

आयकर अपीलिय अधिकरण "ए" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

श्री डी. करुणाकरा राव,लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA Nos.1281 to 1284/PUN/2016
निर्धारण वर्ष / Assessment Years: 2006-07 to 2009-10

The Assistant Commissioner of Income Tax,
(Central) Circle, Kolhapur

.....अपीलार्थी / Appellant

बनाम / V/s.

Ghatge Patil Industries Limited.
At post:- Uchagaon, Tal. Karveer,
Dist.- Kolhapur. Pin-416 005.
PAN :AAACG6595R

.....प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA Nos.1070 to 1072/PUN/2016
निर्धारण वर्ष / Assessment Years: 2006-07 to 2008-09

Ghatge Patil Industries Limited.
At post:- Uchagaon, Tal. Karveer,
Dist.- Kolhapur. Pin-416 005.
PAN :AAACG6595R

.....अपीलार्थी / Appellant

बनाम / V/s.

The Deputy Commissioner of Income Tax,
(Central) Circle, Kolhapur

.....प्रत्यर्थी / Respondent

Assessee by : Shri Nikhil Pathak
Revenue by : Shri Sanjeev Ghei

सुनवाई की तारीख / Date of Hearing : 11.09.2018
घोषणा की तारीख / Date of Pronouncement : 19.09.2018

आदेश / ORDER

PER D. KARUNAKARA RAO, AM :

There are 4 appeals filed by the Revenue involving Assessment Years 2006-07 to 2009-10 and 3 appeals filed by the Assessee involving Assessment Years 2006-07 to 2008-09. They are filed against the consolidated order of CIT(A)-11, Pune, dated 30-03-2016.

We shall take up the appeals of the Revenue first.

ITA Nos. 1281 to 1284/PUN/2016 – By Revenue
A.Yrs. 2006-07 to 2009-10

2. Grounds raised by the Revenue for the A.Y. 2006-07 are extracted here as under :

“1. On the facts and the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition made on sale of scrap made by the AO amounting to Rs.7,02,58,930/- for the years 2003-04 to 2009-10 treating the statement of MD of the assessee company as unreliable in the absence of any evidence supporting/confirming the modus operandi for sale of scrap.

2. On the facts and the circumstances of the case, the Ld. CIT(A) has erred in ignoring the ratio decidendi in the judgment of the Hon'ble Supreme Court in the case of Surjeet Singh Chhabra Vs. UOI (1986).

3. The order of the Ld. CIT(A) may be vacated and that of the Assessing Officer be restored.

4. The appellant craves leave to add, alter, amend and modify any of the above grounds of appeal.”

Revenue raised similar grounds in the rest of the appeals and the issue raised in all these 4 appeals relates to the relief granted by the CIT(A) in respect of disallowance on account of sale of scrap vis-à-vis the disclosure made by MD of the company during the search and seizure action.

3. Briefly stated relevant facts of the assessee are that the assessee is a company and engaged in the business of manufacturing of Grey Iron castings, Gate Valves, Mechanical Industrial Clutches, etc. Assessee company is one of the sister concern of Kiran Patil Group. Assessee company filed the return of income for these years and the details, return of income, the additions, assessed income, etc. are as follows :

<i>Sl.No.</i>	<i>A.Y.</i>	<i>Returned income</i>	<i>Addition on account of scrap</i>	<i>Assessed income</i>
1	2006-07	13,21,09,292	99,22,718	15,35,02,810
2	2007-08	10,99,63,460	1,91,39,800	13,11,58,310
3	2008-09	15,26,23,353	1,94,95,055	17,28,01,170
4	2009-10	15,15,25,993	1,75,79,193	16,91,05,190

4. In the assessment, AO made common addition on account of sale of scrap. This issue has a genesis in the action u/s.132 of the Act on the assessee. There was search and seizure action u/s.132/133A of the Act and seized certain loose papers indicating cash slips/vouchers from the cabins of the cashiers, Manager Finance and the MD of the company. These documents relate to the scrap generated in the process of day to day production in the foundry of the company and the sale of scrap outside the books of the assessee. These documents run into hundreds. The employees as well as the MD were confronted with the seized documents. During the recording of statement u/s.132(4) of the Act, Mr. Kiran Patil, MD of the company, admitted the generation of income outside the books of account on account of sale of scrap. Eventually, a sum of Rs.8 crores was offered as unaccounted income of the assessee @ Rs. 2 crores per year for A.Yrs. 2006-07 to 2009-10. This disclosure is over and above the regular income of the assessee. Despite the same, assessee filed the returns of income offering the reduced undisclosed income and restricted the undisclosed income to the extent appearing on the seized papers only. During the assessment proceedings, AO noted that the assessee did not offer entire amount so disclosed in the return of income. Details of the offer of undisclosed income on assessment year wise is given below :

Sl.No.	A.Y.	Additional income disclosed	Income offered u/s.153A of the Act	Addition on account of scrap
1	2006-07	2,00,00,000	1,00,77,282	99,22,718
2	2007-08	2,00,00,000	8,60,200	1,91,39,800
3	2008-09	2,00,00,000	5,04,945	1,94,95,055
4	2009-10	2,00,00,000	24,20,807	1,75,79,193

Eventually, the AO rejected the explanation of the assessee as well as undisclosed income returned by the assessee and proceeded to make the addition of differential amounts as depicted above. AO relied on the contents of Para No.5 of the assessment order which deals with this issue and the relevant extract for the A.Y. 2006-07 is given below :

“5.1 On verification of returns of income for the above assessment years, it is seen that the assessee has offered additional income on account of above partially as against admitted income of Rs.2 Crores. It has offered the income only to the extent of seized chits/ slips/ vouchers.

