

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'E', NEW DELHI**

**BEFORE SMT. DIVA SINGH, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER**

ITA No.1777/Del/2016
Assessment Year: 2011-12

M/s. Alert India, C-1, SMA Industrial Estate, G.T. Karnal Road, Delhi	Vs.	ACIT, Circle-19(1), New Delhi
PAN :AAFA4467H		
(Appellant)		(Respondent)

Appellant by	S/sh. K. Sampath & Raj Kumar, Advocates
Respondent by	Sh. S.R. Senapati, Sr.DR

Date of hearing	21.08.2018
Date of pronouncement	12.10.2018

ORDER

PER O.P. KANT, AM:

This appeal by the assessee is directed against order dated 18/01/2016 passed by the Ld. Commissioner of Income-tax (Appeals)-32, New Delhi [in short the Ld. CIT(A)] for assessment year 2011-12, raising following grounds:

“The Ld CIT(A) has erred in confirming the addition of Rs 91,37,456/- on account of Machinery Surrendered during the survey ignoring the facts

(a) During the survey, the officer found 6 new machines and 20 moulds in the factory for which documents were not available. As the machines were received on the date of

survey and were pending for installations they are yet to get bills and have also not made payments.

- (b) That due to pressure at the time of survey, the assessee reluctantly surrendered Rs. 91,37,456/- being the value of machines (yet to be installed) and moulds for which bills were yet to be received.*
- (c) That subsequently the bills were received, however the machines did not work properly, these were returned to vendor; and the payments of moulds, freight were made by the assessee.*
- (d) During the assessment proceedings, the Ld. ACIT has made additions of Rs. 91,37,456/- being the value of machineries on the basis of statement taken under pressure at the time of survey carried out on 01.10.2010 without giving adequate opportunity to the assessee and no enquiries were conducted before concluding the additions.*
- (e) That the Ld. AO had made no effort/enquiry about the genuineness of the facts and just went on to conclude that the submissions made by the assessee is nothing but an afterthought of the assessee.”*

2. Briefly stated facts of the case are that the assessee, a partnership firm was constituted by two partners, namely, Sh. Ashwini Kumar Sachdeva and Smt. Puja Sachdeva having profits sharing ratio of 80% and 20%. The firm was engaged in the manufacturing of footwear soles. In the case of the assessee, a survey operation under section 133A of the Income-tax Act, 1961 (in short 'the Act') was carried out on 01/10/2010, wherein the assessee offered income of Rs.1,30,19,418/- for taxation, which included unexplained cash of Rs.9,25,018/-; purchase of machinery outside books of Rs.91,37,456/- and unexplained sundry creditors of Rs.29,56,944/-. For the year under

consideration, the assessee filed return of income on 30/09/2011, declaring total income of Rs.1,09,67,480/-. The case of the assessee was selected for scrutiny and notice under section 143(2) of the Act was issued and complied with. During assessment proceeding, the Assessing Officer observed that the assessee retracted his surrender of income to the extent of purchase of machineries outside books mounting Rs.91,37,456/-. The explanation of the assessee in respect of the said surrender was not accepted by the Assessing Officer and assessment was completed under section 143(3) of the Act on 31/01/2014 after making the said addition of Rs.91,37,456, along with other disallowances. Aggrieved, the assessee filed appeal before the Ld. CIT(A), however, could not succeed and, thus, assessee is in appeal before the Tribunal, raising the grounds as reproduced above.

3. The grounds (a) to (e) raised by the assessee are in respect of the addition of Rs.91,37,456/- on account of machinery surrendered during the course of survey.

4. The facts qua the issue in dispute are that during the course of survey, the survey team found six new injection moulding machines and 20 moulds in the factory premises for which no bills or vouchers were found. During the course of survey statement of the partner of the assessee firm, Sri Ashwini, Sachdeva was recorded , wherein he failed to furnish satisfactory explanation as regard to the existence of the above machineries and thus he surrendered the value of the 6 injection moulding machines (Rs.14 lakh each) and 20 moulds (Rs.35,000 each) alongwith cartage charges (Rs.37,756) totalling to Rs.91,37,456/-. The assessee firm also paid tax of Rs.40,23,000/- on the entire

surrendered income of Rs.1,30,19,418/- made during the course of survey operation, which included the surrender of Rs.91,37,456/- also.

