आयकर अपीलीय अधिकरण ,इन्दौर न्यायपीठ ,इन्दौर

IN THE INCOME TAX APPELLATE TRIBUNAL, INDORE BENCH, INDORE

श्री कुल भारत, न्यायिक सदस्य

तथा

श्री मनीष बोरड, लेखा सदस्य के समक्ष

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER AND SHRI MANISH BORAD, ACCOUNTANT MEMBER

आ.अ.सं /.**I.T.A. No. 185/Ind/2016**		
निर्धारणवर्ष/ **Assessment Year: 2000-01**		
M/s.M.Lodha Impex, 117-118, Manak Chowk, Ratlam.	**vs.**	**Income-tax Officer, Ward 1, Ratlam.**
अपीलार्थी **/Appellant**		प्रत्यर्थी **/Respondent**
स्था.ले.सं./**PAN: AAQFM1917J**		

अपीलार्थी की ओर से**/Appellant by**	**:**	**Shri Rajesh Mehta, C. A.**
प्रत्यर्थी की ओर से**/Respondent by**	**:**	**Shri Satiksh Solanki, DR**

सुनवाई की तारीख**/Date of hearing**	**:**	**29.05.2018.**
उद्घोषणा की तारीख**/Date of pronouncement**	**:**	**27.06.2018**

आदेश /O R D E R

PER KUL BHARAT, J.M. :

This appeal by the assessee is directed against the order of ld. Commissioner of Income tax, Ujjain, dated 02.12.2015 pertaining to the assessment year 2000-01.

2. The assessee has raised the following grounds of appeal :-

1. That the Ld. CIT(A), Ujjain has erred in passing the order which is arbitrary, illegal and without affording an opportunity of hearing.

2. That the issue of Notice u/s 143(2) is illegal and time barred as prescribed in proviso to clause 2 to Section 142 of the Income-tax Act, 1961, and the Ld. CIT(A) has failed to interpret these provisions of law and thus the

entire proceedings are bad in law and needs to be annulled.

3. That the Ld. CIT(A)/Assessing Officer may be directed to grant the refund as claimed of Rs. 1,75,815/- with interest.

4. That the Ld. CIT(A) has erred in applying the average GP rate of previous three years @ 15.34 % as against loss returned at Rs. 5075/- by the assessee without looking at the facts of the case and thus the returned loss may be allowed.

5. That the Ld. CIT(A) has erred in charging interest u/s 234A, 234B, 234C & 234D of the Income-tax Act, 1961.

6. In view of the above, the order passed u/s 143(3) is erroneous, illegal, wrong, without any basis & without looking at the facts of the case. Hence needs to be deleted.

3. Briefly stated, the facts of the case are that the assessee firm derives income from manufacturing of Umbrella. The assessee filed the return of income declaring total loss of Rs. 5,075/- on 30.10.2000. The AO made the addition of Rs. 14,71,147/- on account of low gross profit and made addition of Rs. 50,000/- out of expenses. The assessee preferred an appeal before ld. CIT, who after considering the submissions partly allowed the appeal, thereby he deleted the addition of Rs. 50,000/- and reduced the gross profit rate from 15.34 % to 15.03 % thereby he confirmed addition of Rs. 10,29,121/- in this respect. Now the assessee is in appeal before this Tribunal.

4. The Ld. Counsel for the assessee reiterated the submissions made before us, which is reproduced below :

"SUBMISSION

1. ***Facts of the case:-***

That the assessee is a firm deriving income from manufacturing of Umbrella. The return of Income declaring total loss of Rs. 5075/- has been filed on 30-10-2000 and revised return claiming refund of TDS of Rs.175815/- was filed on 09-04-2001.The assesse also filed rectification u/s 154 on 3/11/2004. Then assesse filed application u/s 119(1)(b)(c) on 21/12/2004 before CIT, Ujjain. The CIT, Ujjain passed order u/s 119(2)(b) on 17/01/2008. The assessee had received first notice U/s 143(2) of the Income Tax Act, 1961 on 16-05-2008.

2.***Notice Issued U/s 143(2) of the act is barred by limitation and thus Illegal :-***

That the notice issued U/s 143(2) is illegal and barred by limitation. The proviso to sec 143(2) states that "no notice under this sub-section shall be served on the assessee

after the expiry of twelve months from the end of the month in which the return is furnished. "

2.1 ***Revised return is within due date as per the act***

The assesse filed the revised return on 09/04/2001 vide receipt no.0027 enclosing the TDS form no. 16A and claiming the TDS at Rs.1,75,815/- which could be filed till 31-03-2002 and hence revised return filed is valid since the original return was filed before the due date. Revised return was filed only for claiming TDS of Rs.1,75,815/- which was not claimed in the original return by mistake.

The revised return has been filed after processing of return but since the assessment has not been completed till 09/04/2001 i.e. date of filing of revised return and therefore revised return filed is valid.

Hon'ble Commissioner of Income Tax (Appeals), Ujjain has mentioned in its own order in Para no. 4.1 that "the revised return filed by the appellant was not regular return. " The assesse had filed the revised return on 09/04/2001 which is a regular return. Since the revised return can be filed upto 31/03/2002 therefore it was not a non-est.

In the case of S.R. Koshti v. Commissioner of Income-tax [2005] 276 ITR 165 Gujarat High court held that "the assessee can file revised return even after intimation is served. "

The issue is settled to rest by the decision of Supreme Court in the case of ACIT vs. Rajesh Jhaveri Stock Brokers (P) Ltd., 291 ITR 500 (2007) in which it was held that "intimation although deem to the notice of demand u/s 156 can not taken as assessment order. "

2.2 <u>Rectification u/s 154 not processed by Assessing Officer</u>

The assesse had filed rectification u/s 154 on 3/11/2004. Then the assesse filed an application u/s 119(1)(b)(c) on 21/12/2004 because no action taken against the application u/s 154 filed on 3/11/2004. The assessing officer should suo-moto rectify the mistake apparent on record. The same has also been held in the case of ***Ardor International Pvt Ltd*** *v/s* ***ACIT, Ahmedabad (2016) ITA No. 1170/Ahd/2013 by Income Tax Appellate Tribunal, Ahmedabad*** *that "the ld. Assessing Officer*

using his inherent power u/s 154 of the Act for amending any mistake apparent on record should have examined the claim of the assessee by verifying the books of accounts of the assessee as well as the relevant ledger accounts wherein the impugned amount on which TDS has been deducted, is duly reflected. "

As per sec 155(14) of the act, "Where in the assessment for any previous year or in any intimation or deemed intimation under sub-section (1) of section 143 for any previous year, credit for tax deducted or collected in accordance with the provisions of section 199 or, as the case may be, section 206C has not been given on the ground that the certificate furnished under section 203 or section

206C was not filed with the return and subsequently such certificate is produced before the Assessing Officer within two years from the end of the assessment year in which such income is assessable, the Assessing Officer shall amend the order of assessment or any intimation or deemed intimation under sub-section (1) of section 143, as the case may be, and the provisions of section 154 shall,

so far as may be, apply thereto. Provided that nothing contained in this sub-section shall apply unless the income from which the tax has been deducted or income on which the tax has been collected has been disclosed in the return of income filed by the assessee for the relevant assessment year. "

The assesse has also shown the income in its return on which TDS has been claimed.

2.3 ***0rder passed u/s 119(2)(b) after 3 years of application:***

The application u/s 119(1)(b)(c) was filed on 21-12-2004 before the Hon'ble Commissioner of Income tax which was decided on 17-01-2008. The application filed ought to have been decided within the reasonable time i.e. order passed after 3 years, hence, delay caused is unreasonable.

2.4 ***Notice issued u/s 143(2) is invalid :***

The proviso to sec 143(2) states that "no notice under this sub-section shall be served on the assessee after the expiry of twelve months from the end of the month in which the return is

furnished". Since the notice issued u/s 143(2) on 16-05-2008 i.e. after 30/04/2002. Therefore, the same is invalid and barred by limitation. The directions of the Hon'ble Commissioner of Income tax to issue notice u/s 143(2) beyond the time prescribed under the law is illegal.

In the case of Shri Ashok Jayaram Jadhav v/s Income Tax Officer,Ward - 2(1), Pune, Income Tax Appellate Tribunal, Pune (2015) held that "the notice u/s. 143(2) was issued and served after the elapse of statutory time limit as envisaged u/s. 143(2) of the Act. The defect in issue of notice is not curable, thus the notice is invalid. We are of the considered opinion that the notice issued u/s. 143(2) by the Assessing Officer was barred by limitation and was thus invalid. The proceedings arising from the said notice are also vitiated. Thus, the assessment order passed in pursuance thereof is annulled. "

Hon'ble Karnataka High Court in the case of A. Balakrishnan Vs. General Manager Hindustan Machine Tools Ltd. and others reported in (2007) 290 ITR 227 held that" It is the duty of the functionaries under the IT act to

implement the provisions of the act in accordance with law. A return filed is bound to be processed by the Income tax authorities within the reasonable time. Section 119(2)(b) of the act cannot relieve the authorities from the obligation of examining a return filed by the petitioner. It cannot be used as an excuse for inaction on the part of respondents. "

Therefore, assessee should not be penalized because of delay caused in deciding the application by the Income tax authorities and thus notice issued u/s 143(2) beyond the time limit is illegal, bad in law and needs to be annulled.

3.Grant the refund as claimed of Rs. 1,75,815/- along with interest:-

That the refund claimed of Rs, 1,75,815/- in the revised return should be paid to the assesse as the revised return filed in within the due date prescribed in the act. The said fact has neither been controverted by Ld. Assessing Officer nor by CIT (Appeals).

The Commissioner of Income Tax (Appeals), Ujjain has mentioned in its order in Para no. 4.6 that "the A O is directed to grant the interest on refund as per law. "

In the case of Tarsem Kumar v/s The Income Tax Officer and others CWP No. 19906 of 2011, The High Court Of Punjab and Haryana at Chandigarh (2012) also held that "the assessee for assessment year 2005-06 could file the revised return after complying with the provisions of Section 139(5) of the Act up to 31.3.2007. The revised return filed on 26.9.2006 was thus validly filed within limitation. Consequently, the claim of the petitioner-assessee for the refund of the additional tax deposited amounting to Rs. 3,61,188/- is valid and justified. Also held that we allow the writ petition and direct that the refund be released to the petitioner within three months from the date of receipt of certified copy of order along with interest at the rate of 12 per annum till the date of making the payment to him. "

Also held in the case of Dinakar Ullal v/s Commissioner of Income Tax (2010) 323 ITR 452 by the Karnataka High Court that "a condition in derogation of the statue is not for the proper administration of the Act and further held that a circular cannot impose any burden on the tax payer can deviate from the provisions of the Act if it is beneficial to the

assessee and mitigates or relaxes the rigour of law."Also held that "the interest U/s 244A would be admissible on belated refund claims and that the instructions cannot run counter to the legislative provisions and create rights and obligation which are contrary to statute. Instructions should supplant the law and not supplement the law. "

As per ***Para*** *7 of* ***Instruction no. 13/2006, dated 22-12-2006*** *of board, "the CCsIT/CsIT are empowered to direct the Assessing Officer to make necessary enquiries or scrutinize the case in accordance with provisions of the Income-tax Act to ascertain the correctness of the claim. "According to this, case should be* ***scrutinized as per*** *the provisions of the* ***act*** *and old case can only be scrutinized through sec. 147.*

Drawing the attention towards CBDT Circular No. 14 (XL-35) dated 11-04-1955 which reads as follows:-

> *"Officers of the department must not take advantage of the ignorance of an assessee as to his rights. It is one of their duties to assist a taxpayer in every reasonable way, particularly in the matter of claiming and securing reliefs*

and in this regard the officers should take the initiative in guiding taxpayer where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would, in the long run, benefit the department, for, it would inspire confidence in him that he may be sure of getting a square deal from the department. Although, therefore, the responsibility for claiming refunds and reliefs rests with the assessees on whom it is imposed by law, officers should (a) draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other; (b) freely advise them when approached by them as to their rights and liabilities and as to the procedure to be adopted for claiming refund and reliefs ".

In view of the above, officer should be directed to grant refund claimed of Rs. 175815/- with interest till the date of making the payment to him.

4. Addition by estimating the arbitrary G.P. rate is wrong:-

The CIT(A)erred in confirming the addition of Rs. 10,29,121/- towards Gross profit by making estimation of gross profit at 15.34 of gross turnover. The Gross profit arbitrarily estimated of Rs. 14,51,019/- in place of Rs. 4,21,898/- on turnover of Rs. 94,65,225/-. The addition made and confirmed is on very high side as the business of assessee is a seasonal business. In this regards assessee had already submitted the news paper item appearing in Naidunia Dt 01.09.1999 wherein the critical condition of Umbrella trade during the year due to low/ delayed monsoon is highlighted in detail. That the pre-condition for estimating business income of the assessee, where an assessee keeps accounts is that the assessee's books should have been found to be unreliable or otherwise not capable of proving the assessee's income.

That the assessee maintains proper books of accounts as required U/S 44AA of Income tax Act, 1961. Assessee's books are also audited by a Chartered Accountant and no adverse opinion has been given in the audit report. That the Ld. Assessing Officer without rejecting the books of accounts U/S

145 and without passing order U/S 144, estimated the gross profit of Rs. 18,93,045/- (Rs. 10,29,1211- confirmed by CIT (A), Ujjain) and passed order U/S 143(3). Also assesse had produced books of accounts before the Assessing Officer & same has been written in Para no. 4 of his order. Therefore, estimating the profit on ad hoc basis without rejecting books of accounts is baseless, illegal and wrong.

The comparison of gross profit of assessed year and previous three assessment years are as under: -

Assessment Year	*Gross Profit (Rs.)*	*Turnover (Rs.)*	*G.P. Rate*	*Type of sale*
2000-01	*42189*	*9465225*	*4.46*	*Local sales*
1999-00	*1927729*	*9625250*	*20.02*	*Export sale*
1998-99	*2001171*	*15284610*	*13.09*	*Export sale*
1997-98	*1295566*	*10024355*	*12.92*	*Export sale*

The business of assessee is export oriented and does not deal in the local market. During the assessed year 2000-01, due to rejection of Export order and spoilage of stock, assessee had to sell entire stock in the local market at a very

low profit. This results in low Gross profit rate during the year. Assessee also closed down the business in the assessed year and no further transaction was being carried in any of the following years.

The estimate of turnover and fixation of gross profit rate are two important parameters which affect the assessment. If these are fixed or calculated in such a way that they adversely affect the assessee's case, then he is entitled to know the basis and to be given an opportunity to rebut the same. Therefore CIT (A) was not justified in confirming the addition.

Looking to the above submission and evidence, kindly delete the arbitrary addition made by the Ld. Assessing officer and confirmed by CIT(A).

5. *The Ld. assessing officer erred in charging and CIT(A) erred in confirming the charging of interest U/s 234A, 234B, 234C and 234D of the Income tax act, 1961.*
6. *In view of the above, huge additions of Rs. 10,29,121/- are wrong, without any basis and without looking to the facts of the case. Hence, needs to be deleted. ”*

5. Apropos ground no.1, the Ld. Counsel for the assessee submitted that the Ld. CIT(A) has not afforded sufficient opportunity to the assessee.

6. The Ld. Departmental Representative opposed the submission and submitted that sufficient opportunity was granted.

7. We have heard the rival submissions. We have perused the record. From the impugned order, it is evident that the Ld. Authorized Representative of the assessee has appeared before the Ld. CIT(A) and filed written submission. The Ld. CIT(A) has considered the written submissions. Therefore, we do not see any merit into the averment of the assessee that no opportunity was granted. This ground of the assessee's appeal is rejected.

8. Through Ground no. 2, the assessee has challenged the issuance of Notice u/s 143(2) which is illegal and time

barred as prescribed in proviso to clause 2 to Section 142 of the Income-tax Act, 1961.

9. The Ld. Counsel for the assessee contended that the assessee firm derives income from manufacturing of Umbrella. The assessee filed return of Income declaring total loss of Rs. 5075/- on 30-10-2000 and filed revised return on 9th April, 2001, claiming refund of TDS of Rs.1,75,815/-. The assesse also filed application for rectification u/s 154 on 3rd November, 2004. Then assesse filed application u/s 119(1)(b)(c) on 21st December, 2004 before CIT, Ujjain. The CIT, Ujjain passed order u/s 119(2)(b) on 17/01/2008. The assessee had received first notice U/s 143(2) of the Income Tax Act, 1961 on 16-05-2008. The Ld. Counsel for the assessee further contended that the notice issued u/s 143(2) of the Act is barred by limitation and thus illegal.

The proviso to sec 143(2) states that "no notice under this

sub-section shall be served on the assessee after the expiry of twelve months from the end of the month in which the return is furnished. " The Ld. Counsel for the assessee further contended that the revised return was filed within due date as per the Act. The Ld. Counsel for the assessee further contended that the assesse filed the revised return on 9th April, 2001, vide receipt no.0027 enclosing the TDS form no. 16A and claimed the TDS at Rs.1,75,815/- which could be filed up to 31-03-2002 and hence revised return filed was valid since the original return was filed before the due date. Revised return was filed only to claim TDS of Rs.1,75,815/- which was not claimed in the original return. The revised return was filed after processing of return but since the assessment was not completed till 9th April, 2001, i.e. date of filing of revised return and therefore revised return filed was valid. The Ld. Counsel for the assessee further contended that

Ld. CIT(A) , Ujjain, has also mentioned in para 4.1 of his order that "*the revised return filed by the appellant was not regular return.* " The assesse had filed the revised return on 9th April, 2001, which was a regular return. Since the revised return could be filed upto 31st March, 2002, therefore it was not a non-est. The Ld. Counsel for the assessee placed reliance on the decision in the case of S.R. Koshti v. Commissioner of Income-tax [2005] 276 ITR 165 Gujarat High Court, in which the Hon'ble Court held that "*the assessee can file revised return even after intimation is served.* " The Ld. Counsel for the assessee further relied on the decision of Hon'ble Supreme Court in the case of ACIT vs. Rajesh Jhaveri Stock Brokers (P) Ltd., 291 ITR 500 (2007) in which it was held that "*intimation although deem to the notice of demand u/s 156 can not be taken as assessment order*. " The Ld. Counsel for the assessee further contended that the assessee filed

application for rectification u/s 154, which was not processed by the AO. Then the assessee filed an application u/s 119(1)(b)(c) on 21st December, 2004. The Ld. Counsel for the assessee further contended that the application u/*s* 119(1)(b)(c) was filed on 21st December, 2004, before the ld. CIT, which was decided on 17-01-2008. The application filed ought to have been decided within the reasonable time i.e. order passed after 3 years, hence, delay caused is unreasonable. The Ld. Counsel for the assessee contended that the proviso to sec 143(2) states that *"no notice under this sub-section shall be served on the assessee after the expiry of twelve months from the end of the month in which the return is furnished".* Since the notice issued u/*s* 143(2) on 16th May, 2008, i.e. after 30th April, 2002, the notice is invalid and barred by limitation. The directions of the ld. CIT to issue notice u/s 143(2) beyond the time prescribed under the law is illegal.

The Ld. Counsel for the assessee contended that the assessee should not be penalized because of delay caused in deciding the application by the Income tax authorities and thus notice issued *u/s* 143(2) beyond the time limit is illegal, bad in law and needs to be annulled.

10. The Ld. Departmental Representative relied on the orders of the lower authorities.

11. We have considered the facts, rival submissions and perused the material available on record. Now the issue is required to be adjudicated as to whether the notice issued u/s 143(2) by the AO is barred by time. Before adverting to the rival submissions, for the sake of clarity, undisputed facts are that the original return was filed on 30.10.2000. The fact is that return was revised on 09.04.2001 to claim refund of TDS amounting to Rs. 1,75,815/-. The assessee filed an application u/s 199(2)(b) of the Income-tax Act, 1961. The said application came to be decided on

17.01.2008. While disposing of that application, the Ld. CIT(A) directed the AO to determine the refund after scrutinizing the case by issue of notice u/s 143 of the Act, as per para 7 of Instruction No.13 dated 22.12.2006 issued by the Board. In pursuance of that order, a notice u/s 143(2) was issued to the assessee on 16.05.2008. The contention of the assessee is that the AO could not have issued the notice u/s 143(2) of the Act. The Ld. CIT(A) in para 4.1 in his order has decided the issue as under :-

> "4.1 *Through this ground of appeal, the appellant has challenged the issuing of notice u/s 143(2) of the I.T. Act. The appellant filed the return of income on 3-0.10.2000. The same has been processed u/s 143(1)(a) of the I.T.Act on 16.02.2001. Subsequently the appellant filed the revised return on 09.04.2001 i.e. after processing ,of original return. The appellant filed the application before*

CIT,Ujjain, for condonation of delay u/s 119(2)(b) to regularize the revised return. The revised return filed by the appellant was not regular return. The revised return has been regularized vide order u/s 119(2)(b) dated 17.01.2008. Therefore, from the date of filing of the revised return till the date of condonation the return remained as non est. The revised return came into the existence only on 17.01.2008 i.e. date of order u/s 119(2)(b) of the I. T. Act. Therefore, the return deemed to have been filed on 17.01.2008 for all practical purpose and the same has been processed, the appellant has been given the refund and at the same time the AO has issued notice u/s 143(2) on 16.05.2008. Therefore, this ground of appeal is ***Dismissed.*** *"*

12. The moot question is whether the ld. CIT is empowered to direct the AO for issuing notice u/s 143(2) after expiry of normal limitation period. Section 119 of the Income-tax Act, 1961, reads as under :-

> *"[Instructions to subordinate authorities.*
>
> *119. (1) The Board may, from time to time, issue such orders, instructions and directions to other income-tax authorities as it may deem fit for the proper administration of this Act, and such authorities and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board :*
>
> ***Provided** that no such orders, instructions or directions shall be issued—*

(a) so as to require any income-tax authority to make a particular assessment or to dispose of a particular case in a particular manner; or

(b) so as to interfere with the discretion of the Commissioner (Appeals) in the exercise of his appellate functions.

