

3. *The learned Commissioner of Income Tax (Appeals)-4 ought to have accepted the profit shown as per audited books of accounts of the assessee, therefore order passed is unjustified, unwarranted and excessive.*
4. *The assessee is maintaining regular books of accounts and same were audited U/s. 44AB of the Income Tax Act and which were produced by the assessee during the course of assessment proceedings, rejecting the same without any reasons and adopting profit @ 8% of total receipts as net profit as per cash system of accounting, therefore order passed is unjustified, unwarranted and excessive.*
5. *The learned Commissioner of Income Tax (Appeals)-4 erred in confirming the addition made by the assessing officer and not accepting regular books of accounts, therefore order passed is unjustified, unwarranted and excessive.*
6. *The learned Commissioner of Income Tax (Appeals)-4 erred in confirming addition made by the assessing officer, adopting 8% of total receipts as net profit as per cash system of accounting by rejecting books of accounts U/s. 145(2) and determined income @ 8% and made the addition, therefore order passed is unjustified, unwarranted and excessive.*
7. *The assessee is under bonafide impression that the department will not initiate any penalty proceedings 263 proceedings against the assessee, but jurisdictional commissioner initiated proceedings U/s. 263 and set aside the assessment and order passed U/s. 153 r.w.s. 263 though the same was quashed by the Hon'ble Income Tax Appellate Tribunal, the department has preferred appeal before the Hon'ble High Court and the said is pending before the Hon'ble High Court, therefore order passed is unjustified, unwarranted and excessive.*
8. *The assessee is under bonafide impression that the department withdrawal the proceeding before the Hon'ble High Court since the same is pending, therefore order passed is unjustified, unwarranted and excessive."*



3. The perusal of the record reveals that the learned CIT(A) passed the order on 31st January, 2017 and the appeals were filed on 4th October, 2017. This appeal is barred by 185 days of period of limitation. The assessee/appellant has filed an application for condonation of the delay.

4. We have perused the application for condonation of delay and heard the ld representatives of the parties. The ld AR for the assessee argued

that the order passed by the CIT(A)-4, Nagpur dated 31st Jaunary, 2017 was received on 1st February, 2017. It was argued that a survey conducted on 3rd September, 2007. During the survey the assessee offered additional income of ₹70,00,000/-. Further, a search was conducted at the business premises of the assessee on 27.05.2008. During the search and seizure action complete records of the assessee were seized. The assessee sought permission for inspection of the records and prepared the return of income as per audited books of account as per law. The assessee was following mercantile system of accounting. Subsequent to the search action notice under Section 153A was issued. The assessee furnished return of income as per mercantile system of accounting. The AO while passing the assessment order adopted 8% of the total receipt of the assessee and changed the accounting system of the assessee. The AO adopted cash system of accounting. To buy peace and to avoid litigation the assessee agreed for 8% of the sales on estimate basis. The assessee objected for adoption of cash system of accounting by the AO as the liability of the assessee was increased. For A.Y. 2008-09 by adopting cash system of accounting the income of the assessee was reduced and in rest of the years income was increased. The CIT initiated proceedings under Section 263 on 28.03.2013. Against the action of the CIT the assessee filed appeal before the Tribunal vide ITA NO. 161/Nag/2013. The appeal of the assessee was allowed and the order under Section 263 for A.Y. 2008-09 was quashed. The assessee was under the bonafide belief that the revenue would not challenge the order of Tribunal in High Court. The Revenue filed appeal before the Nagpur Bench of the Hon'ble Bombay High Court. The assessee was under the bona fide impression that once the order under Section 263 has been quashed by the Tribunal in ITA No. 161/Nag/2013 the assessee filed an application before the CIT(A) for withdrawal of the appeal on 27.12.2016. On the application of the assessee the learned CIT(A) passed an order dismissing the appeal of the assessee on 31st January, 2017.



5. It was submitted that the appeal preferred by Revenue against the order of the Tribunal was admitted by the Hon'ble High Court on 16.06.2017. On admitting the appeal of the Revenue the assessee realised that in case the Hon'ble High Court pass order against the assessee the assessee will suffer heavy monetary loss. The assessee has wrongly withdrawn his appeal and it was a bona fide and mistaken advice of the counsel. In support of his submission the learned A.R. for the assessee relied upon the decisions of the Hon'ble Supreme Court in the case of Ramnath Sao and Other vs. Gobardhan Sao and Others reported in AIR 2002 (SC) 1201, State of Haryana vs. Chandra Mani in AIR 1996 (SC) 1623 and N. Balakrishnan vs. M. Krishnamurthy in AIR 1998 (SC) 3222.

6. On the other hand, the learned D.R. opposed the condonation of delay. It was submitted by the learned D.R. that he leave the decision of delay on the discrepancy of the Bench.

We have considered the rival submissions of the parties and have gone through the order of the CIT(A). The learned CIT(A) passed the following order: -

"5. The AO has completed the assessment by adopting appellant's turnover on cash basis. Thereafter the A.O. has rejected appellant's books of accounts u/s. 145(2) of the Incometax Act and determined the appellant's income at 8% of the total turnover. The A.O. has adopted a rate of 8% on the basis of appellant's offer where the appellant himself has agreed for adoption of net income of 8% subject to the condition that no penalty proceedings are initiated against the appellant. Consequent to passing the order by the A.O. u/s.153A r.w.s.143(3) of the Incometax Act, for A.Y.2008-09, proceedings were initiated by jurisdictional Commissioner against the appellant u/s.263 of the Incometax Act and the assessment was set aside. The A.O. subsequently took up reassessment proceedings and another order u/s. 153A r.w.s. 263 was passed by the A.O. for A.Y.2008-09 on 03.03.2014.

5.1. In the meantime, the appellant went before the ITAT against jurisdictional Commissioner's order u/s.263. Hon'ble ITAT, Nagpur Bench vide order No. ITA.161/Nag/2013, dated 17.7.2015 has quashed Commissioner's order dated 28.03.2013 passed u/s.263 of the Incometax Act. However, the department for A.Y.2008-09 has challenged the order of ITAT before jurisdictional High Court. Further, the appellant has filed an application dated 27.12.2016 expressing

his desire to accept the assessment order passed by the A.O. and to withdraw pending appeals in the group where orders were passed by the A.O. u/s.153A r.w.s.143(3) of the Incometax Act, 1961. The appellant made the following request:

"The assessee has filed aforesaid appeals on 28.01.2014 against the order of Assistant; Commissioner of Incometax, Central Circle-2(1), Nagpur dated 30.12.2010 for the AY.2003-2004 to 2009-2010. The assessee wants to withdraw all the aforesaid appeals. Hence this withdrawal application."

5.2. Considering that the appellant has filed application for withdrawal of appeal, the grounds of appeal filed by the appellant are hereby Dismissed."

From the order of the CIT(A) we noted that the appeals of the assessee were dismissed as the assessee filed an application for withdrawal of appeals. We have further noted that the application for withdrawal of appeals was based on the belief that the Tribunal has quashed the Commissioner's order under Section 263 dated 28.03.2013 for A.Y. 2008-09. The assessee has realised its mistake after admission of the appeal against the order of the Tribunal. Considering the fact the assessee has withdrawn the appeal on a mistaken belief and realised that the assessee will suffer heavy monetary loss, we find force in the submission of the learned A.R. and condone the delay in filing the appeal. We are of the view that under the Income Tax Act the Revenue is entitled to assess the real income and to recover the legitimate tax thereon. The assessee under the mistaken belief withdrew his appeals. There is no adjudication of the issue involve in the appeal at the stage of first appellate stage. Instead of going in the merit of the case we are of the opinion that the matter/ appeal of the assessee be decided on merit instead of technicalities. Considering the explanation offered by the assessee the delay in filing the present appeal is condoned. In the result, the delay of 185 days in filing the present appeals is condoned.

8. We have heard the ld representatives of the parties and perused the order of ld CIT(A). The perusal of the order of the CIT(A) reveals that the learned CIT(A) has not decided the appeal on merits. The appeal of the assessee was dismissed as withdrawn. Considering the factual matrix of the case as discussed in the proceedings paras, we deem it appropriate to



restore the appeal to the file of the CIT(A) to decide the same on merits. Needless to say that the learned CIT(A) shall grant sufficient and adequate opportunity to the assessee before deciding the appeal on merits. We may further order that while hearing the appeal the application for withdrawal of appeal made by the assessee will not come in the way of bypassing the order on merits.

9. In the result, the appeal of the assessee is allowed for statistical purposes.

ITA No. 366 to 371/Nag/ 2017

10. In all the appeals the assessee has raised identical grounds of appeal. All appeals are accompanied by application for condonation of delay on similar facts as taken in ITA No. 365/Nag/2017. As we have already condoned the delay in that appeal, the delay in filing the other appeals is also condoned.

11. Considering the fact that we have already restored the appeal in ITA No. 365/Nag/2017 to the file of the CIT(A), all the other appeals in the group are restored to the file of the CIT(A) for deciding the issue on merits.

12. In the result, ITA No. 365 to 371/Nag/2017 are allowed for statistical purposes.

Order pronounced in the open court on 22nd November, 2017.

Sd/-
(P.K. Bansal)
Vice President

Sd/-
(Pawan Singh)
Judicial Member

Nagpur, Dated: 22nd November, 2017

Copy to:

1. The Appellant
2. The Respondent
3. The CIT(A)-4, Nagpur

4. The Pr. CIT (Central), Nagpur
5. The DR, Bench, ITAT, Nagpur
6. Guard File

//True Copy//

n.p.

By Order
रजिस्ट्रार निजी सचिव
Sr. Private Secretary
ITAT, Nagpur Bench, Nagpur
आयकर अपीलार्थी अधिकारी
Income Tax Appellate Tribunal
नागपुर बेंच/Nagpur Bench