4.1 During assessment proceeding, the assessee explained that the said surrender was under pressure by the survey team and it was not a voluntarily surrender. The assessee submitted that 6 injection moulding machines were purchased from M/s Aman Hydraulics (India), New Delhi, vide their invoice Nos. 84 and 87 dated 01/10/2010. Regarding 20 PVC moulds, the assessee submitted that same were purchased from M/s Kalyani Mould, Mongol Puri, New Delhi vide invoice number 112 dated 01/10/2010. The assessee submitted that those machines and moulds were received through Mallik Transport Company. The assessee explained that those injecting moulding machines broke down during trial run and could not be repaired satisfactorily and as such those were sent back. The assessee submitted that surrendered amount was without any basis and the tax paid by way of cheques against the surrender amount by including the value of above machinery , was adjusted against the advance tax liability and no separate advance tax was deposited. The above submissions of the assessee were not accepted by the Assessing Officer due to reasons summarized as under:

- 1. In the statement recorded, the partner of the firm mentioned that the statement was given voluntarily without any fear and thus the contention that said surrender was under pressure, was not acceptable.*

2. *The assessee paid income tax of Rs.40,23,000/- on the total surrendered income of Rs.1,30,19,418/-without raising any objection.*
3. *Sri Ashwani Kumar Sachdeva, partner of the firm could not explain satisfactory existence of the above machinery during the course of survey operation and he voluntarily surrendered the above amount.*
4. *The submission of the assessee justifying purchase of the Machinery was an afterthought and not acceptable.*

4.2 According to the Assessing Officer, the partner of the assessee firm could not substantiate as how the statement recorded during survey proceedings was not genuine and not voluntarily. In view of above facts, the learned Assessing Officer rejected the contention of the assessee and held that statement of the partner was without any fear, pressure or coercion, accordingly made addition of Rs.91,37,456/-. The Ld. CIT(A) was also not convinced with the submission of the assessee. He rejected the contention of the assessee that the statement of Sri Sachdeva was recorded under pressure observing as under:

“The assessee claimed that the statement of Shri Sachdeva was recorded under pressure. Even for the sake of argument, if it is believed that Shri Sachdeva gave the statement under pressure then why the assessee paid taxes on the disclosed income? The assessee deposited the tax by cheque, assessee has not claimed that the cheques were taken by the department by force. For the sake of imagination even if it is assumed that the cheques too were obtained by the department by force even then the assessee had sufficient time to get the clearing of the

cheque stopped by writing a simple letter to the bank. The partners of the assessee firm were not confined by the department after the Survey.”

4.3 The Ld. CIT(A) also rejected the contention of the assessee that machinery were returned back to the supplier. The observation of the Ld. CIT(A) in this regard are reproduced as under:

“The assessee has filed copies of correspondences with the manufacturer M/s Aman Hydraulics. The assessee vide it's letter dated 18/10/2010 addressed to Nishant Ahmed of M/S Aman Hydraulic has mentioned that it had ordered the injection machines in June 2010 and the machines were supposed to be delivered in September 2010. The machine were delivered late on 1/10/2010. If the machines were to be delivered in Sept 2010 and had been delivered on 1/10/2010 how can it be said late. "Any way if the order was placed in June for machinery which appears to be custom made for assessee. The normal business practice demands that the assessee must have paid some advance to the manufacturer to enable them to make the machinery which was worth Rs.82 lac. No prudent businessman will take an order without advance to manufacture machines as per somebody else's specification requiring fabrication. Because if the machine is rejected by the buyer there will not be another buyer for that product and the manufacturer will suffer huge losses. It's common business practice even if someone wants to buy 10 Kg of sweets and wants to place order at any sweet shop, the shopkeeper will not take order unless substantial advance is given. In this case it was a question of Rs 82 Lac.

The assessee claimed that no payment whatsoever was made to M/s. Amaan Hydraaulics for supplying machines worth Rs.82 Lac. That M/s Amaan Hydraulics supplied the machines at the assessee's premises without taking a

single penny. It allowed the assesses to install the machines and to start trial production without receiving anything in return !! The Assessee further claims that the machines were found to be faulty – (the production was low) hence the assessee returned it without any cost!! Unbelievable.”

4.4 The Ld. CIT(A) was also not satisfied with the submission of no production record in respect of the machines in dispute. The relevant observation of the Ld. CIT(A) are reproduced as under:

“Secondly the assesses was asked to furnish production records of these machines to verify assessee’s claim that the machines had low yield. The assessee claimed that it did not keep machine-wise production record (Para -5 of submission dated 04.12.2015). If the assessee did not maintain machine-wise production records then how can it claim that the yield of the machines were low or were not up to the mark?”

4.5 Further, the Ld. CIT(A) analysed the internal document of the assessee firm and observed that according to said documents the bills of purchase of the machinery were cleared. The relevant finding of the Ld. CIT(A) is reproduced as under:

“Thirdly the assessee has filed copy of its internal document scanned hereunder. On this document it has been mentioned “PARTY BILL PASSED AGAINST BILL NO. 87 OF 1/X/X”. This clearly shows that the machines were received and bills were passed implying thereby payments were done.”

4.6 The Ld. CIT(A) also observed that fact of the purchase of the machines and return thereon was not recorded in the audited

accounts. The relevant observation of the Ld. CIT(A) is reproduced as under:

“The assessee has also filed copy of the audited accounts. In the audit report in the form 3CD the list of assets has been given. In the list of assets addition of assets up to 01/10/2010 and addition of assets after 01/10/2010 has been given. These machines do not find place in the list of additions either upto 01/10/2010 or after 01/10/2010. The assessee itself has admitted that the machines were installed and were put on trial production. Then the machines should have been shown in the list of additions up to 01/10/2010 or in the list after 01/10/2010. On return of the machines machine account should have been credited.”

4.7 In view of the above analysis, the Ld. CIT(A) upheld the addition observing is under:

“It is therefore held that the assessee did acquire machines and moulds worth Rs.91,37,456/- out of its undisclosed income. Once the machines were noticed in the Survey operation, the assessee disclosed additional income of Rs.91,37,456/- and paid tax on the disclosed income. Later the assessee tried to avoid paying taxes by creating the story that the machines were returned and no payment was made to the manufacturer. The machines were taken after making payment from unknown sources. No finding is being given on what happened afterwards with the machines. If the machines were indeed returned the assessee might have received a part of money back from the manufacturer as per the industry norm. Initial acquisition of machineries and moulds was from undisclosed source of income.”

5. Before us, the learned counsel of the assessee relied on the submission made before the Ld. Assessing Officer and Ld. CIT(A)

and filed copy of all those submissions in the form of paper-book containing pages 1 to 142.

6. The learned counsel referred to page 127 of the paper-book, which is a photo copy of the office copy of letter dated 20/10/2010 issued by proprietor of M/s Aman Hydraulics (India). In this letter, it is mentioned that the proprietor of M/s Amaan Hydraulics (India) agreed for return of machines supplied by him in view of defaults in the machines. The learned counsel submitted that this is one of the evidence that machines were returned back to the supplier. Further, the learned counsel referred to page 10 to 19 of the paperbook, which are copy of the statement of Sri Ashwani Sachdeva , partner of the assessee firm recorded on 01/10/2010 during the course of survey proceedings. He also referred to pages 20 to 24 of the paper-book, which are typed copy of the statement of Sri Sachdeva. He submitted that in response to question No. 17, Sri Sachdeva stated that he had not got the bills and also not made payment for those machines and moulds etc., however, the authorised officer was not satisfied with the answer of Sri Sachdeva and he again asked question No. 18 to explain about the machineries. In response thereon, Sh. Sachdeva surrendered amount of Rs.91,37,456/- to buy the peace of mind subject to no penalty or prosecution. The learned counsel further submitted that referred statement was taken at midnight of 01/10/2010 , and obviously taken under pressure and intimidation and thus cannot be allowed to use as evidence against the assessee. In support of his contention that evidence recorded in middle of night cannot be used against the assessee, he relied on the decision of the Hon'ble

High Court of the Gujarat in the case of KailashBen Manharlal Chokshi Vs CIT reported in 328 ITR 411.

7. He further submitted that the authorised officer is not empowered to take a statement on oath during the course of survey proceeding and thus the statement recorded during the course of survey proceeding on oath cannot be admitted as evidence without corroborating with other evidences. In this regard, the learned counsel relied on the decision in the case of S. Khader Khan Son reported in 352 ITR 480 (SC). The learned counsel also relied on the decision of the Hon'ble High Court of the Delhi in the case of Dhingra Metal Works reported in 328 ITR 384 and submitted that the statement recorded during the course of survey is not a conclusive piece of evidence.

8. The learned counsel referred to pages 116 to 142 of the paper book, which contain copy of letter filed before the Assessing Officer. According to the learned counsel, the assessee explained before the Assessing Officer that during the course of survey, Sh Sachdeva stated that bills of the machines were not received and no payment was made in respect of those machines, but however on pressurising, he offered to surrender the amount in respect to the machines and moulds. He submitted that the assessee has substantiated that machines are returned back and payment for moulds has been made through cheque subsequently, and thus no addition was called for in respect of those machines and moulds.

9. On the contrary, the Ld. DR submitted that the allegation of pressurizing the partner of the firm during the course of survey proceedings is false and without any basis. According to the learned DR, the survey team was not having any personal enmity

with the assessee, for which they would pressurize or intimidate the partner of the assessee firm. He submitted that in normal course of survey proceeding, once survey is started, it is continued on day to day basis and thus statement was recorded on the next day. According to the learned DR, the allegation of recording a statement under pressure at midnight of 01/10/2010 are false and without basis, as Sh. Sachdeva in his own handwriting has written at the end of the statement that he had given above statement voluntarily without any fear, threat and coercion. The Ld. DR also submitted that survey proceedings are normally carried out in presence of local witnesses brought by the tax payer only.

10. On the issue of oath administered during the statement recorded in survey proceedings, the Ld. DR submitted that by merely administration of the oath, the facts recorded in the statement cannot get changed or loose its relevance, if corroborated by other evidences. On the issue of retraction, the learned DR submitted the partner of the firm surrendered total income of more than rupees 1.3 crores including the surrender against machinery and mould and he honoured the cheques of Rs. 40.23 lakhs submitted during the course of survey proceeding against the tax liability. According to him, the assessee did not retracted the statement within a reasonable period and thus the allegation of making a statement under pressure or intimidation are only an afterthought , to negate the offer of amount of income. In support of the contention that retraction after a substantial period from making a statement cannot be accepted, the learned DR relied on the decision in the case of Avinash Kumar Setia reported in 395 ITR 325.

11. He further submitted that in the books of accounts of the assessee firm, no entry of receipt of machines and return of those machines has been recorded. He also submitted that the so-called supplier of machines M/s Amaan hydraulics (India) was not recorded as creditor in the books of accounts of the assessee. According to the Ld. DR the entire story of receipt of machines from M/s Amaan Hydraulics (India) and return thereof is an afterthought only as during the course of survey proceeding the assessee did not provide name of any supplier or copy of the bills received there from. He submitted that moulding machines are product subject to excise duty and no manufacturer would supply those machines without receiving any payments. According to him, the payment for machinery must have been paid out of undisclosed sources and the story of receipt of machines from M/s Amaan hydraulics (India) has been presented to take back the amount of tax paid on said undisclosed income during the course of survey proceedings. He accordingly submitted that addition in dispute should be sustained.

12. In the rejoinder, the learned counsel submitted that the ratio in the case of Avinash Mishra (supra) is not applicable over the facts of the instant case. He further submitted that machinery was received on approval and therefore same was not entered in the books of accounts. He submitted the correspondence between the assessee and M/s. Amaan Hydrolics (India) has not been discarded by the Revenue authorities. According to him the allegation that payment was made from unaccounted sources was a mere guesswork and no evidence in this regard have been found during the course of survey. He submitted that in respect of the moulds payment has already been made by the assessee and this

fact has not been denied by the Assessing Officer. In view of the above submissions, the learned counsel submitted that amount of addition in dispute deserve to be deleted.

13. We have heard the rival submissions and perused the material on record including the paper-book submitted by the assessee and the orders of the lower authorities. In view of the finding of the lower authorities and the arguments of the Ld. counsel of the assessee and Ld. DR, the main issue in dispute is whether the assessee made any payment out of undisclosed sources for acquiring the 6 moulding machines which were found at the factory premise of the assessee during the course of survey proceeding. The Revenue is relying on the statement of the partner of the firm Shri Ashwani Sachdeva, wherein he surrendered the amount of unexplained investment in those machines and other evidence gathered. The contention of the assessee is that surrender was obtained in pressure & intimidation and actually the machines were brought on approval and subsequent to the survey operation same have been returned back to the supplier and thus there is no question of unexplained investment in those machineries.

14. In view of the arguments of the parties on the statement of Sh. Sachdeva, few issues arise before us. The first issue is whether the statement of Sh. Sachdeva was recorded under pressure or intimidation. The assessee is contending that the statement was recorded at midnight wherein he was pressurized and intimated to surrender the amount against machinery and moulds. The Revenue on the other hand is contradicting the argument of the learned counsel of the assessee. In the case of **Kailash Ben Manharlal Chokshi** (supra) cited by the Ld.

Counsel, a statement under section 132(4) of the Act was recorded at midnight on the date of search, which was retracted by the assessee after 2 months on the ground that it was recorded under coercion and duress and in support thereof an affidavit was also filed. The Assessing Officer did not consider the explanation on the ground that retraction was made after delay of 2 months. The Hon'ble High Court in the circumstances held that *no credit can be given to a statement recorded at midnight when a person may not be in a position to make any correct or conscious disclosure*. Further, in said case the Revenue could not brought any evidence on record in support of said disclosure and thus addition was deleted.

15. We find that on issue of recording statement at midnight though the assessee has alleged that the statement was recorded under pressure and intimidation, but according to us, the above allegation is not substantiated by any of the evidences. The relevant question and answer of the statement of Sh. Sachdeva are reproduced as under:

“Q 17. As per physical stock inventory of goods, documents/records cash, following discrepancies have been notices, which you are required to explain.

(i) As per books of accounts, the cash in hand is shown at Rs.96,431/-. However, as physical verification cash has been found at Rs.10,21,449/-, excess cash Rs.9,25,018/-

(ii) As per books of accounts, you have shown creditors at Rs. 2,85,33,061/- which includes the following:

<i>(a) M/s Aggarwal Trading Co., Mundka , New Delhi.</i>	<i>Rs.2,80,800/-</i>
<i>(b) M/s B K Plast, Timar pur, Delhi.</i>	<i>Rs.4,55,270/-</i>
<i>(c) M/s Crystal Plymer Impex, Nerela, Delhi.</i>	<i>Rs. 2,32,336/-</i>
<i>(d) M/s Daya Footwear Pvt. Ltd. .</i>	<i>Rs. 2,21,934/-</i>
<i>(e) M/s Laxmi Polychem, Laxmi Nagar, Delhi.</i>	<i>Rs.1,53,660/-</i>

(f) M/s Kandla Polyplast Pvt. Ltd.	Rs.4,66,454/-
(g) M/s Kneader House, Mundka, Delhi.	Rs.4,94,000/-
(h) M/s Kutch Plymers, Bawana Industrial Area, Delhi.	Rs.2,32,330/-
(i) M/s Marvel Vinyls Ltd, Nehru Place, Delhi.	<u>Rs.4,20,160/-</u> <u>Rs.29,56,944/-</u>

As per correspondence made by you with the above parties (copies of letters) you have been disputing the above payments, please explain why it shall not be held that this liability to the extent of Rs. 29,56,944/- does not exist.

(iii) Six new machines i.e. (injection molding machine) and 2 moulds have been found in your premises for which no documents have been furnished. Please explain.

(iv) As per books of accounts stock of goods have been shown at Rs. 1,12,60,354/- (Rs. 1,17,39,106/- - gross profit of Rs. 4,78,752/- however physical inventory of stock cost of goods is valued at Rs. 1,12,14,576/- i.e. short by Rs. 45,776/- please explain.

Ans. For excess cash in hand of Rs.9,25,018/-, 9 sundry creditors of Rs.29,56,944/- totaling to Rs.38,81,962/-, I have no explanations to offer. Further 6 New Injection Molding machines and 20 Moulds have been purchased by us for Rs.91,37,456/- (6 X Rs. 14,00,000/- = Rs. 84,00,000/- + 20 X Rs. 35,000/- = Rs. 7,00,000/- + Cartage , Loading, Unloading etc. @ 37,456/-). However, we have not got the bills and have also not made payment for these machines and moulds etc. Further, regarding the shortage of stock valuation by Rs.45,776/-, it is stated that the difference of 45,776/- is quiet insignificant keeping in view the total stock of Rs. 1,12,60,354/- and it is further submitted that all the stock has been properly account for in the excise record also. However, to buy piece of mind, I surrender Rs. 38,81,962/- (Sundry Creditors of Rs.29,56,944 and excess cash in hand of Rs.9,25,018/-) as additional income of the firm M/s Alert India in the current F.Y. 2010-11 relevant to A.Y. 2011-12 in addition to be normal income subject to the condition that no penalty or prosecution proceedings will be initiated against M/s Alert India or its partners.

Q18. Regarding 6 new machines (Injection Moulding machines) and 20 Moulds, your explanation mentioning that above machines and moulds have been purchased by you which are lying in your promises to which no bills have been produced nor any payment is stated to have been made is not acceptable. Please explain.

Ans. To buy piece of mind, I surrender further Rs.91,37,456/- being the value of 6 Injection Moulding Maching and 20 moulds and cartage etc. as additional income of the firm M/s Alert India in addition to the normal income subject to the condition that no

penalty or prosecution proceedings will be initiated against the firm M/s Alert India or its partners. Accordingly, I surrender a total of Rs. 1,30,19,418/-(Sundry Creditors of Rs.29,56,944/- + Excess cash in hand of Rs. 9,25,018/- + Machinery and Moulds as stated above of Rs.91,37,456/-) as additional income of the firm M/s Alert India for the current Financial Year 2010-11 relevant to A.Y. 2011-12 in addition to be normal income.”

16. On perusal of the statement, we find that there is no evidence that the statement of Sh. Sachdeva, particularly, the surrender was recorded at midnight. At the beginning of the statement, the date is recorded as 01/10/2010, whereas at end of the statement the date recorded is 02/10/2010. Thus, possibility of recording the statement in daylight of 02/10/2010 could not be rejected. Merely mentioning the date at the end of the statement as 2/10/2010, it cannot be presumed that it was recorded at midnight of 01/10/2010. No such fact has been asserted by Sh. Sachdeva before the lower authorities. The assessee firm, is interpreting the statements of Sh. Sachdeva according to its choices. Thus, the ratio in the case of Kailash Ben Manharlal Chokshi (supra) cannot be imported to the facts of the instant case.

17. Further, during the course of survey the assessee surrendered income of Rs.1,30,19,418/- which included surrender on account of unexplained cash of Rs.9,25,018/- unexplained creditors of Rs.29,56,944/- and unexplained investment in machines and moulds of Rs.91,37,456/-. The assessee has duly honoured the surrender of unexplained cash and unexplained creditors. In such circumstances, it cannot be understood as how, there is no allegation of pressure or intimidation in respect of surrender of unexplained cash and

unexplained creditors and there is only pressure or intimidation in respect of unexplained investment in machines and moulds.

18. Further, we find that during the course of survey proceeding, the assessee tendered cheques amounting to Rs.40,23,000/- corresponding to the tax liability on the income surrendered Rs.1,30,19,418/-. The cheques were deposited in bank by the tax authorities subsequent to the survey proceedings. If the statement was recorded under pressure or intimidation, the assessee should have objected immediately and requested the bank to dishonour those cheques. As far as records of the case before us, no such request was made by the assessee either to the Income-tax Authorities for not to deposit the said cheques or to the bank authorities to stop the payment of those cheques. Further, we also find that Sh. Sachdeva did not file any letter making allegation of pressure and intimidation before the Assessing Officer. Sh. Sachdeva also did not file any letter or statement retracting his statement made during the course of survey proceedings. In this case, since the assessee did not declare the income surrendered of Rs.91,37,456/- in the return of income, it has been deemed by the assessee as retraction of the statement of Sh. Sachdeva. In view of the above facts and circumstances, we are of the opinion that the allegation of pressure and intimidation on Sh. Sachdeva by the survey team is without any basis or supporting evidence and accordingly same are rejected.

19. The second issue is whether the statement recorded on oath under survey proceedings could be accepted as a statement recorded as per law and it could be made basis for making addition. The learned counsel has submitted that during the

course of survey proceeding u/s 133A of the Act, the authorised officer is not authorised to record statement on oath. According to him, in the instant case statement of Sri Sachdeva has been recorded on oath by the Authorised Officer, which being not in accordance with law, should be ignored and not relied upon. In the case of **S. Khadar Khan Son** (supra) the Hon'ble Supreme Court granting the petition of special leave upheld the decision of the Hon'ble Madras High Court *wherein it is held that section 133A does not empower any Income-tax Authority to examine any person on oath, hence any such statement has no evidentiary value and any admission made during such a statement cannot, by itself, be made the basis for addition.* Similarly, **Hon'ble Delhi High Court in the case of Dhingra Metal Works** (supra) held *that for a statement to have evidentiary value, the survey officer should have been authorised to administer oath and records sworn statement, but he has not been so authorised under section 133A of the Act.* The Hon'ble court further held that *the word "may" used in section 133A(3)(iii) of the Act clarifies beyond doubt that material collected in the statement recorded during the survey is not a conclusive piece of the evidence by itself. It is settled law that the admission is an extremely important piece of evidence, it cannot be said to be conclusive and it is open to the person who has made the admission to show that it is incorrect.* In the case of **PCIT Vs Avinash Kumar Setia (supra) Hon'ble Delhi High Court**, the assessee voluntarily made a declaration 2 months after the date of the survey but did not include the said declaration in the return of income filed. The assessee made retraction in writing after two years from the date of declaration made. The Hon'ble High Court rejected the submission of the learned

counsel of the assessee that the assessee had filed a return of income without disclosing the said sum declared, so it should have been deemed that the assessee resiled from the said declaration. The Hon'ble High Court held that *it was too much delayed to be taken the retraction as bonafide*. The court also held that *the circumstances under which retraction was made also had not been explained*. In such circumstances, the Hon'ble High Court set aside the order passed by the Tribunal. In the above case, the Hon'ble High Court distinguished the decision of the Madras High Court in the case of CIT Vs. Khader Khan Son reported in 300 ITR 157, observing as under:

“14. The learned counsel for the Assessee relied upon the decision of the Madras High Court in CIT V. Khader Khan Son (2008) 300 ITR 157 (Mad.). In the said case, during the search action, one of the partners of the Assessee made a statement under Section 133A of the Act offering additional income. Less than 10 days thereafter, on 3rd August, 2001, the statement was resiled from in writing. This again, therefore, makes the case distinguishable from the case in hand where the Assessee has waited for 2 years to resile from the declaration earlier made.

15. On the side of Revenue, reliance was placed on the decision in Raj Hans Towers Pvt. Ltd. Vs. Commissioner of Income Tax-V (2015) 373 ITR 9 (Del.) where the Court explained the evidentiary value of a statement under Section 133A of the Act.

16. The Court finds that in the present case, the ITAT erred in relying upon the decision in CIT v. Khader Khan Son (supra), which as noted hereinbefore, is distinguishable on facts. The Court is not satisfied that the retraction made by the Assessee two years after the declaration was bonafide. There was no satisfactory explanation for not including the said amount in the return of income filed by the Assessee on 26th September, 2009.”

20. In view of the judicial pronouncements discussed above, it is evident that no addition can be made merely on the basis of statement recorded during the course of survey proceeding and for making the addition the statement must be corroborated with other evidences.

21. We find that in the instant case, the Ld. CIT(A) has upheld the addition not merely in view of the statement of Sh. Sachdeva or surrender of the income corresponding to investment in machinery, but the Ld. CIT(A) has examined the addition in view of the provisions of section 69A of the Act, where if the assessee is found to be owner of a valuable article and same is not found to be recorded in the books of accounts, the assessee is required to explain satisfactorily the source of acquisition of said article and in case of failure it is deemed to be the income of the assessee. The relevant provision i.e. 69A of the Act is reproduced as under:

“Unexplained money, etc.

69A. Where in any financial year the assessee is found to be the owner of any money, bullion, jewellery or other valuable article and such money, bullion, jewellery or valuable article is not recorded in the books of account, if any, maintained by him for any source of income³⁶, and the assessee offers no explanation about the nature and source of acquisition of the money, bullion, jewellery or other valuable article, or the explanation offered by him is not, in the opinion of the 37[Assessing] Officer, satisfactory, the money and the value of the bullion, jewellery or other valuable article may be deemed to be the income³⁶ of the assessee for such financial year.]”

22. Thus, in view of the section 69A of the Act, the onus was on the assessee to explain nature and source of acquisition of the 6 injecting moulding machines, irrespective of the fact, whether the

amount was surrendered during the course of the survey or not. The assessee was required to discharge this onus of explaining nature and source of acquisition of those machines by way of adducing evidences. During the course of the survey preceding the partner of the assessee firm failed to explain source of investment in said machines and thus he surrendered. But in the assessment proceeding, the assessee submitted explanation that those machineries were purchased from M/s Amaan Hydraulics (India) and were delivered on 01/10/2010 i.e. on the date of survey and thus could not be installed. The assessee submitted that Invoice/Bill of those machines were not received on the date of the survey and therefore could not be entered in the books of account. Before us, the learned counsel has submitted that purchase of the machinery was not recorded and books of account as same was received on approval. Regarding source of investment, the assessee has submitted that no payment was made to the party and those machines have been returned back in view of the defects in those machines. Thus according to the assessee, no payment was made to the supplier for acquiring the machines and therefore there is no requirement to discharge the onus of source of acquisition by the assessee.

23. The Ld. CIT(A) has found various faults in the above explanation of the assessee to justify the source of acquisition of the machineries, which we have already reproduced in earlier Paras.