(2) Without prejudice to the generality of the foregoing power,—

(a) the Board may, if it considers it necessary or expedient so to do, for the purpose of proper and efficient management of the work of assessment and collection of revenue, issue, from time to time (whether by way of relaxation of any of the provisions of sections [115P, 115S, 115WD, 115WE, 115WF, 115WG, 115WH, 115WJ, 115WK,] 80[139,] 143, 144, 147, 148, 154, 155 [, 158BFA], [sub-section (1A) of section 201, sections 210, 211,

234A, 234B, 234C [, 234E]], [270A] 271 and 273 or otherwise), general or special orders in respect of any class of incomes [or fringe benefits] or class of cases, setting forth directions or instructions (not being prejudicial to assessees) as to the guidelines, principles or procedures to be followed by other income-tax authorities in the work relating to assessment or collection of revenue or the initiation of proceedings for the imposition of penalties and any such order may, if the Board is of opinion that it is necessary in the public interest so to do, be published and circulated in the prescribed manner for general information;

(b) the Board may, if it considers it desirable or expedient so to do for avoiding genuine hardship in any case or class of cases, by general or special order, authorise [any income-tax authority, not

being a Commissioner (Appeals)] to admit an application or claim for any exemption, deduction, refund or any other relief under this Act after the expiry of the period specified by or under this Act for making such application or claim and deal with the same on merits in accordance with law;

[(c) the Board may, if it considers it desirable or expedient so to do for avoiding genuine hardship in any case or class of cases, by general or special order for reasons to be specified therein, relax any requirement contained in any of the provisions of Chapter IV or Chapter VI-A, where the assessee has failed to comply with any requirement specified in such provision for claiming deduction thereunder, subject to the following conditions, namely:—

(i) the default in complying with such requirement was due to circumstances beyond the control of the assessee; and

(ii) the assessee has complied with such requirement before the completion of assessment in relation to the previous year in which such deduction is claimed :

***Provided** that the Central Government shall cause every order issued under this clause to be laid before each House of Parliament.]"*

13. We find that the Ld. CIT(A) has relied upon the Instruction No.13/2006 dated 22.12.2006 . For the sake of clarity Instruction No.13 of 2006 is reproduced as under :-

"INSTRUCTION NO. 13/2006, DATED 22-12-2006

1. The procedure for dealing with the applications for condonation of delay in filing returns and claiming refund is presently governed by the Board's earlier

Orders/Circulars issued under section 119(2)(b) of the Income-tax Act, 1961, namely, F. No. 225/208/93-ITA-II, dated 12-10-1993, read with Board's Circular No. 670, dated 26-10-1993 issued from F. No. 225/208/93-ITA-II, Circular No. 812001, dated 16-5-2001 issued from F. No. 212/35/99-ITA-II and also Instruction No. 12/2003 dated 30-10-2003 issued from F. No. 212/338/2002-ITA - II.

2. In modification to earlier Instructions/Circulars, this Instruction vests the Chief Commissioners of Income-tax (CCsTT) with powers for acceptance/rejection of applications/claims under section 119(2)(b) for condonation of delay in filing return involving refund claims above Rs. 10,00,000 and up to Rs. 50,00,000. It also vests the Commissioners of Income-tax (CsIT) with powers of acceptance/rejection of applications/claims under section 119(2)(b) for condonation of delay in filing

return involving refund claims up to Rs. 10,00,000.

3. The applications/claims under section 119(2)(b) for condonation of delay involving refund claims exceeding Rs. 50,00,000 would continue to be processed by Central Board of Direct Taxes, both for acceptance and rejection.

4. No fresh application for claim of refund will be entertained beyond six years from the end of the assessment year for which the application/claim is made.

5. The powers of acceptance/rejection within the monetary limits delegated to the CCsIT/CsTT would be subject to the following conditions:-

(a) The refund has arisen as a result of excess tax deducted/collected at source and payments of advance tax under the provisions of Chapters XVII-B, XVII-BB and XVII-C respectively and the

amount of refund does not exceed Rs. 50,00,000 in respect of CCsIT and Rs. 10,00,000 in respect of CsIT for anyone assessment year;

(b) The income of the assessee is not assessable in the hands of any other person under any of the provisions of the Act; and

(c) No interest will be admissible on the belated refund claims.

6. At the time of considering the case under the provisions of section 119(2)(b), it should be ensured that the income declared and refund claimed are correct and genuine and also that the case is of genuine hardship on merits.

7. *The CCsIT/CsIT are empowered to direct the Assessing Officer to make necessary enquiries or scrutinize the case in accordance with provisions of the Income-tax Act to ascertain the correctness of the claim.*

8. *This instruction will also cover those applications/claims for condonation of delay under section 119(2)(b) which are pending as on the date of issue of this instruction. ”*

14. There is no ambiguity under the law that the scrutiny assessment is to be framed as per the provisions of Section 143 of the Income-tax Act, 1961. The Instruction No. 13/2006 would not override these provisions. From a bare reading of the instructions, it is evident that the Instruction is related to condonation of delay in respect of refund due. This instruction is issued with an objective to mitigate the hardship to the assessee. Para 7 of the Instruction, in our view, is limited to the extent of ascertaining the claim of the assessee. This does not empower the Assessing Officer to make scrutiny of the entire case, which goes against the spirit of the law. In the case in hand, the AO was required to ascertain that the tax has been deducted at source and

on the returned income, such refund is available to the assessee or not. In our view, the AO has misconstrued direction of the ld. Commissioner of Income-tax and assessed the income by making scrutiny assessment. It is also noticed that there is an inordinate delay in disposing the application by the ld. Commissioner of Income-tax. Under these facts, we are constrained to hold that the impugned assessment order as framed by the AO is contrary to the provisions of law and beyond the jurisdiction of the AO. Accordingly, the assessment is quashed. Ground no.2 of the assessee's appeal is allowed.

15. Ground no. 3 relates to refund claimed at Rs. 1,75,815/- with interest.

16. The Ld. Counsel for the assessee contended that the refund claimed at Rs. 1,75,815/- in the revised return should be paid to the assesse as the revised return filed was within the due date prescribed in the Act. The

Commissioner of Income Tax (Appeals), Ujjain mentioned in its order in Para no. 4.6 that *"the A O is directed to grant the interest on refund as per law. "* The Ld. Counsel for the assessee relied on the decision in the case of Tarsem Kumar vs. ITO and others, CWP No. 19906 of 2011, wherein the Hon'ble High Court Of Punjab and Haryana at Chandigarh (2012), also held that *"the assessee for assessment year 2005-06 could file the revised return after complying with the provisions of Section* 139(5) *of the Act up to 31.3.2007. The revised return filed on 26.9.2006 was thus validly filed within limitation. Consequently, the claim of the petitioner-assessee for the refund of the additional tax deposited amounting to Rs. 3,61,188/- is valid and justified.* Also held that *we allow the writ petition and direct that the refund be released to the petitioner within three months from the date of receipt of certified copy of order along with*

interest at the rate of 12 *per annum till the date of making the payment to him. "*

17. The Ld. Counsel for the assessee further placed reliance on the decision in the case of Dinakar Ullal v/s Commissioner of Income Tax, (2010) 323 ITR 452 (Kar), wherein the Hon'ble Karnataka High Court held that *"a condition in derogation of the statue is not for the proper administration of the Act and further held that a circular cannot impose any burden on the tax payer can deviate from the provisions of the Act if it is beneficial to the assessee and mitigates or relaxes the rigour of law."Also* held that *"the interest u/s 244A would be admissible on belated refund claims and that the instructions cannot run counter to the legislative provisions and create rights and obligation which are contrary to statute. Instructions should supplant the law and not supplement the law. "*

18. The Ld. Counsel for the assessee further drew our attention to **Para** 7 of **Instruction no. 13/2006, dated 22-12-2006** of Board, *"the CCsIT/CsIT are empowered to direct the Assessing Officer to make necessary enquiries or scrutinize the case in accordance with provisions of the Income-tax Act to ascertain the correctness of the claim.* "According to this, case should be scrutinized as per the provisions of the Act and old case can only be scrutinized through sec. 147. The Ld. Counsel for the assessee further drew our attention towards CBDT Circular No. 14 (XL-35) dated 11-04-1955 which reads as follows:-

> *"Officers of the department must not take advantage of the ignorance of an assessee as to his rights. It is one of their duties to assist a taxpayer in every reasonable way, particularly in*

the matter of claiming and securing reliefs and in this regard the officers should take the initiative in guiding taxpayer where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would, in the long run, benefit the department, for, it would inspire confidence in him that he may be sure of getting a square deal from the department. Although, therefore, the responsibility for claiming refunds and reliefs rests with the assessees on whom it is imposed by law, officers should (a) draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other; (b) freely advise them when approached by them as to their rights and liabilities and as to the procedure to be adopted for claiming refund and

reliefs ".

19. The Ld. Counsel for the assessee concluded the arguments that in view of the above, the Officer should be directed to grant the refund claimed at Rs. 1,75,815/- with interest till the date of making the payment to him.

20. The Ld. Departmental Representative supported the orders of the lower authorities.

21. We have considered the facts, rival submissions and perused the material available on record. Since we have decided ground no.2 in favour of the assessee, the AO is directed to allow the refund with interest as per law.

22. Ground no. 4 relates to application of average gross profit rate of previous three years @ 15.34 % as against loss returned at Rs. 5075/- by the assessee without looking to the facts of the case and thus the returned loss may be allowed.

23. The Ld. Counsel for the assessee contended that the the Ld. CIT(A) erred in confirming the addition of Rs. 10,29,121/- towards Gross profit by making estimation of gross profit at 15.34 % of gross turnover. The Gross profit arbitrarily estimated at Rs. 14,51,019/- in place of Rs. 4,21,898/- on turnover of Rs. 94,65,225/-. The Ld. Counsel for the assessee contended that the addition made and confirmed is on very high side as the business of assessee is a seasonal business. The Ld. Counsel for the assessee contended that the assessee had also submitted the news paper item appearing in Naidunia dated 1st September, 1999, wherein the critical condition of Umbrella trade during the year due to low/delayed monsoon was highlighted in detail. That the pre-condition for estimating business income of the assessee, where an assessee keeps accounts is that the assessee's books should have been found to be unreliable or otherwise not capable of proving

the assessee's income. The Ld. Counsel for the assessee contended that the assessee maintained proper books of account as per requirement of Section 44AA of the Income-tax Act, 1961. Assessee's books were also got audited by Chartered Accountants. No adverse opinion was recorded in the audit report. The Ld. Counsel for the assessee further contended that the A.O. without rejecting the books of accounts u/s 145 and without passing order u/s 144, estimated the gross profit at Rs. 18,93,045/- (Rs. 10,29,1211- confirmed by CIT (A), Ujjain) and passed order u/s 143(3). The Ld. Counsel for the assessee further contended that the assesse produced all the books of accounts before the Assessing Officer. The Ld. Counsel for the assessee contended that estimating the profit on ad hoc basis without rejecting books of accounts is baseless, illegal and wrong. The Ld. Counsel for the assessee drew our attention to comparative chart of gross profit of

assessed year and previous three years, which is as under :-

Assessment Year	Gross Profit (Rs.)	Turnover (Rs.)	G.P. Rate	Type of sale
2000-01	42189	9465225	4.46	Local sales
1999-00	1927729	9625250	20.02	Export sale
1998-99	2001171	15284610	13.09	Export sale
1997-98	1295566	10024355	12.92	Export sale

The Ld. Counsel for the assessee contended that the business of assessee was export oriented and the assessee did not deal in the local market. During the assessment year under consideration i.e. 2000-01, due to rejection of Export order and spoilage of stock, assessee had to sell entire stock in the local market at a very low profit. This resulted in low Gross profit rate during the year. Assessee also closed down the business in the assessed year and no further transaction was being

carried out in any of the following years. The Ld. Counsel for the assessee contended that the estimation of turnover and fixation of gross profit rate are two important parameters which affect the assessment. The Ld. Counsel for the assessee contended that the ld.CIT (A) was not justified in confirming the addition. The Ld. Counsel for the assessee concluded that looking to the above submission and evidence, kindly delete the arbitrary addition made by the Ld. Assessing officer and confirmed by CIT(A).

24. The Ld. Departmental Representative relied on the orders of the lower authorities.

25. We have considered the facts, rival submissions and perused the material available on record. Since we have decided ground no. 2 in favour of the assessee by holding the assessment as bad in law. The addition as made by the AO by estimating the gross profit does not survive. The AO

is directed to delete the same. This ground of the assessee's appeal is allowed.

26. Ground no. 5 relates to the charging of interest u/s 234A, 234B, 234C and 234D of the Income-tax Act, 1961.

27. This ground is of consequential nature.

28. In the result, the appeal of the assessee is partly allowed.

The order pronounced in the open court on 27.06.2018.

Sd/-	Sd/-
(मनीष बोरड)	(कुल भारत)
लेखा सदस्य	न्यायिक सदस्य
(MANISH BORAD)	(KUL BHARAT)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Indore; दिनांक Dated : 27/06/2018

CPU*/SPS

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order

Private Secretary/DDO, Indore