

IN THE INCOME TAX APPELLATE TRIBUNAL “PATNA BENCH” PATNA
(VIRTUAL HEARING AT KOLKATA)

SHRI SOJOY SARMA, JUDICIAL MEMBER
SHRI SANJAY AWASTHI, ACCOUNTANT MEMBER

I.T.A. No. 269/Pat/2018
Assessment Year: 2008-09

Assistant Commissioner of Income Tax,
Circle-4(1), Patna,

4th Floor, Lok Nayak Jai Prakash Bhawan,

Dak Bungalow Road, Patna **Appellant**

vs.

Munni Rai,

68, Chanakya Puri,

Raja Bazar, Bailey Road, B.V. College,

Patna -14

[PAN: AANPR7968R] **Respondent**

Appearances by:

Assessee represented by : Shri Sudipta Sannigrahi, CA

Department represented by : Shri Ashok Kumar, CIT

Date of concluding the hearing : 09.01.2025

Date of pronouncing the order : 16.01.2025

ORDER

PER SANJAY AWASTHI, ACCOUNTANT MEMBER:

1. The present appeal emanates from order u/s 250 of the Income Tax Act, 1961 (hereafter ‘the Act’), passed by the Ld. Commissioner of Income Tax (Appeals) -2, Patna [hereafter ‘the Ld. CIT(A)']. The impugned order dated 06.08.2018 has been passed in respect of Ld. AO’s order dated 25.02.2016 (u/s 143(3) r.w.s 254 of the Act.

1.1 This particular case has a unique set of facts which deserve to be enumerated briefly as under:

(a) Order u/s 143(3) of the Act dated 30.07.2010 was passed after estimating business income at 7% of gross receipts. The assessee preferred an appeal against this order.

(b) CIT(A) passed an order dated 21.11.2011 and reduced the estimated rate from 7% (AO) to 5%. Revenue went in second appeal before ITAT.

(c) Through order dated 03.07.2014, the ITAT upheld the action of the Ld. CIT(A), dismissing the Revenue's appeal.

(d) The Ld. CIT(A) passed an order dated 26.11.2011 u/s 263 of the Act and held the order of AO dated 30.07.2010 as being erroneous and prejudicial to the interests of revenue as the loan creditors had not been allegedly verified. The assessee went in appeal before the ITAT against this order.

(e) Vide order dated 28.05.2015, the ITAT dismissed the assessee's appeal, even though it was directed to consider the benefit of telescoping regarding the loan creditors and overall turnover.

(f) In the meantime, the Ld. AO passed an order u/s 143(3) r.w.s. 263 of the Act dated 06.03.2013 and after verification, etc. added Rs. 3,44,45,808/- u/s 68 of the Act.

(g) The Ld. AO passed an order dated 25.02.2016 u/s 143(3) r.w.s. 254 of the Act to give effect to the ITAT's order dated 28.05.2015 (passed for proceedings u/s 263 of the Act). Actually, this is the order forming basis for first appellate order dated 06.08.2018, which is the impugned order for the present appeal. However, it deserves to be mentioned that the order u/s 143(3) r.w.s. 254 of the Act was also challenged in appeal by the assessee before the Ld. CIT(A)

(h) The impugned order (dated 06.08.2018) has been passed after admittedly "subsuming" the earlier appeal (presumably dismissed as withdrawn) filed against order of the Ld. AO dated 06.03.2013. The following extract from the impugned order is relevant:

"The A.O. passed an order dated 25/2/2016 u/s 143(3)/254 in compliance to the directions of Hon'ble ITAT but again made the same addition as was made after the order u/s 263 of the Ld. PCIT-2, Patna. The appellant filed an appeal against this order which is the appeal before me.

The order u/s 143(3)/263 dated 6/3/2013 passed in compliance to the order u/s 263 and the appeal against that order is being subsumed as an order u/s 143(3)/254 has been passed by the A.O. in compliance to the order dated 28/5/2015 of the Hon'ble ITAT. For record purposes the appellant has also moved an application seeking withdrawal of the appeal filed against the order u/s 143(3)/263 dated 6/3/2013 passed by the AO in compliance to the order u/s 263. This application has been made before the Ld. CIT(A) Hazaribagh, to whom this appeal has been assigned.

Therefore, the order passed on 25/2/2016 by the A.O. u/s 143(3)/254 is the subject matter of this appeal and all previous orders and pending appeal are subsumed."

(i) Thereafter, through the impugned order, the Ld. CIT(A) proceeded to adjudicate on the issues pertaining to two of Ld. AO's orders:

(i) Dated 06.03.2013 u/s 143(3)/263 of the Act.

(ii) Dated 25.02.2016 u/s 143(3)/254 of the Act.

1.2 The Ld. CIT(A) proceeded to delete the addition of Rs. 3,44,828/- made u/s 68 of the Act. Aggrieved with this action, the Revenue has filed the present appeal through the following grounds of appeal:

"1. The Ld. CIT(A) erred in allowing relief of Rs. 3,44,45,828/- by deleting addition made by the A.O. on account of Unexplained Sundry Creditors even though the assessee had not discharged the onus of burden of proof regarding genuineness of the transactions with Sundry Creditors.

2. Any other ground taken at the time of hearing."

Subsequently, the Revenue also filed a revised ground of appeal as under:

"1. The Ld. CIT(A) has deleted the addition of Rs. 3,44,45,828/- on account of bogus creditors, which was not even added in the order U/s 143(3)/254. The addition was done in earlier order U/s 143(3)/263 dated 06.03.2013.

2. The Ld. CIT(A) has decided the issue which was not subject matter of the order matter of the impugned order.

3. Any other grounds taken at the time of hearing."

1.3 It is seen that through written submission the Ld. AR has vehemently opposed the admission of additional ground of appeal of the Revenue. In this regard, we would do well to be remind ourselves of the *locus classicus* on the subject being the case of National Thermal Power Company limited reported in 229 ITR 383 (SC). The relevant portion from the said order of the Hon'ble Apex Court may be extracted as under:

“Under section 254, the Tribunal may after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is, thus, expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, there is no reason why the assessee should be prevented from raising that question before the Tribunal for the first time, so long as the relevant facts are on record in respect of that item. There is no reason to restrict the power of the Tribunal under section 254 only to decide the grounds which arise from the order of the Commissioner (Appeals). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. There is no reason why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier.

In the case of Jute Corpn. of India Ltd. v. CIT [1991] 187 ITR 688, the Court, while dealing with the powers of the AAC observed that an appellate 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 is no good reason 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 Court further observed that there may be several factors justifying the raising of a new plea in an appeal and each case has to be considered on its own facts. The AAC must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The AAC should exercise his discretion in permitting or not permitting the assessee to raise an additional ground in accordance with law and reason. The same observations would apply to appeals before the Tribunal also.

The view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner (Appeals) takes too narrow a view of the powers of the Tribunal. Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings there is no reason why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee.

The Tribunal has, therefore, jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee.

Proceedings remanded back to the Tribunal for consideration of the new grounds raised by the assessee on the merits.”

Since, the additional ground of appeal does not require any new fact to be brought on record for adjudication, it deserves to be held that the additional ground filed by the Revenue is admitted for adjudication.

2. Before us, two paper books have been filed, one filed by revenue and another filed by assessee. The Ld. DR argued that for the Ld. CIT(A), the

impugned order was actually AO's order u/s 143(3) r.w.s. 254 of the Act dated 25.02.2016 and not AO's order dated 06.03.2013 (u/s 143(3) r.w.s. 263) of the Act. The Ld. DR took us through the paper book filed by the revenue and re-emphasized the chronology of events in this case. It needs to be mentioned that this chronology of events has been duly taken note of in para 1.1 (supra). It was vehemently argued on behalf of the Revenue that the Ld. CIT(A), should have confined himself to decide on the issues adjudicated in the order dated 25.02.2016 of Ld. AO, which was merely giving appeal effect to the order of Hon'ble ITAT, dated 28.05.2015. Thus, it was emphasized that the only issue before the Ld. CIT(A) was regarding the appeal effect given to the order of the Hon'ble ITAT and not the issue of unexplained cash credit, which was added in earlier order dated 06.03.2013, passed u/s 143(3) r.w.s. 263 of the Act. The Ld. DR stated that technically the matter attained finality with the withdrawal of appeal by the assessee, pertaining to the order dated 06.03.2013. He pointed out that the Ld. AO had simply adopted the computation figures from earlier order dated 06.03.2013 and has not discussed in any manner whatsoever the addition made u/s 68 of the Act amounting to Rs. 3,44,45,828/-. It was stated that not only should the additional ground of appeal be admitted but on that account the Revenue deserves to succeed.

2.1 Per contra, the Ld. AR vehemently argued, with the help of paper book filed by him, that the additional ground deserves to be dismissed and the assessee deserves to succeed on the basis of detailed finding given by the Ld. CIT(A) in the impugned order. The Ld. AR took us through various relevant paragraphs and stated that the addition u/s 68 of the Act was uncalled for and therefore, rightly directed to be deleted. The Ld. AR also argued on the legality of the action of Ld. CIT(A) in adjudicating on the issue of addition of Rs. 3,44,45,828/- even though it did not arise from the Ld. AO's order dated 25.02.2016, in as much as the figure of addition was merely picked up from earlier dated 06.03.2013. It was pointed out that the Ld. CIT(A) was justified in adjudicating this issue because it was part

of the enhancement of income as per this order and it adversely affected the assessee.

4. We have carefully perused the documents on record and have heard the rival arguments at length. It is seen that the impugned order dated 06.08.2018 mentions the details of impugned order before the Ld. CIT(A) as under:

“Instituted on 27/03/2016 from the order of DCIT/ACIT, Circle-4, Patna dated 25.02.2016

<i>Appeal No.</i>	<i>CIT(A), Patna-2/10611/2015-16)</i>
<i>Status/Deductor Category</i>	
<i>Resident Status</i>	<i>Resident</i>
<i>Nature of Business</i>	<i>Others</i>
<i>Section under which the order appealed against was passed</i>	<i>143(3) r.ws. 254</i>
<i>Date of Order under which the order appealed against was passed</i>	<i>25/02/2016</i>
<i>Income Assessed (In Rs.)</i>	<i>38967770</i>
<i>Tax/Penalty/Fine/Interest Demanded (in Rs.)</i>	<i>12821900</i>
<i>Date of Hearings(s)</i>	<i>26/03/2018</i>
<i>Present for the appellant</i>	<i>Shri S.C. Sannigrahi, CA & AR of the appellant</i>
<i>Present for the Department</i>	<i>None”</i>

It is clear that the Ld. CIT(A) was seized of order dated 25.02.2016 only. In the said order of the Ld. AO, the following findings may be extracted as under:

“The Assessee is a contractor and derives income from contract receipt and filed its return of income on 30.09.2009. The assessee has shown total taxable income of Rs. 17,60,784/-. The case of the assessee was selected for scrutiny on compulsory basis under section 143(3) of the Income-tax, Act, 1961 and statutory notice u/s 143(2) & 142(1) of the Income-tax Act, 1961 have been issued accordingly. In this case, assessment was passed u/s 143(3) of the I.T. Act, 1961 on 30/09/2011 determining of the total income of Rs.23,50,588/ at the rate of 7.0% after invocation of proviso under section 145(3) of the Income-tax Act, 1961 as rejection of books of account of the assessee. On perusal of the assessment order passed under section 143(3) of the Income-tax Act, 1961 for A.Y. 2008-09, it is found that the order u/s 143(3) was prejudicial to the interest of revenue and henceforth the said order was re-opened u/s 263 of the Income-tax Act, 1961 by the Hon'ble CIT-2, Patna and subsequently an order under section 143(3)/263 of the Income-tax Act, 1961 was passed by the erstwhile A.O. on 06/03/2013 ascertaining the total income of the assessee at Rs.3,89,67,770/- after adding back unexplained sundry creditors of Rs.3,44,45,828/-. Being aggrieved with the order passed under section 143(3)/263 of the A.O. dated 06/03/2013 the assessee preferred an appeal before the Hon'ble

ITAT, Patna. The Hon'ble ITAT, Patna has passed an order vide I.T.A.Nos.29 & 30/Pat/2012 dated 28/05/2015 wherein it has upheld the invocation of section 263 and passed direction to the A.O. On the direction of the Hon'ble ITAT, Patna benefit of telescoping in respect of bogus sundry creditors has to be considered but since there is no evidence on the case record of the assessee nor produced by the assessee till date, the effect to the order is being given accordingly by this draft order. Any objection to this may be submitted before the undersigned on or before 10/01/2016.

Accordingly, the assessment order of the A.O. u/s 143(3)/263 dated 06/03/2013 is proposed to be modified u/s 143(3)/254 of the I.T. Act, 1961 as per order of the ITAT, Patna dated 28/05/2015. Calculation of tax on the modified income is proposed as under:

4.1 It is clear that the Ld. AO has not discussed the merit, or otherwise, of the addition of Rs. 3,44,45,828/-. Presumably this was not done because he was merely consolidating the computation of income arising from orders/directions by various Appellate Authorities in one place. Thus, effectively, the issue of unexplained creditors does not arise from this order of AO. It is also felt that the Ld. CIT(A) should have confined himself to the substantive issue in the impugned order before him. A plain reading of the AO's order reveals that the issue of unexplained cash credit was neither discussed nor any opportunity given to the assessee for responding to the same. Technically, the Revenue's contention that the issue of unexplained cash credit became final with the withdrawal of appeal by the assessee has merit. However, at this stage, in the interest of substantive justice it is felt that the assessee should not be left without an alternative remedy to agitate his grievance in a legally correct manner. Hence, we deem it fit to remand the issue of addition of Rs. 3,44,45,828/- to the file of Ld. AO for fresh adjudication, after giving an opportunity of being heard to the assessee.

5. In result, the appeal filed by Revenue is allowed for statistical purposes.

Order pronounced in the court on 16.01.2025

Sd/-
(Sonjoy Sarma)
Judicial Member

Sd/-
(Sanjay Awasthi)
Accountant Member

Dated: 16.01.2025

AK, P.S.

Copy of the order forwarded to:

1. Munni Rai
2. Assistant Commissioner of Income Tax, Circle-4(1), Patna
3. CIT(A)-
4. CIT-
5. CIT(DR)

//True copy//

By order

Assistant Registrar, Kolkata Benches