24. We find that in the instant case , firstly, the Ld. CIT(A) on page 10 of the impugned order based on the documents of the assessee, has observed that machines were received and bills were passed implying that payments were done. The relevant

finding of the Ld. CIT(A) though reproduced in earlier Paras, it is again reproduced as under :

“Thirdly the assessee has filed copy of its internal document scanned hereunder. On this document it has been mentioned “PARTY BILL PASSED AGAINST BILL NO. 87 OF 1/X/X”. This clearly shows that the machines were received and bills were passed implying thereby payments were done.”

25. The learned counsel of the assessee has not controverted this finding of the Ld. CIT(A). In normal terminology of accounting, bill passed means payment has been made by the assessee. In our opinion, when the documents of the assessee itself shows that bills for the machines were passed, which means payment was made by the assessee.

26. Secondly, the assessee has failed to furnish production report that the machines in questions were having low yield. According to the assessee, this was the main reason for return of those machines to the supplier, but this reason has not been substantiated by the assessee with evidences. Thirdly, the probability that machines worth Rs.82 lakhs would be supplied to the assessee without any payment to the supplier is also remote. Fourthly, the receipt of the machines and return thereof has not found place in form No.3CD of the Tax Audit Report.

27. We have also noticed certain other discrepancies in the documents submitted by the assessee in the paper book filed before us. The assessee has produced copy of so called bills No. 84 and 87 dated 01/10/2000 issued by M/s Amaan Hydraulics (India), which are available on page 122 and 123 of the paper-book. The assessee also claimed that the machinery was

transported to the premise of the assessee and has submitted a receipt issued by Mallik Transport Company, Haryana, which is available on page 125 of the paper book. But in the so called bills issued by M/s Amaan Hydraulics (India), the space for vehicle number is left blank and there is no mention as through which mode of transport, those machines were transported at the premise of the assessee. The injecting moulding machines are quite bulky and not small machines, which could be transported personally by hand. The photocopy of the receipt issued by Mallik Transport Company is not bearing signature of the person, who issued the receipt and also not carrying any service tax registration number of the transporter. The assessee has also submitted copy of the so-called letters exchanged between M/s Amaan Hydraulics (India) and the assessee, which are available on page 127 to 137 of the paper book. There are no supporting evidence as how those letters were delivered, whether by post or by Courier or by any other means of delivery.

28. In view of the above observations, prima facie the preponderance of probability goes against the assessee.

29. Notwithstanding our above observations, one important link which is missing in the entire analysis of evidences, is that no inquiry has been made by the lower authorities in this respect from M/s Amaan Hydraulics (India). The assessee has claimed before us that all those documents were filed before the lower authorities. We find that the authorities have not examined whether said party was engaged in manufacturing of those machines or was only engaged in supplying tools and spare parts. The authorities have also not examined whether those bills produced by the assessee, have actually been issued by that

party. The authorities have also not examined the records of the Mallik Transport Company, which the assessee has claimed to be the transporter of the machines. The authorities have also not examined genuineness or authenticity of the letter of correspondence exchanged between the assessee and the supplier, produced by the assessee. The lower authorities have also not examined, the sales tax record or central excise records of M/s Amaan Hydrolics (India). All those enquiries could have established with some certainty, whether the explanation of the assessee is having any substance.

30. In our opinion, it is extremely necessary to examine genuineness of the correspondence between the assessee and M/s Amman Hydraulics (India) and other records of the assessee as well as records of M/s Amaan Hydraulics (India). Without examining and verifying the records in this respect, rejecting the contention of the assessee in holding that investment in machines was made out of undisclosed sources would not be justified and against the conscience of Justice.

31. In view of above facts and circumstances, we feel it appropriate to restore this issue in dispute to the file of the Ld. CIT(A) for carrying out enquiries as mentioned above. He may remand the matter to the AO, if circumstances so requires. The assessee is directed to produce proprietor of M/s Amaan Hydrolic (India) before the authorities alongwith all necessary documentary evidences for cross-examination by him. The assessee may be provided results of the enquiries and cross-examination by the Income-tax Authorities and also afforded adequate opportunity of being heard. The Ld. CIT(A) is then directed to decide the issue in dispute in accordance with law without prejudice by our

observations above. The grounds of the appeal are accordingly allowed for statistical purposes.

32. In the result, the appeal is allowed for statistical purposes.

Order is pronounced in the open court on 12th October, 2018.

**Sd/-
DIVA SINGH
JUDICIAL MEMBER**

**Sd/-
O.P. KANT
ACCOUNTANT MEMBER**

Dated: 12th October, 2018.

RK/-(D.T.D.)

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi