

**IN THE INCOME TAX APPELLATE TRIBUNAL
JABALPUR BENCH "SMC", JABALPUR**

BEFORE SHRI ANADEE NATH MISSHRA, ACCOUNTANT MEMBER

I.T.A. No.4/JAB/2024
Assessment year:2017-18

Pradeep Sharma, Sagar Prop. M/s. Gandhi Medical Store, Ground Floor, Padmakar Nagar, Makronia, Madhya Pradesh-470004. PAN:AHWPS9035J (Appellant)	Vs.	ACIT Circle-1, Katni NFAC, Delhi (Respondent)
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Appellant by	Shri Govind Rinwa, C.A
Respondent by	Shri N. M. Prasad, Sr.D.R-1

ORDER

(A) This appeal vide I.T.A. No.4/JBP/2024 has been filed by the assessee for assessment year 2017-18 against impugned appellate order dated 05/12/2023 (DIN & Order No.ITBA/NFAC/S/250/2023-24/1058474022(1) of Commissioner of Income Tax (Appeals) ["CIT(A)" for short].

(B) The facts of the case, in brief, are that in this case, the assessee filed its return of income on 27.10.2017 declaring total income at Rs.40,40,535/-. The Assessing Officer completed the assessment and passed rectification order under section 154 read with section 143(3) of the Income Tax Act, 1961 ("Act", for short) on 24.11.2022 and determined the total income of the assessee at Rs.47,33,190/-. Being aggrieved, the assessee carried the matter in appeal before the learned CIT(A), who has dismissed the appeal

of the assessee. Being further aggrieved, the assessee is in appeal before the Income Tax Appellate Tribunal.

(C) In the aforesaid paper book, the written submissions of the assessee were filed, which are reproduced below for ease of reference: -

"The present appeal is against the Order of the CIT(A), NFAC, Delhi u/s 250 dated 05/12/2023 arising out of Order 154 r.w.s. 143(3) dated 24/11/2022 made by ACIT-Circle, Katni.

The Appellant is running a medical store as proprietor in the name and style of M/s Gandhi Medical Store at Sagar (M.P). During the relevant year, survey u/s 133A was conducted at the business premises of the Appellant on 22/09/2016. During the course of survey, discrepancy in stock etc. was found and additional income totalling to Rs.40,40,535/- was surrendered by the appellant. Return of income for the relevant year was filed by the Appellant on 17/10/2017 declaring total income of Rs.47,33,190/- which included the income surrendered during survey. The assessment for the relevant year was made u/s 143(3) vide order dated 17/12/2019 accepting the income shown in the return filed.

During the course of assessment proceedings, books of account along with supporting evidence etc. were produced before the learned ITO. The books and documents produced along with the impounded material were verified by the learned ITO and the income shown in the return filed was accepted.

Later, the learned ITO issued notice u/s 154 on 07/06/2022 stating that in the original assessment tax on the income assessed was levied at normal slab rates whereas the tax on the income surrendered during survey should have been charged u/s 115BBE.

The Appellant through his reply dated 16/06/2022 objected to the proposed rectification and charging of tax u/s 115BBE. The learned ITO did not find the reply of the Appellant as tenable and charged tax u/s 115BBE vide order u/s 154 dated 24/11/2022. The said order of the learned ITO u/s 154 dated 24/11/2022 and the consequent levy of tax u/s 115BBE were the subject matter of the Appeal filed before the CIT(A) and were disputed.

Submissions were made before the Honourable CIT(A) on 01/12/2023. The CIT(A) dismissed the appeal made before him through Order u/s 250 dated 05/12/2023 which is disputed in this appeal. Ground-wise submissions of the appellant against the Order u/s 250 r.w.s. 154/143(3) and the tax levied u/s 115BBE are as under:

GROUND NO.1:

The appellant submits that the Rectification Order u/s 154 r.w.s 143(3) dated 24/11/2022 is bad in law and is unjustified because the Assessment Order u/s 143(3) dated 17/12/2019 did not suffer from any mistake apparent

on record. In the assessment order u/s 143(3) dated 17/12/2019, the learned ITO accepted the returned income of the appellant and simply stated to charge interest u/s 234A/234B/234C/234D. No other directions were issued by the learned ITO in the assessment order.

In the notice u/s 154 dated 07/06/2022, the Assessing Officer proposed to tax the income surrendered by the appellant u/s 115BBE and in the Rectification Order treated the income surrendered to be taxable income u/s 68,69, 69A, 69B, 69C or 69D and levied tax u/s 115BBE. The learned ITO has not specified any mistake in the Assessment Order that is apparent from record. The issue involved in the present case was highly controversial and debatable and clearly not a mistake which is apparent from record. Therefore, no rectification could have been made u/s 154.

Hence, the issue of notice u/s 154 was incorrect and is bad in law. The said notice and the order in consequence of said notice are requested to be quashed.

GROUND NO.2:

It is submitted that the amount surrendered during the course of survey has been duly offered by the appellant while filing his return of income and the said return of income has been accepted by the Assessing Officer without making any adjustment or variation either in the quantum, nature or classification of income so offered by the appellant.

A perusal of Section 115BBE of the Act clearly contemplates that it is only when the total income of the appellant includes any income referred to in Sections 68,69, 69A, 69B, 69C or 69D of the Act or so determined by the ITO, then income tax has to be calculated under such section.

A reading of Section 68, 69, 69A, 69B, 69C, 69D of the Act shows that for invoking such provisions, the learned ITO should reach a conclusion that the appellant has not offered any explanation about the nature and source of the income or the explanation offered by him is not to his satisfaction.

Therefore, it is only when the learned ITO requires and records that the explanation is either not offered or even if offered it is not to his satisfaction then only the provisions u/s 68, 69, 69A, 69B, 69C, 69D of the Act could be invoked in determination of income.

In the Original Assessment Order u/s 143(3) dated 17/12/2019 there is no finding of the learned Assessing Officer that upon the income surrendered by the appellant during survey. the provisions of section 68, 69, 69A, 69B, 69C, 69D are attracted. In absence thereof, the provisions of section 115BBE cannot be applied.

Further, there is nothing on record which shows that the Assessing officer has called for any explanation of the appellant regarding the nature and source of such investment during the course of assessment proceedings. He has not issued any show-cause for invoking provisions of section 68, 69, 69A, 69B, 69C, 69D of the Act. The assessment order so passed by the Assessing officer is silent about invoking the provisions of section 68, 69,

69A, 69B, 69C, 69D of the Act. Where the provisions of section 69 have not been invoked by the Assessing officer while passing the assessment order u/s 143(3), section 115BBE, cannot be invoked.

Therefore, the learned ITO was not justified to charge tax u/s 115BBE where there are no findings in the assessment order that the income surrendered by the appellant during survey was chargeable u/s 68, 69, 69A, 69B or 69C of the Act.

GROUND NO.3:

It is submitted that charging of tax u/s 115BBE in any particular case is a debatable issue and not amenable for rectification u/s 154 of the Act.

The Honourable Jaipur Tribunal in case of ACIT Circle-2, Alwar v Sudesh Kumar Gupta in ITA No. 976/JP/2019 for AY 2014-15 dated 09/06/2020, the issue under consideration was: whether rectification proceedings u/s 154 were permissible when at the first place while passing assessment order u/s 143(3) provisions of Section 69 were not invoked for charging higher rate of tax u/s 115BBE. The Honourable Tribunal held that "It is therefore not a case where provisions of section 69 have been invoked by the Assessing officer while passing the assessment order u/s 143(3) and at the same time, he has failed to apply the rate of tax as per section 115BBE of the Act. Had that been the case, it would clearly be a case of rectification and powers under section 154 can be invoked. However, in the instant case, the Assessing officer has not invoked the provisions of section 69 at first place while passing the assessment order u/s 143(3), therefore, the provisions of section 115BBE which are contingent on satisfaction of requirements of section 69 cannot be independently applied by invoking the provisions of section 154 of the Act."

The Appellant places further reliance on the decisions of Hari Narain Gattani vs DCIT [123 taxmann.com8 (Jaipur-Tribunal) 2021], M/s Kothari & Brothers vs ITO [ITA No. 2637/Bang/2017(AY 2012-13) dated 14.11.2018] and Anjanee Vijetha Kasturi, Kurnool vs ACIT, Circle 1, Kurnool [ITA No. 196/Hyd./2023 AY 2015-16 dated 09.05.2023].

The learned CIT(A) in the Order u/s 250 dated 05/12/2023 erred in interpreting the case laws submitted by the appellant. The Honourable CIT(A) in the Order stated that the above-mentioned case laws are not applicable to the facts of this case due to two primarily reasons:

- i. that both the appellant and the AO have acknowledged that the income declared by the assessee are covered u/s 68, 69, 69A, 69B, 69C, 69D.*
- ii. that in the above cases the income surrendered was declared under as business income.*

Firstly, the amount surrendered during the course of survey has been duly offered by the appellant while filing his return of income and the said return of income has been accepted by the Assessing Officer without making any adjustment or variation either in the quantum, nature or classification of income so offered by the appellant. The assessment order so passed by the

Assessing officer is silent about invoking the provisions of section 68, 69, 69A, 69B, 69C, 69D of the Act. Further, there is nothing on record which shows that the Assessing officer has called for any explanation of the appellant regarding the nature and source of such investment during the course of assessment proceedings. He has not issued any show-cause for invoking provisions of section 68, 69, 69A, 69B, 69C, 69D of the Act. Therefore, neither the appellant nor the AO have acknowledged in the assessment order that the income declared by the assessee are covered u/s 68, 69, 69A, 69B, 69C, 69D.

Secondly, in all the above-mentioned case laws the issue involved was similar to the case of the Appellant. The judicial opinion in all these cases is unequivocal and unanimous that: if the learned Assessing Officer accepted the return of income and levied the tax on the undisclosed income as per the slab rates and without determining such income as the income referred to in Sections 68, 69, 69A, 69B, 69C, 69D of the Act in the order passed u/s 143(3), then subsequent exercise of powers u/s 154 of the Act to invoke Section 115BBE of the Act for rectification of the so-called mistake is bad under law. Whether the surrendered income was declared as business income or under any other head of income does not change the interpretation of the judicial opinions and the fact that the learned AO accepted the returned income and levied tax at normal rate in the order u/s 143(3).

The decisions in the aforesaid cases sufficiently establish that the issue involved in the present case was highly controversial and debatable and no rectification could have been made u/s 154. Therefore, the learned ITO was not justified to charge tax u/s 115BBE by invoking and exercising his powers u/s 154 of the Act.

GROUND NO.4:

This ground is broad in scope and general in nature and do not pertain to any specific issue. It may be addressed in a general manner as deemed appropriate based on the context and relevance of the case"

(C.1) At the time of hearing, the Ld. Authorized Representative for the assessee submitted that the issue of applicability of section 115BBE of the Act in the facts and circumstances of the case is highly disputable and controversial, and therefore recourse to rectification proceedings u/s 154 of the Act could not be taken. He further submitted that it is well settled law that section 154 of the Act is for the purpose of rectification of mistakes apparent from the record and cannot be invoked to take adverse action against the assessee on debatable or controversial issues. In support of this

contention, he placed reliance on the written submissions already reproduced in foregoing paragraph (C) in this order.

(C.2) The Ld. Departmental Representative for the Revenue supported the order of the Assessing Officer passed u/s 154 of the Act and the impugned order of the Ld. CIT(A). Both sides have been heard and the material placed on record has been perused. The notice issued u/s 115BBE of the Act is reproduced below for the sake of ready reference: -

"Insertion of new section 115BBE.

47. After section 115BBD of the Income-tax Act, the following section shall be inserted with effect from the 1st day of April, 2013, namely:—

"115BBE. Tax on income referred to in section 68 or section 69 or section 69A or section 69B or section 69C or section 69D.—(1) Where the total income of an assessee includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, the income-tax payable shall be the aggregate of—

(a) the amount of income-tax calculated on income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, at the rate of thirty per cent; and

(b) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause (a).

(2) Notwithstanding anything contained in this Act, no deduction in respect of any expenditure or allowance shall be allowed to the assessee under any provision of this Act in computing his income referred to in clause (a) of sub-section (1)."

(C.2.1) On perusal of Section 115BBE of the Act, it is evident that this provision comes into effect only where the assessee's income includes any income referred to in Sections 68, 69, 69A, 69B, 69C, or 69D of the Act, (*whether such income is reflected in the return of income or determined by the Assessing Officer*). In the present case, a perusal of the assessment order as well as the impugned order of the Ld. CIT(A) reveals that there is no reference whatsoever to Sections 68, 69, 69A, 69B, 69C, or 69D of the

Act, nor is there any indication that the provisions of these sections were invoked. It is not in dispute that the income of Rs. 6,23,922/- was duly recorded by the assessee in the books of account and was also included in the return of income. Further, the contention of the Ld. Authorized Representative for the assessee that the applicability of Section 115BBE of the Act to the facts and circumstances of the case is a highly disputable and controversial issue, for which recourse to Section 154 of the Act cannot be invoked, is found to be reasonable and acceptable. The action of the Assessing Officer in applying Section 115BBE of I.T. Act through an order u/s 154 of I.T. Act is an Act of revision of the assessment order in which Section 115BBE of I.T. Act was not invoked. However, it is well settled that the Assessing Officer does not have power of revision. Power of revision is vested in higher authorities, as per Section 263 (and Section 264) of I.T. Act. Thus, the order passed by the AO u/s 154 of I.T. Act in revising the assessment order by invoking Section 115BBE of I.T. Act; is an order passed without lawful authorities. At this stage, it is not necessary to express a view whether, on merits, it was a fit case for applying Section 115BBE of I.T. Act. The point is, even if it was a fit case the Assessing Officer had no authority to do so through an order u/s 154 of I.T. Act, because the Assessing Officer does not have powers of revision.

(C.3) Further, it is also well settled that debatable and disputable issues on which different views are possible are beyond the scope of Section 154 of I.T. Act. An order u/s 154 of I.T. Act can be passed only for satisfaction of mistakes apparent from record, and not for debatable and disputable issues on which different views are possible whether this is a fit case for applying Section 115BBE of I.T. Act or not; is a debatable and disputable issue on which different views are possible; and hence beyond the scope of Section

154 of I.T. Act. For this reason, also the order passed, by the Assessing Officer is without lawful authority.

(D) In view of the foregoing discussion, it is held that the rectification of the assessment order for invoking Section 115BBE of the Act, thereby taxing the income of the assessee at a higher rate, was erroneous and without lawful authority in the facts and circumstances of the present case. Accordingly, the impugned order of the Ld. CIT(A) is set aside and the Assessing Officer is directed to assess the assessee's income without applying the provisions of Section 115BBE of the Act.

(E) On merits, the assessee's case is supported by the decisions in *Anjanee Vijetha Kasturi, Kurnool vs. ACIT, Circle-1, Kurnool* (ITA No. 196/Hyd/2023, A.Y. 2015-16, dated 09.05.2023) and *ACIT, Circle-2, Alwar vs. Sudesh Kumar Gupta* (ITA No. 976/JP/2019, A.Y. 2014-15, dated 09.06.2020). For the ease of reference, the relevant portion of the decision in the case of *ACIT, Circle-2, Alwar vs. Sudesh Kumar Gupta* (supra) is reproduced below: -

"8. We have heard the rival submissions and perused the material available on record. During the course of survey, the assessee has surrendered an amount of Rs 21,00,000/- as undisclosed investment in stock from undisclosed income during the course of survey. In the return of income, the same has been offered to tax under the head "business income" and the return of income so filed has been accepted by the Assessing officer without making any adjustment/variation either in the quantum, nature or classification of income so offered by the assessee. The assessee, being an individual, has offered the same to tax applying the slab rate of taxation as applicable to an individual. The case of the Revenue is that the same is taxable @ 30% as per provisions of section 115BBE r/w section 69 of the Act and is thus a mistake apparent from record rectifiable u/s 154 of the Act.

9. In order to appreciate the rival contentions, it would be appropriate to refer to the provision of section 115BBE at the relevant point in time which reads as under:

"115BBE. (1) Where the total income of an assessee,—

(1) includes any income referred to in section 68 , section 69, section 69A , section 69B , section 69C or section 69D, the income-tax payable shall be the aggregate of—

(a) the amount of income-tax calculated on the income referred to section 68 , section 69, section 69A , section 69B , section 69C or section 69D, at the rate of thirty per cent; and

(b) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause (a)."

10. The provisions of section 115BBE thus provides that where the income of the assessee includes any income referred to in section 69, the income tax payable shall be at the rate of 30% on income so referred in section 69 and on the remaining income, the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred in section 69. In other words, it provides for a special rate of taxation at the rate of 30% as against the normal rate of taxation which may be applicable to the assessee. The question is whether assessee's income involves income referred to in section 69 and the provisions thereof reads as under:

"69. Where in the financial year immediately preceding the assessment year the assessee has made investments which are not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of the investments or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the value of the investments may be deemed to be the income of the assessee of such financial year."

11. In the instant case, as we have noted above, the return of income so filed has been accepted by the Assessing officer without making any adjustment/variation to the income so offered by the assessee and the assessment has been completed u/s 143(3) of the Act. Further, there is nothing on record which shows that the Assessing officer has called for any explanation of the assessee regarding the nature and source of such investment during the course of assessment proceedings and any formation of opinion and recording of satisfaction by the Assessing officer which is required before invoking the provisions of section 69 of the Act. Though the Assessing officer has issued a show-cause as to why penalty proceedings u/s 271(1)(c) may not be initiated in respect of such investment, however, he has not issued any show-cause for invoking provisions of section 69 of the Act or has called for any explanation of the assessee regarding the nature and source of such investment. In fact, the assessment order so passed by the Assessing officer is silent about invoking the provisions of section 69 of the Act. Where the provisions of section 69 have not been invoked by the Assessing officer while passing the assessment order u/s 143(3), going by the plain language of section 115BBE, the latter cannot be invoked in the instant case.

12. It is therefore not a case where provisions of section 69 have been invoked by the Assessing officer while passing the assessment order u/s 143(3) and at the same time, he has failed to apply the rate of tax as per section 115BBE of the Act. Had that been the case, it would clearly be a case of rectification and

powers under section 154 can be invoked. However, in the instant case, the Assessing officer has not invoked the provisions of section 69 at first place while passing the assessment order u/s 143(3), therefore, the provisions of section 115BBE which are contingent on satisfaction of requirements of section 69 cannot be independently applied by invoking the provisions of section 154 of the Act. We therefore upheld the order of the Id CIT(A) and the matter is decided in favour of the assessee and against the Revenue.

(E.1) Further, for the ease of reference, the relevant portion of the decision in the case of *Anjane Vijetha Kasturi vs. ACIT* (supra) is also reproduced below: -

"9. I have gone through the record in the light of the submissions made on either side. Coming to the admitted facts, there was a survey in the business premises of the assessee on 19/02/2015. In the statement recorded under section 131 of the Act, one Shri Kasturi Skanda Kumar offered an additional income of Rs. 20 lakhs in the hands of the assessee for the assessment year 2015-16. Subsequently, when the assessee filed the return of income for the assessment year 2015-16 on 30/12/2015, such declared additional income was incorporated therein. Learned Assessing Officer by order dated 07/09/2017 considered this fact in the light of the impounded material, books impounded in relation to survey and other documents produced, during the scrutiny, accepted the return of income. Learned Assessing Officer did not invoke the provisions of section 115BBE of the Act nor did he levy the tax at 30% thereunder. He only adopted slab rates. He, however, invoked the provisions of section 115BBE of the Act through an order dated 09/04/2019, proposing to rectify the mistake apparent from record under section 154 of the Act, which the assessee is challenging in this appeal.

10. Assessee submits that when once the learned Assessing Officer does not invoke section 115BBE of the Act in the assessment order passed under section 143(3) of the Act and simply accepted the additional income offered, there is no mistake apparent from record in respect of the rates of tax. Such a thing will be available to the learned Assessing Officer if he invokes the provisions of section 115BBE of the Act, but levies the tax at a different rate by mistake. For this, he relied on the decisions cited above.

11. In the cases of Hari Narain Gattani vs. DCIT (supra), ACIT vs. Shri Sudesh Kumar Gupta (supra) and M/s. Kothari and Brothers vs. ITO (supra), the facts are that there was a survey, recording of statement, wherein the additional income was declared, such an additional income declared was incorporated in the return of income that was filed and the learned Assessing Officer accepting the same without invoking the provisions of section 115BBE of the Act. In all these cases, the learned Assessing Officer invoked section 115BBE of the Act in exercise of powers under section 154 of the Act to rectify the mistake apparent from record. The judicial opinion in all these cases is unequivocal and unanimous that if the learned Assessing Officer accepted the return of income and levied the tax on the undisclosed income as per the slab rates taxation, and without determining such income as the income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D of the Act in the order

passed under section 143(3) of the Act, then subsequent exercise of powers under section 154 of the Act to invoke section 115BBE of the Act for rectification of the so-called mistake is bad under law. It is further held that the provisions of section 115BBE of the Act are contingent on the decision of the learned Assessing Officer as to the requirement of sections mentioned in section 115BBE of the Act and, therefore, without recording such a satisfaction in the assessment order, the learned Assessing Officer cannot say that there was error apparent on record and has to be rectified under section 154 of the Act to invoke section 115BBE of the Act. In all these decisions, the decisions of Co-ordinate Benches of this Tribunal and the decisions of higher fora are noticed.

12. A perusal of section 115BBE of the Act clearly contemplates that it is only when the total income of the assessee includes any income referred to in sections 68, section 69, section 69A, section 69B, section 69C or section 69D of the Act or so determined by the Assessing Officer, then income tax has to be calculated under such section. A reading of section 68, section 69, section 69A, section 69B, section 69C and section 69D of the Act shows that for invoking such provisions, the learned Assessing Officer shall reach a conclusion that the assessee has not offered any explanation about the nature and source of the unexplained money or the explanation offered by him is not to his satisfaction. Therefore, it is only when the learned Assessing Officer requires and records that the explanation is either not offered or even if offered it is not to his satisfaction then only the provisions under section 68, section 69, section 69A, section 69B, section 69C or section 69D of the Act could be invoked in determination of income.

13. In the case on hand, there is no specific allegation of the learned Assessing Officer that he sought any explanation from the assessee and the assessee did not offer any explanation or that the explanation if any, offered by the assessee is not to his satisfaction. In the absence of such a satisfaction, if an order under section 143(3) of the Act is passed accepting the return of income, then it is difficult to presume that such an order was passed in respect of any income determined under section 68, section 69, section 69A, section 69B, section 69C or section 69D of the Act or that the tax has to be levied under section 115BBE of the Act. Unless and until such a compliance is there in the assessment order, it cannot be said that there was any mistake apparent from record or that the proceedings are amenable to the jurisdiction of the learned Assessing Officer under section 154 of the Act. Having not recorded any such satisfaction as required under law, the learned Assessing Officer cannot be allowed to contend that the provisions of section 115BBE of the Act are applicable to the case of the assessee and, therefore, the error in respect of leviable rates has to be rectified under section 154 of the Act.

14. With this view of the matter, I am of the considered opinion that consistent view taken by the Co-ordinate Benches of this Tribunal referred to above is applicable to the facts of the case on hand on all force. Accordingly, I hold that exercise of jurisdiction under section 154 of the Act by the learned Assessing Officer is bad in law and consequently the proceedings under section 154 of the Act are liable to be quashed."

(E.2) However, on merits, whether this is a fit case for invoking Section 115BBE of I.T. Act, is merely academic and it is not required to take a view

on this; because in the foregoing paragraph (D) of I.T. Act, direction is given already to assess the income of the assessee, without applying the provisions of Section 115BBE of I.T. Act. Therefore, by way of abundant caution, it is hereby clarified that no view is being expressed on merits.

(F) All the grounds of appeal are treated as disposed of in accordance with the aforesaid order. For statistical purposes, the appeal of the assessee is partly allowed.

(Order pronounced in the open court on 13/02/2026)

Sd/.
(ANADEE NATH MISSHRA)
Accountant Member

Dated: 13/02/2026
Vijay Pal Singh (Sr. PS)

Copy of the order forwarded to :

1. The Appellant
2. The Respondent.
3. Concerned CIT
4. D.R., I.T.A.T., Jabalpur