5.2 The assessee company vide this office letter (questionnaire) dated was requested to show cause as to why the difference between admitted income of Rs.2 Crores and additional income actually offered in respective return of income should not be added.

5.3 The assessee company has filed its submission on all the points including that of less declaration. The verbatim submission of the assessee on partial offering of additional income is "During the course of search proceedings, the Dept., had found certain paper slips containing indication of sale of scrap and disposals amounting to Rs.5,11,854/-pertaining to asst. year 06-07. Similarly, the Dept had found cash payment vouchers amounting to Rs.95,65,428/- pertaining to the above asst. year. The slips indicating cash sale of scrap and disposables was not included in the total income as it is still not certain whether the sale is actually materialized or not. As regards payments vouchers, the same are mostly of IOU natures which have been refunded by the respected person. However, these vouchers have no bearing on the income or profit of the assessee. Both the documents are pertaining to disposals as well as payment vouchers which have not been recorded in the books of account. These payment vouchers could not be recorded in the books of account because no supporting were available for the vouchers though the expenditure was incurred strictly for business purposes. Technically, only the payment vouchers of Rs.95,65,428/- remains to be explained for the above asst. year. However, the assessee on its own volition has come forward and included in the return the total of receipts of Rs.5,11,854/- as well as total of payment vouchers of Rs.95,65,428/- and added the same as additional income.

5.4 They have filed a letter dt.15/10/2009. In this submission filed, the company has narrated the events. In para no.3 of the letter, it has stated that the search party has recorded statements of certain staff and MD of the company. It pleaded that upon receipt of copies of the statements, all the staff as well as MD had empathetically refused the contents of the statements. In para No.4 it -stated that the Dept has found certain paper

slips containing indication of sale of scrap of Rs.5,11,854/- pertaining to this assessment year. Similarly the Dept. has also found cash payment vouchers of Rs.95,65,428/-. The assessee has offered the above Rs.1,00,77,282/- as additional income.

5.5 In the second and final submission dt.15/11/2010, the company reiterated its earlier plea.

5.6 The assessee's contentions are carefully considered. From the analysis of the seized material and the statement recorded under oath, the following issues emerge:

- The assessee is admitting that during the course of search proceedings, the Dept. had found certain paper slips.
- It indicates sale of scrap and disposals
- The Dept., also found cash payment vouchers.
- The assessee has admitted in its statement recorded u/s. 132(4) that cash sale of scrap and disposables was not included in the total income.
- The assessee company categorically accepts that "both the documents are pertaining to disposals as well as payment vouchers have not been recorded in the books of account".
- These were not recorded in the absence of supporting vouchers.

5.7 In spite of accepting the above facts, for which reason the M.D of the company has declared Rs. 2 crores each for 4 A.Ys, declaration is honoured only to the extent of proof seized during the course of search.

5.8 The assessee company's claim that additions can be made only on the basis of cash slips/chits/vouchers of concerned year. The arguments of the assessee are carefully perused and are not acceptable. **Inferences are ought to be drawn based on the accepted modus operandi of the person.** The assessee is accepting that it has not accounted the sale of scrap which is depicted in the seized papers. Because, there is no other option for the company. The vouchers are signed by Sri Kiran Patil, MD, Sri J.H.Kulkarni, Fin. Controller, cashier, Deptl. authority. These vouchers cannot be brushed aside without any reason. **The evidences found and seized during the course of search are only indicative evidences. The offering of income by the assessee only to that extent is not at all acceptable. Because of search operations, these evidences have come to the knowledge of Department. It clearly proves that assessee is indulging in suppression of sale of scrap. It is but natural that nobody will keep proof of one's unaccounted books. For all these reasons and after considering the factual matrix the M.D. Shri Kiran Patil has declared Rs.2 crores as its additional income on account of unaccounted sale of scrap and unaccounted received by him through employees of the assessee company.**

5.8 The statement recorded u/s.132(4) of various employees and that of managing person Shri Kiran Patil is having evidentiary value. Even the Apex court held that the statement u/s.132(4) is having evidentiary value if it is corroborated with the evidences. In this case, the evidences in the form of chits, vouchers, slips which are in hundreds are of primary nature. The M.D. of the company is also accepting these facts.

5.9 There is a fundamental difference between acceptable tax mitigation and unacceptable tax avoidance. The former are case in which the tax-payer takes advantage of the law to plan his affairs so as to minimize the incidence

of tax. "Unacceptable tax avoidance typically involves the creation of complex artificial structures in case of *Khopade Kisanrao vs ACIT, 2000- (074)-ITD - 0025T-TPUN*, THE Hon'ble Pune tribunal has opined as under :-

The process of assessment under s. 158BC r/w s.158BB is not merely computation of income but a process of evaluation of evidence and material found during the course of the search and derived from the books of account, documents and other information. There is no doubt that the AO does not have the power to make an arbitrary assessment. He cannot base his assessment merely on suspicion, conjectures or guesswork or on irrelevant or inadmissible material. The language of s. 143(3) as also s. 158BB makes it abundantly clear that the assessment to be made by the AO should be based on evidence before the officer. The word "evidence" has to be construed in a comprehensive sense and it includes circumstantial evidence. It is well settled principle of law that the material or evidence on which the taxing authorities may base the assessment is not confined to direct testimony by witnesses. It may be reiterated that the word used in s.143/s.158BB is evidence. However, in making assessment the AO does not act merely on what is technically described as evidence in the Indian Evidence Act. It is observed from s.143(3) that the AO can base his assessment not only on the evidence found during the course of the search but also on the material gathered by him. It is now well settled that the AO is not fettered by technical rules of evidence and the like and that he may act on material which may not strictly speaking be accepted as evidence in a Court of law. Such evidence need not necessarily be direct evidence. It may be circumstantial evidence or assessment based on preponderance of probabilities judged by human conduct. For instance, the past history of the case, living style of the assessee and general conditions of the market in the particular trade will constitute relevant material for the purposes of assessment.....the power of the AO to make an assessment based on relevant material is also enshrined in s. 143(3). If there is material on record to establish that the assessee has charged on money in regard to land deals which is not recorded in the regular books of account, it is permissible for the AO to make an assessment on the basis of such material. The AO might not get the entire material in regard to the undisclosed transactions, in such cases there is nothing wrong in estimating the undisclosed income in respect of such transactions which are not recorded in the diaries, documents or other papers. The principle is supported by the decision. of the Supreme Court in the case of H.M. Esufali H.M.Abdulali (supra). In this case the AO had detected sales for 19 days as not having been entered in the books of account. The AO estimated the turnover for the entire year based on the undisclosed sales for the period of 19 days. Their Lordships of the Supreme Court upheld the estimation of income as competent. Similarly, in the case of Overseas Chinese Cuisine (supra) the Bombay Bench of the Tribunal held that when there was evidence of suppressed sales for three months, the AO was entitled to adopt the basis of unaccounted sales throughout the year on the basis of such material. The Tribunal further held that the said material could be utilized for estimation of unaccounted sales in earlier years as well as in subsequent assessment years."

5.10 During the course of search the MD of the company has duly considered the evidences found. He is the only persons to who knows the actual facts of the business. After thoughtful consideration of facts he himself has declared Rs.2 crores for each A.Ys.from 2006-07 to 2009-10. This has been categorically admitted by him in his statement under oath recorded during the course of search u/s.132(4) of the I.T.Act. Such statement has evidentiary value as stated in section 132(4) itself. The retraction by the

assessee is an afterthought and not acceptable. Under the above circumstances an amount of Rs.99,22,718/- being the difference between declared income in statement u/s.132(4) of Rs.2 Crore & the amount of Rs.1,00,77,282/- disclosed in the return is added to the total income of the assessee company. In this connection, I am also satisfied that the company has concealed its income by furnishing inaccurate particulars. This squarely attracts penalty u/s.271(1)(c) of the Act. The same is initiated separately.”

5. Aggrieved with the above addition by the AO on this account, the assessee filed the appeals before the CIT(A) for the years under consideration. CIT(A) examined this issue at length and analysed various decisions and eventually deleted the addition giving the following reasons :

“3.30 In the appellant's case the seized papers do not reveal any pattern of scrap sold outside the books. There is no correlation between the scrap sold outside the books and the scrap sales accounted for in the books. The AO in asst year 2003-04, 2004-05 and 2005-06 has estimated total sale' of scrap to be about 1% of the turnover. In the asst year 2005-06 as the scrap sales exceeded 1% of the turnover, no further addition was made. In the asst years 2006-07 to 2009-10 the appellant has consistently shown scrap sale @ more than 1% of the turnover. The AO has given no reasons as to why he has estimated the scrap sale of these asst years at more than twice the estimate for the earlier years. If the AO follows the same rate of 1% of total turnover, the scrap sales accounted for in these asst years are much better than that and no addition would be required even on estimate basis.

3.31 Even if estimate of income is justified in a particular case, the quantum of estimate cannot be arbitrary. The quantum should be based on relevant facts. In the appellant's case the AO has based the asst on a retracted statement which is not the same as an assessment based on the AO's estimation. Further the AO has not justified the quantum of the additions made from any angle other than the 132(4) statement. The books of the appellant company are duly audited and have been accepted by the AO in all the asst years. No defect has been pointed out in the books or in the manufacturing records of the appellant. There is no justification or support for the additions made from the technical point of view i.e. there is no allegation that the scrap sales shown by the appellant in his books were less than the industry norms etc. The AO himself has estimated the scarp sales to be 1% of the turnover in the asst years 2002- 03 to 2005-06. The scrap sales shown by the appellant in asst years 2006-07 to 2009-10 are better than 1%, hence no further addition on estimate basis should be made in these asst years. Thus the additions made in asst years 2006-07 to 2009-10 cannot be sustained on estimate basis also.

3.32 To sum up, I hold that the additions made in the appellant's case in asst years 2006-07 to 2009-10, relying exclusively on the retracted statement are not correct in law or on the facts of the case. There is no corroborative addition to support such additions. The additions as following are therefore required to be deleted.

6. Although Para No.3 of his order deals with this issue Para No.3.27 deals with specific issue of correctness of making addition on estimation basis outside the seized material and the same is extracted below :

“3.27 The next aspect of the controversy is whether the income from unaccounted sale of scrap should be estimated over and above what is recorded in the seized material, and thus the addition made by the AO can be justified on this ground.

3.27.1 I have considered the facts of the case. I find that such a course of action is not feasible or justified in the facts of the case. First the majority of the impugned seized papers are cash vouchers pertaining to the cash paid to the MD or other employees of the assessee company. The source of such cash payments has been admitted to be unaccounted in the absence of supporting vouchers etc. The cash was admittedly paid to meet with urgent requirements such as travelling expenses etc. Full details regarding the purpose for which the cash was paid is not known. The seized vouchers are for different dates and the dates are not continuous. In a few cases there are many vouchers altogether for many days in between. From the seized vouchers no presumption can be made about periodicity of cash payments.

3.27.2 The source of the cash paid as per these vouchers can be presumed to be out of unaccounted sale of scrap. In such a scenario, whatever cash was generated and paid to the MD or other employees as per the seized vouchers has been disclosed in the returns.

3.27.3 Further there are a few chits showing scrap sales which is not accounted in the books. The appellant has offered the total sum of slips and cash vouchers as his additional income in the returns filed in response to the 153A notice. Thus unaccounted scrap sales are totally disclosed and offered to tax. There is nothing in the seized material or on the records to show that certain amount of scrap must have been sold every day outside the books. Further the appellant has shown substantial sale of scrap in the regular books of accounts. The scrap sales shown by the appellant in his books in different years are as under :

Sr.No.	Fin Year	Turnover in lakhs	Scrap sales in lakhs	%
1	1998-99	5982.52	55.84	0.93
2	1999-00	6427.21	107.66	1.68
3	2000-01	6367.36	59.43	0.93
4	2001-02	6642.05	37.23	0.56
5	2002-03	6930.16	68.03	0.98
6	2003-04	11020.02	70.24	0.64
7	2004-05	17707.21	178.24	1.01
8	2005-06	22147.47	179.76	1.01
9	2006-07	26959.32	342.05	1.54
10	2007-08	29700.71	568.35	2.11
11	2008-09	23265.74	595.20	2
12	2009-10	33943.35	402.02	1.73
13	2010-11	42821.37	802.55	2.36
14	2011-12	40875.50	1004.92	2.35
15	2012-13		897.00	2.19

3.27.4 No pattern of understatement of scrap sales can be perceived in the details as above. The AO has made addition in the years in which the sale of scrap as % of turnover is rather better than earlier years. Maximum addition is made in asst. year 2008-09 (FY 2007-08) in which year the % of scrap sale to total turnover is 2.11%. Thus the additions made by the AO have no relationship with the scrap sale shown in the books.

3.27.5 It is seen from the records that the appellant had filed details of scrap sales and burning loss etc before the AO. A copy of such letter filed in asst. year 2006-07 in the office of the Aon on 15-11-2010 has been produced along with appeal submissions. It is seen that the burning loss shown by the appellant in asst. year 2006-07 was 5.51% which went down gradually in the subsequent years. In the appellant's own case the ITAT has held in asst. year 2001-02 and 2002-03 that burning loss upto 8.5% should be accepted as within admissible limits. The AO has also not pointed out any defect in the appellant's manufacturing account. The books which are audited and accepted by the AO and a manufacturing record subject to excise verification cannot be disregarded without sound and cogent evidence.

3.27.6 The seized material also do not point out any systematic suppression of scrap sales such as say every third sale bill being kept outside the books etc. There is nothing on the record to contradict the appellant's claim that whatever scrap sale was kept outside the books, has been found recorded the seized slips. No unexplained investments or expenditure have been found during the search. **Therefore, in totality of facts no extrapolation of scrap sale is required or practical on the basis of few slips seized indicating unaccounted sales.**

.....”

7. Aggrieved with the above relief granted by the CIT(A) on this issue, the Revenue is in appeal for the 4 assessment years under consideration raising the aforesaid grounds.

8. Before us, Ld. DR for the Revenue brought our attention to the facts of the case as well as the decisions of AO/CIT(A) and submitted that the assessee offered the additional income of Rs.2 crores per year for all the 4 assessment years and read out the relevant questions and answers in this regard. He also submitted that the relief granted by the CIT(A) is required to be reversed.

9. On the other hand, Ld. Counsel for the assessee furnished the following written submissions :

“3] According to the learned A.O., the assessee should have adhered to the declaration made at the time of search and irrespective of the actual evidences found, he has held that the assessee should have offered Rs.2 Crs each for A.Ys. 2006-07 to 2009-10. Thus, the learned A.O. has made the addition by considering the declaration made of Rs.2 Crs. and after reducing the income on account of loose papers I vouchers offered by the assessee in its return filed u/s. 153A. In nutshell, the learned A.O. has held that the addition is warranted on the basis of the statement of Shri Kiran Patil.

4] The learned CIT(A) has discussed this issue in para 3 to 3.32 of his order. According to him, there is no dispute that the assessee has offered income to tax on the basis of the actual evidences found as a result of search. He has held that the addition cannot be made on the basis of the statement which has been subsequently retracted and particularly because, the assessee has offered the income to tax on the basis of the evidences found. The learned CIT(A) has referred various decisions wherein it has been held that the addition cannot be made solely on the basis of the statement recorded.

5] It is also to be noted that the learned A.O. has made an addition for A.Ys.2003-04 and 2004-05 by considering the realization of scrap @1 % of the turnover. Since for A.Y.2005-06, the realization of scrap duly accounted in the books was more than 1%, no addition was made by the learned A.O. for that year. The learned CIT(A) has noted on page 43 of his order that the realization of scrap for A.Ys.2006 - 07 to 2009-10 is much more than 1% of the turnover. In fact, on page 44 of the paper book, the assessee has given a chart to demonstrate the percentage of scrap sale to total turnover after including the additional income declared in the return furnished u/s.153A. For A.Ys., 2006- 07 to 2009-10, the percentage of scrap sale is much higher as compared to A.Y. 2005 -06 for which no addition has been made by the learned A.O.

6] Considering the above facts, the assessee submits that the addition has been rightly deleted by the learned CIT(A). It is submitted that the statement made by Shri Kiran Patil was on an ad-hoc basis and there was no corroborative evidence found as a result of search to indicate that the assessee had generated undisclosed income on sale of scrap to the tune of Rs.2 Crs for each of the four asst. years. The assessee places reliance on the following decisions wherein the addition made solely on the basis of the statement recorded has been held to be invalid in law –

- a. Pullangode Rubber Produce Co. Ltd. v. State of Kerala & other [91 ITR 18 (SC)]
- b. Kailashben Manharlal Chokshi v. CIT [328 ITR 411(Guj H.C.)]
- c. Dhanvarsha Builders & Developers P. Ltd. v. DCIT [102 ITD 375 (Pune Trib)]
- d. CIT v. Ashok Kumar Soni [166 Taxmann 371 (Raj H.C.)]
- e. M. Narayanan & Bros v. ACIT [339 ITR 192 Mad H.C.]
- f. ACIT v. Janak Raj Chauhan [102 TTJ 316 (Asr Trib)]
- g. Maheshwari Industries v. ACIT [81 TTJ 914 (Jodh Trib)]
- h. Jyotibhaichand Bhaichand Saraf & Sons P. Ltd. V. DCIT [139 ITD 10 (Pune Trib.)]
- i. M/s. Avishkar Infrastructure Pvt. Ltd. V. DCIT [7165/Mum./2011]

7. In view of the above decisions and the facts of the case, the assessee submits that the learned CIT(A) is justified in deleting the addition made by the learned A.O.”

9.1 Further, Ld. Counsel for the assessee submitted that to the extent the seized material is available, assessee duly offered the undisclosed income. Regarding the disclosure of Rs.2 crores per year, Ld. Counsel submitted that the said disclosure is given when there is no specific material and the disclosure is given on estimation basis. Such estimations in either way is not bonafide. Therefore, the addition made by the AO sincerely relying on the statement of assessee given u/s.132(4) of the Act is unsustainable. In support of the said retraction of the statement of assessee, Ld. Counsel relied on various decisions including the decision of the Mumbai Bench of the Tribunal in the case of M/s. Avishkar Infrastructure Pvt. Ltd. Vs. DCIT – ITA No.7165/Mum/2011, dated 17-06-2015. He brought our attention to Para No.6.1 to 6.3 of the order of Tribunal and submitted that the retraction given by the assessee in the absence of corroborative evidence in support of the additional income offered during the search cannot be added and such statements are not sacrosanct.

10. We heard both the parties on this limited issue and relief granted by the CIT(A) on account of scrap sales. There is no dispute on the fact that assessee offered Rs.2 crores per year for all the 4 assessment years under consideration during the search and seizure action. We proceed to extract the relevant question and answers on this specific issue and the same reads as under :

“Question No. 8. *In the course of search action at your business premises evidences relating to cash sale of Scrap have been found and seized. These cash receipt against sale of scrap in the relevant financial years are not found recorded in the regular book of accounts, hence remains unaccounted. The details of such unaccounted cash receipts are confronted in the statement recorded on oath of Shri **Bashis Patil, cashier, Shri Sanjay Bhalchandra Varpe, Jr. Supdt. at Foundry, Shri Mukund Laxman Shinde,***

Vice President, Finance During search on 11/09/08, these executives and employees have categorically confessed that the cash receipts pertain to sale of scrap outside the books. What you have to say as regards these unaccounted cash receipts not found recorded in books?

Answer: I have been made aware about the contents of the statements of the executives & employees recorded u/s.132(4) on 11/09/08 at my office premises. I state that some of the answers given are not fully reliable. However, I admit that there are some receipts generated out of "Scrap Sales", which cannot be explained as no supporting are available. Therefore, I offer Rs. Eight Crores (Rs.8,00,00,000/-) as my additional unaccounted income in equal proportion for the financial year 2005-06, 2006-07, 2007-08 and current financial year 2008-09, over and above my regular income.

Question No. 9 : Please give the details of investment in Bungalow and land at Rajaram Talav where you are residing with your family.

Answer : The land was purchased by Company in 1998 and Bungalow was constructed in the year 2007-08. The cost of construction is Rs.83,60,561/- and the details of investment in the land will be submitted lateron.

Question No. 10 : I am showing you the P & L Account of Ghatge Patil Industries Ltd. as on 31/3/2008 annexed at page No.8 of Bundle No. A-8, showing the Net Profit of Rs.11,25,14,273.29. Please confirm the same.

Answer : Yes, I do confirm the same and the same will be offered for taxation as may regular income for AY 2008-09 subject to computation of income. I also confirm that the additional income of Rs.2,00,00,000/- (Rs. Two Crore) over and above my regular income for AY 2008-09.

Question No. 11 : I am showing you the income and expenditure statement of Ghatge Patil Industries Ltd. for the period 1/4/08 to 12/09/08 showing the profit at Rs.4,61,69,920.13 annexed at page No. 27 at Bundle No. A-7. Please confirm the same.

Answer : Yes I do confirm the same and the profit will be offered for taxation for AY. 2009-10 subject to computation of income. I also confirm that the additional income of Rs.2,00,00,000/- (Rs.Two Crore) over and above my regular income for AY 2009-2010.

Question No.12 : In your statement vide reply to Question No.8 you have offered additional unaccounted income of Rs.8,00,00,000/- (Rs. Eight Crore only) as under:

F.Y	Additional income offered (in Rs.)
2005-06	Rs.2,00,00,000/-
2006-07	Rs.2,00,00,000/-
2007-08	Rs.2,00,00,000/-
2008-09	Rs.2,00,00,000/-
-----	-----
Total	Rs.8,00,00,000/-
-----	-----

Please state as to how do you purpose to pay taxes on the additional undisclosed offered for taxation.

Answer: I will pay the tax on the additional undisclosed income admitted of Rs.8,00,00,000/- (Rs. Eight Crores only) in due course.

Question No. 13 : *Do you want to say anything else?*

Answer: *Yes, the additional undisclosed income offered pertains to the entries of cash sales of Scrap and after omission and finding during the search proceedings in this regard.*

Whatever stated above is true to the my best knowledge and belief. I have given this statement voluntarily without any fear and in a sound state of mind."

The above extract shows that the offer of the undisclosed income of Rs.8 crores is not corroborated with the seized material in its entirety.

10.1 We have also perused the order of Mumbai Bench of the Tribunal in the case of M/s. Avishkar Infrastructure Pvt. Ltd. and the finding given by the Tribunal in Para Nos. 6.1 to 6.3 of the order reads as under :

"6.1 Under these facts and circumstances of the case we have to examine that whether sustenance of impugned addition is in accordance with law or not. The law in this regard has already been described in the above part of this order and reference can be made to the decision of Hon'ble Telangana & Andhra Pradesh High Court in the case of Gajjam Chinna Yellapa vs. ITO (supra), where their Lordships have observed that in case statement is retracted then totally different consideration altogether will ensue and the situation would resemble to section 164 of the Code of Criminal Procedure. The evidentiary value of retracted statement become diluted and it loses its strength to stand on its own. In that case Assessing authority has to garner some support to the statement [or passing an order of assessment. It is also held that retracted statement would not put an end to the procedure, then the AO is under an obligation to support his findings on the basis of other materials and if he does not have such material then it would reflect upon the very perfunctory nature of the survey. For holding so their Lordships have referred to the aforementioned circular dated 10/3/2003, wherein CBDT has clearly given the mandate to the officers that during the course of search, seizures and survey no attempt should be made to obtain confession as to the undisclosed income and such instructions to CBDT were applicable when the search and seizure was made and assessment was framed. CBDT has further mandated that in respect of pending assessment also AO should rely upon the evidences/materials gathered during the course of search/survey operations or thereafter while framing relevant assessment order. The addition made in the present case is contrary to the aforementioned decision of Hon'ble Telangana & Andhra Pradesh High Court as well as aforementioned circular of CBDT as the assessment is entirely based upon the statement recorded during the course of search and no independent material has been brought on record by the AO to show that the income returned was incorrect.

6.2 The other decisions which have been relied upon by Ld. AR also supports similar proposition and these have been discussed in the above part of this order and for the sake of brevity they are not repeated.

6.3 So far as it relates to findings recorded by Ld. CIT(A), one of the finding is that by making admission under section 132(4) the assessee has altered the position of the Department because of which the Department did not pursue the matter further and did not visit the said Acme Centre at Ahmedabad. It may be mentioned that such opinion of Ld. CIT(A) would be contrary to the aforementioned circular issued by CBDT, where the clear mandate has been given to the Income Tax Authorities working under the CBDT that while recording the statement during the course of search/survey no attempt should be made to obtain confession of the undisclosed income and any such action would be viewed adversely. Recognizing such position their Lordships of Telangana & Andhra Pradesh High court have already observed that if addition is made simply on the basis of statement recorded under section 132(4) and no material is brought on record by the Revenue authorities then it would reflect upon very perfunctory nature of the survey/search action of the Department. Therefore, in absence of supporting material, the addition simply on the basis of statement cannot be upheld. The other findings of Ld. CIT(A) do not support the addition as they are only based upon the admission of the assessee. According, to the facts of the case, the assessee had furnished all required particulars regarding sale and expenditure incurred on the impugned project and AO could not point out any defect in those particulars submitted by the assessee. **Thus, the addition is made simply on the basis of statement recorded during the course of search and is not supported by any material. In view of case law relied upon by Ld. AR, the addition is not sustainable and is deleted."**

The above extract from the Tribunal supports the view that the statement recorded during the search and seizure action in the absence of any independent and corroborating/incriminating material is not to be relied upon. Assessee offered the undisclosed income to the extent the corroborating evidences were seized. It is not the case of the AO that total sum of Rs.8 crores is backed up by such incriminating material. Considering the above, we are of the opinion that factually the assessee offered the income to the extent the seized material was available and not otherwise. AO's attempt to make the differential amounts of undisclosed strictly relying on the sworn statement of Mr. Kiran Patil, MD of the company is unsustainable considering the written submission of the assessee and the order of the Tribunal in the case of M/s. Avishkar Infrastructure Pvt. Ltd. (supra). Therefore, we hold that the relief granted by the CIT(A) in his order is fair and reasonable and it does not call for any interference. Accordingly, the common ground raised by the Revenue in

the grounds of appeal has to be decided against the Revenue and in favour of the assessee.

11. In the result, all the 4 appeals of the Revenue are dismissed.

ITA Nos. 1070 to 1072/PUN/2016 – By Assessee
A.Yrs. 2006-07 to 2008-09

12. In all the 3 appeals by the assessee, couple of issues are raised (i) relating to addition based on DVOs report; and (ii) the allowability of depreciation on the building occupied by Mr. Kiran Patil, MD of the company. The first issue is common in all the 3 appeals and this is the solitary ground raised in the two appeals for the A.Yrs. 2006-07 and 2007-08. In addition, in the A.Y. 2008-09, there is a ground relating to depreciation. Therefore, the grounds raised by the assessee for the A.Y. 2008-09 are extracted here as under :

“1. The order of the learned CIT(Appeals) is bad in law and opposed to the facts.

2. The learned CIT (Appeals) has erred in upholding addition of Rs.2,03,646 made by the DCIT as difference between cost of construction as per books and value as per the valuation report of DVO. He erred in simply following the order of CIT(A) Kolhapur for AY 2005-06 and confirmed the addition. He failed to appreciate that entire cost of construction has been recorded in the books of account of the appellant from year to year, ignoring the extract of ledger of audited accounts placed on the records which contained complete narration for each entry date-wise, and failed to appreciate that the report of DVO was a personal judgment devoid of any evidence. The addition of Rs.2,03,646 may kindly be deleted.

3. The learned CIT (Appeals) has erred in upholding addition of Rs.4,29,120/- made by DCIT on account of disallowance of depreciation on above referred building. He failed to appreciate that the MD was occupying the building only temporarily for his residence where many business meetings were held. He failed to appreciate that occupation of building by MD constitutes use of the asset for business purposes and depreciation should have been allowed. The addition of Rs.4,29,120/- may kindly be deleted.

4. The appellant craves leave to add, alter, amend and modify any of the above grounds of appeal.”

13. Regarding the issue relating to the DVOs-report linked addition, relevant facts are that the assessee constructed a bungalow and the investment in the land and the said building was an area of enquiry during the search and seizure action. The statement from Mr. Kiran Patil, MD of the company was recorded. Facts relating to this building agreement include that the said land was purchased in 1998 and the building thereon was constructed in 2007-08. The cost of construction of the building is Rs.83,60,568/-. Assessee promised to furnish the cost of purchase of land and the same never happened. Accordingly, the property was referred to the DVO for valuation u/s.142A of the Act. DVO submitted the report and estimated the cost of construction at Rs.94,84,215/- and the difference works out to Rs.11,23,557/-. When the said differential amount was apportioned among the assessment years 2004-05 to 2009-10 u/s.69B of the Act, the a sum of Rs.3,20,011/- pertains to the year under consideration, Rs.2,63,550/- for the A.Y. 2007-08 and Rs.2,03,646/- for the A.Y. 2008-09. Relying on the said estimation of the DVO, the AO invoked the provisions of section 69 of the Act and added the said amount as undisclosed income of the assessee.

14. Before us, Ld. Counsel for the assessee brought our attention to the figures and submitted that the estimated cost of construction of Rs.94,84,215/- against the disclosed sum of Rs.83,60,568/- constitutes the difference which works out to merely 13.43%. In this regard, Ld. Counsel for the assessee relied on various decisions to demonstrate that the difference in estimations need to be ignored when the difference merely works out to less than 15% of the accounted values. Ld. Counsel relied on the order of Tribunal in the assessee's own case in ITA No.1069/PUN/2016

and connected appeals for the A.Yr.2004-05 decided on 31-08-2018.

Further, Ld. Counsel filed the following written submissions on this issue :

*“Addition of Rs.3,20,011/- for A.Y. 2006-07, Rs.2,63,550/- for A.Y. 2007-08
 And Rs.2,03,646/- for A.Y. 2008-09*

1.1 The assessee had constructed a bungalow and the total cost of construction accounted in the books was Rs.83,60,568/-. In the course of search, no incriminating evidence was found relating to the construction of bungalow. During the course of asst. proceedings, the learned A.O. referred the valuation of the said bungalow to the DVO who valued the cost of construction at Rs.94,84,215/- as against Rs.83,60,568/- accounted by the assessee since the assessee had constructed the bungalow over the years from A.Ys. 2004 - 05 to 2008 - 09, the difference of Rs.11,23,557/- has been taxed by the A.O. towards the years on the basis of the year wise investment shown by the assessee. Accordingly, in this year, the A.O. has made an addition of Rs.3,20,011/- u/s, 69B of the Act. The learned CIT(A) has confirmed the addition made by the A.O.

1.2 The assessee submits that similar addition has been made for A.Y. 2005 - 06. Hon'ble ITAT has deleted the said addition on the ground that the difference between the cost shown by the assessee and the amount worked out by the DVO was mere 13.43%. Hon'ble ITAT has also noted that the DVO has applied CPWD rates as against prescribed PWD rates. Accordingly, the addition has been deleted. The copy of the order of Hon'ble IT AT is enclosed on pages 1 - 7 of the paper book. Further, for A.Y. 2004 - 05, similar addition has been deleted and the copy of the order is enclosed herewith. Accordingly, the addition made may kindly be deleted.

15. We heard both the parties on this issue of cost of construction of bungalow on the basis of DVO's report. We have also perused the order of Tribunal in the assessee's own case in ITA No.1069/PUN/2016 for the A.Y. 2004-05 where similar was allowed in favour of the assessee relying on the order of Tribunal for the A.Y. 2005-06. We proceed to extract the finding given by the Tribunal here as under :

“19. Both sides heard. The solitary issue raised by the assessee in appeal is against confirming addition of Rs.28,621/ - on account of difference between cost of construction of bungalow as declared by assessee and value as determined by the DVO. We find that identical issue was raised by the assessee in ITA No. 1332/PUN/2014 for assessment year 2005-06 before the Tribunal. The Tribunal deleted the addition by observing as under:

“10. The first issue which arises in the present appeal is jurisdictional issue that in the case of search proceedings where no incriminating documents were found, can the addition be made in respect of assessment proceedings, which had not abated. The second issue which is arising is that where the difference in the valuation is about approximately of Rs.11 lakhs which works out to 13.43% and where the DVO has failed to give the benefit of deduction under self supervision and had also applied CPWD rates as against the prescribed rates of PWD rates, can any addition be made in the hands of assessee. We find merit in the plea of assessee in this regard. The total addition made in the instant assessment year was only Rs. 85,988/- and difference shall stand reduced in case the rates of PWD for construction are applied as against the DVO applying the rates of CPWD and further, the assessee is entitled to the deduction in value on account of self supervision. In the totality of the above said facts and circumstances and in view of the difference being about 13.43%, we find no merit in the orders of authorities below in upholding the above addition made in the hands of assessee. Accordingly, we delete the addition of Rs. 85,988/-, In view of our deciding the issue on merits, we are not going into the jurisdictional aspect of the issue raised by the learned Authorized Representative for the assessee, which becomes academic in nature. Accordingly, we hold so.”

The property in question in the assessment year under appeal is the same which was subject matter of valuation in the assessment year 2005-06. No material has been placed before us by the Revenue controverting the findings of the Co-ordinate Bench. Following the decision of Tribunal in assessee's own case in the immediately succeeding assessment year, we delete the addition for similar reasons. Accordingly, appeal of the assessee for the assessment year 2004-05 is allowed.”

Considering the above settled legal position, we are of the opinion that the addition made by the AO on account of investment in the land at Ujaiwadi is not sustainable in view of the said decision. Accordingly, this common issue raised for the two assessment years 2006-07 and 2007-08 stands allowed.

16. Ground No.2 in A.Y. 2008-09 relates to addition of Rs.4,29,120/- relating to depreciation made by the assessee u/s.32 of the Act.

17. Briefly stated relevant facts are that the assessee owns bungalow named as Ghatge Patil located at 85/1, Near Rajaram Talav, Ujalaiwadi, Kolhapur. Mr. Kiran Patil, MD of the company is staying in the said bungalow with his family members. During the year under consideration, assessee reported expenditure on the said construction at Rs.85,82,400/-

was capitalized and claimed depreciation of Rs.4,29,120/- on the same u/s.32 of the Act. AO disallowed the said claim stating that neither there is no agreement between the company and Mr. Kiran Patil nor there is any Board Resolution. In the First Appellate proceedings also, the CIT(A) confirmed the same.

18. Before us, Ld. Counsel for the assessee submitted that the said building was occupied by Mr. Kiran Patil, MD of the company and it is a perquisite value. The said perquisite value was offered by Mr. Kiran Patil in his return of income that makes the assessment as business asset eligible for claim of depreciation u/s.32 of the Act. In this regard, Ld. Counsel filed the following written submissions.

19. On the other hand, Ld. DR for the Revenue relied on the orders of the AO/CIT(A).

20. We heard both the parties on the issue of claim of depreciation u/s.32 of the Act in respect of building which is occupied by Mr. Kiran Patil, MD of the company. It is undisputed that the asset is owned by the assessee and the presently occupied by MD of the company. It is also an undisputed fact that the asset has a perquisite value and the occupant of the property offered to tax. In such circumstances, it is only inference that the asset is put to use by the assessee for the business purposes of the assessee. Therefore, in our view, the claim of the assessee is fair and reasonable. We reverse the finding of AO/CIT(A) on this issue making assessee eligible for claim of depreciation on this asset. Accordingly, Ground No.2 raised by the assessee in A.Y. 2008-09 is allowed.

21. In the result, all the 3 appeals of the assessee are allowed.

22. To sum up, all the 4 appeals filed by the Revenue are dismissed and all the 3 appeals filed by the Assessee are allowed.

Order pronounced on 19th day of September, 2018.

Sd/-

Sd/-

(विकास अवस्थी /VIKAS AWASTHY)
 न्यायिक सदस्य/JUDICIAL MEMBER

(डी. करुणाकरा राव/D. KARUNAKARA RAO)
 लेखा सदस्य/ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 19th September, 2018.
 Satish

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals), Pune-11.
4. The Pr. CIT, Central, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच,
 पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary
 आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.