. The invocation of Sec. 40A(3) as well as estimating a net profit @5.39% of the estimated out of books turnover shall not go hands in hand as it will lead to double taxation of the same income. Once the net income rate is applied, obviously the income determined takes care of all the provisions of Sec. 28 to 43 of the Income Tax Act and Sec. 40A(3) cannot be separately invoked.

It is therefore prayed that, the deletion by the CIT(A), of the sum of Rs. 3,52,882,071/-, which is perfectly legal and judicious, be upheld and oblige.”

7. The assessee has relied upon the several judicial pronouncements as mentioned in the written submission in support of the relief claimed that once the profit was estimated, there was no requirement of making any further disallowance as the said would amount to double addition.

8. We have considered the submissions made and have also gone through the order of the Ld. CIT(A) who had called for the remand report, analysed the impounded documents and thereafter recalculated the undisclosed sales on which gross profit rate has been applied and additional income has been computed. The Revenue has not been able to assail the findings of the Ld. CIT(A) for estimating the undisclosed income and the findings of the Ld. CIT(A) in this regard are hereby confirmed. Hence, Ground No. 2 is dismissed.

9. Further, once the books of account were rejected and gross profit rate was applied, there was no question of making any further disallowance on account of cash payment u/s 40A(3) or any other disallowance of the Act as the application of net profit rate took care of all the allowable expenses. As regards the addition on account of capital required for the undisclosed business of the assessee, the findings of



the Ld. CIT(A) are justified as the addition to the income made does not require any further estimation on account of capital required for doing the business as the estimated income is more than the addition on account of capital requirement. We find merits in the submission of the assessee and find no reason to interfere with the findings of the Ld. CIT(A) for deleting the addition made u/s 40A(3) of the Act by the Ld. AO and the findings of the Ld. CIT(A) are hereby upheld. Hence, Ground Nos. 1, 3, 4 and 5 are dismissed.

10. A query was made as to whether once the assessee has opted for Direct Tax Vivad se Vishwas Scheme, 2024 (in short 'VSV Scheme'), the Revenue can continue with this appeal, to which the Ld. DR pointed out that in the present scheme partial declaration under VSV Scheme was permitted. Since relief has been allowed on the merits of the case, therefore, this issue becomes only of the academic interest.

11. Ground Nos. 6 and 7 are general in nature and do not require any separate adjudication.

12. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open Court on 29th September, 2025.

Sd/-

[George Mathan]
Judicial Member

Sd/-

[Rakesh Mishra]
Accountant Member

Dated: 29.09.2025

Bidhan (Sr. P.S.)



Copy of the order forwarded to:

1. **ACIT, Central Circle.**
2. **Ajit Kumar, Muzaffarpur, M/s. Ajanta Chura Mill, Purani Bazar, Narkatiyganj, Bettiah, Bihar, 845455.**
3. CIT(A)-3, Patna.
4. CIT-
5. CIT(DR), Patna Bench, Patna.
6. Guard File.

// True copy //

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata