

IN THE INCOME TAX APPELATE TRIBUNAL  
DELHI BENCH "G": NEW DELHI  
BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER  
AND  
SHRI N.S. SAINI, ACCOUNTANT MEMBER

**ITA No. 15/DEL/2013**

A.Y. : 2009-10

SMT. SUSHMITA GUPTA,  
100, SUNDER NAGAR,  
NEW DELHI – 110 003  
(PAN: ACZPG1440P)  
**(Appellant)**

Vs.

ACIT, CC-2,  
NEW DELHI

**(Respondent)**

**ITA No. 533/DEL/2013**

A.Y. : 2009-10

DCIT, CIRCLE-32(1),  
ROOM NO. 323, 3<sup>RD</sup> FLOOR,  
ARA CENTRE  
JHANDEWALAN EXTN.,  
NEW DELHI  
**(APPELLANT)**

Vs.

Sh. Rajiv Kumar Gupta,  
100, SUNDER NAGAR,  
NEW DELHI – 110 003  
(PAN: ACZPG1440P)

**(RESPONDENT)**

Assessee by : Dr. Rakesh Gupta, Adv. & Sh.  
Somil Agarwal, Adv.  
Department by : Sh. S.S. Rana, CIT(DR)

**ORDER**

**PER H.S. SIDHU, JM**

These are the appeals filed by the Assessee and the Revenue emanate out of the separate impugned Orders of the Ld. Commissioner of Income Tax (Appeals)-III, New Delhi pertaining to assessment year 2009-10. Since the issues involved in these appeals are common and identical, hence, the appeals were heard together and are being consolidated by this common

order for the sake of convenience, by first dealing with Assessee's ITA No. 15/Del/2013 (AY 2009-10)- Smt. Sushmita Gupta vs. ACIT.

2. The grounds raised in the Assessee's appeal - Smt. Sushmita Gupta vs. ACIT read as under-

i) That on the facts and in the circumstances of the case, the Hon'ble Commissioner of Income Tax (Appeals) has erred in law in sustaining the addition of Rs.1,36,3J3,501/- as made by the learned Assessing Officer merely relying upon the statement of the appellant recorded u/sec. 132(4) of the Income Tax Act, 1961 which was subsequently retracted.

ii) That the Hon'ble Commissioner of Income Tax (Appeals) while sustaining the aforesaid addition of Rs. 1,36,30,501/- has failed to appreciate that "though the statement rendered at the time of search may be used as evidence in any proceedings, but that by itself, cannot become the sole material to rest the assessment, more so, when the assessee sought to withdraw the same by producing material evidence in support of such retraction. It is always open to the person who has made the

admission to show that the statement to offer income is incorrect".

iii) That the Hon'ble Commissioner of Income Tax (Appeals) has himself confirmed in his order that the appellant has partially retracted the surrender which has been made in clandestine manner but while deciding the appeal, he altogether has ignored this fact and confirmed the entire additions of Rs. 1,36,30,501/- merely relying upon the statement made by the appellant u/sec. 132(4) of the Act which is totally unjustified and unwarranted on the facts and in the circumstances of the case.

iv) That the Hon'ble Commissioner of Income Tax (Appeals) while examining the issue on merits of the case has erroneously held that "surrender of Rs. 1,50,00,000/- was made voluntarily, in the presence of two individual witnesses and the disclosure was made without any pressure, coercion etc.". This finding of the Hon'ble Commissioner of Income Tax (Appeals) is totally incorrect because the statement of the appellant was recorded u/sec. 132(4) of the Act at mid night and in abnormal circumstances, it was too much to give any credit in the statement recorded at such odd hours. Moreover as

alleged by the Hon'ble Commissioner of Income Tax (Appeals) that the statement recorded u/sec. 132(4) of the Act were in the presence of two individual witnesses - this also appears to be also incorrect because no such individual witnesses were available in the mid night when the statement of appellant were recorded which is evident from the copy of statement recorded as there are no signatures of the alleged two witnesses. Thus the presumption made by the Hon'ble Commissioner of Income Tax (Appeals) is not only erroneous but unsustainable in law.

v) That the Hon'ble Commissioner of Income Tax (Appeals) while deciding the appeal has given erroneous findings and that too without any material evidence on record holding that "by making surrender of Rs.1,50,00,000/- at the time of search, she got the immunity from further deeper investigation to be conducted by the Department". This fact is absolutely arbitrary.

vi) That the Hon'ble Commissioner of Income Tax (Appeals) while sustaining the additions of Rs. 1,36,30,501/- has totally disregarded the Explanation offered by the appellant in writing in respect of gap in

stock of jewellery, gap of cash in hands and Explanation for loose papers and slips etc. which were fully substantiated by the direct evidences which were already available on record with the learned Assessing Officer since been filed with him during the course of hearing of the case and the same were also made available with him during the course of hearing of the appeal.

vii) The Hon'ble Commissioner of Income Tax (Appeals) decided the appeal of the appellant purely on the basis of suspicious and surmises with a pre-determined mind in not accepting the submissions of the appellant about retraction of statement which was made with due bonafide reasons.

viii) That the Hon'ble Commissioner of Income Tax (Appeals) has erroneously held that the retraction of statement after a month is not sustainable in law. The Hon'ble Commissioner of Income Tax (Appeals) while holding so has failed to appreciate that the appellant had filed a letter dated 27.03.2009 along with her own affidavit retracting her statement given u/sec. 132(4) of the Act dated 26.02.2009. This letter was filed before the learned Additional Director of Income Tax (Investigation) Unit-I(2), New Delhi just after two days of opening of bank locker

which was opened on 25.03.2009 and last Panchnama was made. Thus the retraction of statement followed by an Affidavit of the appellant was just after two days of the last Panchnama when the search was completed and not after one month as alleged by the Hon'ble Commissioner of Income Tax (Appeals).

ix) That the Hon'ble Commissioner of Income Tax (Appeals) has further erred in law as much as on the facts of the case in not appreciating that "despite the fact that the statement recorded u/sec. 132(4) of the Act was later retracted but the revenue department did not place any tangible material on record to reject the claim of the appellant and thus the rejection of retraction is ab initio void.

The appellant accordingly hereby humbly pray that the unwarranted and unlawful addition of Rs. 1,36,30,501/- may kindly be deleted after providing adequate opportunity of being heard to the appellant.

3. The grounds raised in the Revenue's ITA No. 533/Del/2013 – DCIT vs. Sh. Rajiv Kumar Gupta read as under -

- i) On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in holding that the addition of Rs. 1.50 crore made on substantive basis in the case of Smt. Sushmita Gupta (assessee's wife) has already been confirmed by him, hence, the addition of Rs. 1.50 crore made on protective basis is deleted.
- ii) On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in ignoring the facts that Smt. Sushmita Gupta (assessee's wife) is in appeal before the ITAT, hence, the issue has not yet attained the finality.
- iii) The order of the CIT(A) is erroneous and is not tenable on facts and in law.
- iv) The appellant craves leave to add, alter or amend any / all of the grounds of appeal before or during the course of the hearing of the appeal.

4. The brief facts of the case are that a search and seizure operation was carried out on 26.2.2009 in the case of assessee. Assessee filed the return of income at Rs. 16,40,740/- and the AO assessed the income of the assessee at an income of Rs. 1,52,71,241/-, by making an addition of Rs. 1,36,30,501/-. The addition was made on the ground that during the search operations at the assessee premises on 27.3.2009, certain incriminating

documents, unexplained cash, jewellery and excess stock was found and to cover up all the discrepancies, the assessee surrendered a sum of Rs. 1,50,00,000/- before the Authorised Officer. However, later after one month on 27.3.2009, the assessee retracted from the surrender of Rs. 1.50 crore, stating that the surrender was made under force, coercion and threat. The assessee stated before the AO that on the basis of reconciliation done by them the additions at best can be made only to the tune of Rs. 13,60,000/- on account of unexplained cash, unexplained jewellery, foreign exchange and value of unexplained loose paper found during the search and the same they have disclosed in their revised return of income filed after the search pursuant to notice u/s. 142(1)/143(2) read with section 153A. The AO however, did not accept the assessee's contention that the undisclosed income is to the tune of Rs. 13,60,000/- only, but he considered Rs. 1,50,00,000/- as the assessee's undisclosed income, which the assessee had surrendered in their statement given under section 132(4) of the Act during the search, on account of unexplained cash, jewellery and excess stock and unexplained loose papers, foreign exchange etc. found during the search. Aggrieved with the AO's action, the assessee appealed before the Ld. CIT(A), who vide his impugned order has dismissed the appeal of the assessee. Against the impugned order, the assessee is in appeal before us.

5. Ld. Counsel for the assessee that Ld. CIT(A) has wrongly sustained the addition of Rs.1,36,3J3,501/-as made by the Assessing Officer merely

relying upon the statement of the assessee recorded u/sec. 132(4) of the Income Tax Act, 1961 which was subsequently retracted. It was further submitted that though the statement rendered at the time of search may be used as evidence in any proceedings, but that by itself, cannot become the sole material to rest the assessment, more so, when the assessee sought to withdraw the same by producing material evidence in support of such retraction. It is always open to the person who has made the admission to show that the statement to offer income is incorrect. It was the further submission that the assessee has partially retracted the surrender which has been made in clandestine manner but while deciding the appeal, he altogether has ignored this fact and confirmed the entire additions of Rs. 1,36,30,501/- merely relying upon the statement made by the assessee u/sec. 132(4) of the Act. He further stated that Ld. CIT(A) while examining the issue on merits of the case has erroneously held that "surrender of Rs. 1,50,00,000/- was made voluntarily, in the presence of two individual witnesses and the disclosure was made without any pressure, coercion etc.". This finding of the Ld. CIT(A) is totally incorrect because the statement of the assessee was recorded u/sec. 132(4) of the Act at mid night and in abnormal circumstances under coercion and duress, it was too much to give any credit in the statement recorded at such odd hours. Moreover as alleged by the Ld. CIT(A) that the statement recorded u/sec. 132(4) of the Act were in the presence of two individual witnesses - this also appears to be also

incorrect because no such individual witnesses were available in the mid night when the statement of appellant were recorded which is evident from the copy of statement recorded as there are no signatures of the alleged two witnesses. Thus the presumption made by the Ld. CIT(A) is not only erroneous but unsustainable in law. It was further submitted that the addition was made and sustained without any material evidence on record holding that "by making surrender of Rs.1,50,00,000/- at the time of search, she got the immunity from further deeper investigation to be conducted by the Department". This fact is absolutely arbitrary. He further submitted that Ld. CIT(A) while sustaining the additions of Rs. 1,36,30,501/- has totally disregarded the Explanation offered by the assessee in writing in respect of gap in stock of jewellery, gap of cash in hands and Explanation for loose papers and slips etc. which were fully substantiated by the direct evidences which were already available on record with the learned Assessing Officer since been filed with him during the course of hearing of the case and the same were also made available with him during the course of hearing of the appeal. It was further stated that Ld. CIT(A) is wrong in holding that the retraction of statement after a month is not sustainable in law. However, the assessee had filed a letter dated 27.03.2009 along with her own affidavit retracting her statement given u/sec. 132(4) of the Act dated 26.02.2009. This letter was filed before the Ld. Additional Director of Income Tax (Investigation) Unit-I(2), New Delhi just after two days of opening of bank

locker which was opened on 25.03.2009 and last Panchnama was made. Thus the retraction of statement followed by an Affidavit of the assessee was just after two days of the last Panchnama when the search was completed and not after one month as alleged by the Ld. CIT(A). He further submitted that it is not disputed fact that the statement recorded u/sec. 132(4) of the Act was later retracted but the revenue department did not place any tangible material on record to reject the claim of the assessee and thus the rejection of retraction is ab initio void. In view of above, he further submitted that the surrender of Rs. 1.50 crore made by the assessee was not free and fair voluntary surrender and it was under tremendous direct and indirect pressure and therefore, such alleged surrender cannot be used for making the addition. Further, it was submitted that it is settled law that addition made solely based upon the statement cannot be sustained and also CBDT vide its Instructions No. F. No. 286/2/2003-IT (Inv.II), dated 10.3.2003 has made it clear that reliance shall not be solely placed on the statements recorded in the search survey. Hence, he prayed for deletion of addition in dispute. To support his aforesaid contention, he relied upon the following case laws:-

- Hon'ble Supreme Court of India decision in the case of Dayawanti vs. CIT (2017) 84 taxmann.com 296 (SC) dated 8.8.2017.

- Shri Ganesh Trading Co. vs. CIT (2013) 257 CTR 159, High Court of Jharkhand
- Chetanaben J Shah Heir of Jagdish Chandra K.Shah vs. ITO (2016) 140 DTR 0235 – High Court of Gujarat.
- Kailashben Manharlal Chokshi vs. CIT (2008) 220 CTR 138, High Court of Gujarat.

6. On the contrary, Ld. DR relied upon the orders of the authorities below. He submitted that during the course of search, statement of Smt. Sushmita Gupta was recorded in which she surrendered undisclosed income of Rs. 1.50 crores on account of difference in stock, cash of Rs. 20 lakhs and various investment and expenditure. It was further submitted that the above surrender of Rs. 1.50 crore was confirmed by Sh. Rajiv Gupta H/o Smt. Sushmita Gupta in his statement u/s. 132(4) on the date of search. No retraction was filed within a reasonable time. There is no material on record to establish that any attempt was made on behalf of the assessee to prove the allegation of inducement, threat or coercion through the witnesses. It was further submitted that by making the surrender, the assessee got immunity from further deeper investigation and unaccounted cash, foreign exchange, stock and incriminating documents were found from the assessee

during the course of search. In view of above submission, he relied upon the following case laws:-

- i) Kishore Kumar vs. CIT (62 taxmann.com 215), 234 Taxman 771.  
  
B. Kishore Kumar vs. CIT (52 taxmann.com 449) Madras High Court confirmed.
- ii) Bhagirath Aggarwal vs. CIT 31 taxmann.com 274, 215 taxman. 229, 351 ITR 143).
- iii) CIT vs. MS Aggarwal (2018) 93 taxmann.com 247 Delhi
- iv) Smt. Dayawanti Vs. CIT (2016) 75 taxmann.com 308.
- v) M/s Peeble Investment and Finance Ltd. vs. ITO (2017-TIOL-238-SC-IT).  
  
M/s Peeble Investment and Finance Ltd. vs. ITO (2017-TIOL-188-HC)-Mum-IT) Bombay High Court confirmed.
- vi) Raj Hans Towers (P) Ltd. vs. CIT 56 taxmann.com 67

- vii) PCIT vs. Avinash Kumar Setia (2017) 81taxmann.com 476 (Delhi.)
- viii) ACIT vs. Hukum Chand Jain (2010) 191 Taxman 319 (Chhatisgarh)
- ix) Greenview Restaurant vs. ACIT (2003) 133 Taxman 432 (Gauhati).

7. We have heard both the parties and perused the records, especially the impugned order and the written submission and the Paper Book and the case laws relied upon by both the parties as well as the CBDT Instructions on the subject in dispute. We find that the only issue in the present appeal is against the action of the AO in making an addition of Rs. 1,50,00,000/- to the total income of the assessee on the ground that that assessee had surrendered the said amount as her undisclosed income and which was ratified by her husband in the statement given under section 132(4) of the Act. According to AO, since assessee had herself declared a sum of Rs. 13,69,499/- as undisclosed income in the return of income, as against the surrendered amount of Rs. 1,50,00,000/-, difference of Rs. 1,36,30,501/- (Rs. 1,50,00,000 - Rs. 13,69,499) was added to the total income. This addition was confirmed by the Ld. CIT(A) in the appeal and against the same the Assessee is in appeal before us. We find that a search was carried out on 26.2.2009 at the residential premises of the assessee

and during the course of search cash at residence, personal jewellery, cash in locker, stock of jewellery, foreign currency and loose papers were found. Also during the course of search in the statement recorded u/s. 132(4) of the Act, an aggregate amount of Rs. 1.50 crore surrendered as undisclosed income. The said statement was retracted by the appellant on 27.3.2009 but AO and Ld. CIT(A) both have rejected such retraction on the ground that it was mere after thought. We find considerable cogency in the contention of the assessee's counsel that the said surrender was not voluntary surrender but was extracted under duress and therefore, immediately after the conclusion of search it was withdrawn. It is noted that Assessee then went to explain with evidence the source of various assets found at the time of search and the uncovered amount of Rs. 13,69,499/- which was not supported by the explanation. We note that authorities below did not except the explanation tendered by the assessee with respect to various assets found as a result of search and held that since assessee had already declared a sum of Rs. 1,50,00,000/- during the course of search in the statement made u/s 132(4), the addition of that amount as reduced by the amount declared by the assessee was warranted. Hence, the submission of the assessee has force that the surrender of Rs. 1,50,00,000/- made by the assessee was not free and fair voluntary surrender and it was under tremendous direct and indirect pressure and therefore, such alleged surrender cannot be used for making the addition. It is also noted that various

Hon'ble Courts in the following cases have held that during the search the whole atmosphere is of utmost pressure and therefore there is very little scope for free and fair thinking on the part of a person searched, which squarely covers the issue in dispute, hence, we draw support from the same.

- **CIT v. Naresh Kumar Agarwal, (2014) 369 ITR 171, High Court of Andhra Pradesh**

“The circumstances under which a statement is recorded from an assessee, in the course of search and seizure, are not difficult to imagine. He is virtually put under pressure and is denied of access to external advice or opportunity to think independently. A battalion of officers, who hardly feel any limits on their power, pounce upon the assessee, as though he is a hardcore criminal. The nature of steps, taken during the course of search are sometimes frightening. Locks are broken, seats of sofas are mercilessly cut and opened. Every possible item is forcibly dissected. Even the pillows are not spared and their acts are backed by the powers of an investigating officer under Section 94 of Cr.P.C by operation of sub-section (13) of Section 132 of the Act. The objective may be genuine, and the exercise may be legal. However, the freedom of a

citizen that transcends, even the Constitution cannot be treated as non-existent ”.

**Dy. Commisioner Of Income Tax vs Pramukh Builders, (2008) 112 ITD 179, ITAT Ahmedabad Bench (Third Member)**

“ The first reason which the AM considers to be a crucial pointer is that K is the managing partner of the assessee firm and in fact, is one of the main persons who is in the know of the affairs of the business. This fact is undisputable. However, having retracted from the original statement, the latter does not lead one to anywhere. The search was on the group as a whole consisting of several entities. The statements that he may have given during the search are for the group as a whole and though in the statement he has given the break-up of disclosure, it is not corroborated by anything that might have been unearthed during the search. There may have been hundreds of reasons and thoughts crossing in the mind of the deponent during the search and it is not expected that whatever is reeled out during the search is only after proper application of mind. He may have explained the modus operandi of charging on-money, or the avenues and the

destination of such money. Again, this may be true for the group as a whole but the retracted statement does not lead to the conclusion that the present assessee had an undisclosed income of Rs. 10 lakhs. The second reason given by the AM is that enhancing the figure of disclosure two months later shows proper application of mind and also absence of any duress while giving the statement. Well, there may not be any evidence of coercion being exercised by the search party, there may not be any duress also, but existence of confusion cannot be ruled out. Duress has to be distinguished from confusion. Duress is a constraint illegally exercised to force a person to perform some act. This, as mentioned earlier, may be absent. But confusion means something thrown into disorder wherein a person may be perplexed or embarrassed or thrown into turmoil. The entire family is likely to be in a state of perdition during and in the aftermath of the search. In fact, the revision of the earlier statement does not reflect application of mind but a state of compounded confusion only. When such are the state of affairs, no sanctity can be attached to the statement and that cannot form the sole basis to determine undisclosed

income. It is not the question of throwing the burden on the Revenue as observed by the AM, but certainly when search is conducted, it needs to have some basis to come to the conclusion of concealment.

It has also been held in the following judicial decisions that the addition made solely based upon the statement cannot be sustained and reliance is placed on the following judicial decisions.

**Shree Ganesh Trading Co.v.CIT, (2013) 257 CTR 159,  
High Court of Jharkhand**

Section 132 of the Income-tax Act, 1961 - Search and seizure - Statement on oath - Assessment year 1988-89 - Whether statement on oath of an assessee under section 132(4) is a piece of evidence and when there is incriminating admission against himself, then it is required to be examined with due care and caution - Held, yes - During course of search conducted under section 132 upon assessee-firm, a partner made a statement under section 132(4) and surrendered a sum of Rs. 20 lakhs for assessment year 1988-89 as income - In return fded after search assessee-firm did not declare income of Rs. 20

lakhs on plea that declaration made by partner was misconceived and divorced from real facts and that firm or individual had no undisclosed income - Lower authorities did not accept asses see's said retraction on ground that statement given by partner appeared to be voluntarily given statement disclosing undisclosed income of Rs. 20 lakhs and added said amount to its income as undisclosed income - No specific reason had been given for rejection of asses see's contention by which it had retracted for admission of partner - During course of search there was no recovery of assets or cash by department - Whether having regard to facts and circumstances of case a wrong inference had been drawn by authorities below in holding that there was undisclosed income to tune of Rs. 20 lakhs of assessee - Held, yes [Para 6]

**Shree Ganesh Trading Co. vs. CIT, (2013) 84 CCH 0025, High Court of Jharkhand**

Search & Seizure—Admission of undisclosed income—Statement retracted— Admissibility—During course of search, a statement was recorded u/s 132(4) in which a sum was surrendered as income—However, same was not disclosed in return contending that statement was made

after persuasion—AO did not accept assessee's contention & taxed said amount—Held, retracted statement recorded u/s 132(4) cannot be basis for assessing undisclosed income of assessee, there must be some corroborative evidence to admission—All authorities reached to conclusion merely on basis of assumption resulting into fastening of liability upon assessee—No specific reason had been given for rejection of asses see's contention and why AO did not proceed further to enquire into undisclosed income—This fact was also not taken care of and considered that in a case where there was search operation, no assets or cash was recovered from assessee, in that situation what had prompted assessee to make declaration of undisclosed income— Thus, a wrong inference had been drawn by authorities in holding that there was undisclosed income

**Jyotichand Bhaichand Saraf & Sons Pvt. Ltd. vs. DCIT, (2013) 154 TTJ 0226, ITAT Pune Bench**

Block assessment—Search and seizure—Undisclosed income—Addition on account of difference in stock— Assessee was engaged in business of dealing in gold ornaments and jewellery—Search and seizure u/s 132 was

conducted at business premises of assessee—Differences were found in physical inventory and books of account—Director of assessee company in his statement recorded u/s 132(4) stated that there were unrecorded sales which were not reflected in books of account and cash generated from unaccounted sales was invested in purchase of agricultural land—Said statement was subsequently retracted on ground that same was made under mistaken belief—AO made addition of entire unaccounted/suppressed sales in addition to gross profit—CIT(A) affirmed addition made by AO—Held, entire unaccounted sale price could not be treated as undisclosed income—Only gross profit embedded in the suppressed or unaccounted sale could be added—AO was thus not justified in making addition of entire unaccounted/suppressed sales— Addition of undisclosed income was made solely on basis of statement of director of assessee company without corroborating same with material unearthed by search was also unjustified— Since admission made by assessee u/s 132(4) is an important piece of evidence but same is not conclusive—Assessee had produced all evidences in respect of investment in

agricultural land—No evidence was found in course of search action or post search enquiries to show that assessee has made any investment over and above sale price with regards to agricultural land transaction—Revenue authorities failed to establish nexus between unrecorded sale with investment in agricultural land—Assessee has accounted for suppressed sales by way of declaration of gross profit on account of suppressed sales—Addition made by AO and CIT(A) on account of undisclosed income cannot be sustained—Assessee's appeal allowed

**In Chetnaben J Shah Legal Ileir of Jagdish Chandra K. Shah v. ITO, (2016) 140 DTR 0235, High Court of Gujarat it was held that CIT (Appeals) has rightly appreciated the case. In this case CIT(A) held that**

“It is a normal presumption that —statement under section 132(4) is given voluntarily unless it is proved otherwise. There is no evidence on record to show that this statement was given in any coercion. Therefore, I am unable to agree with the assessee that it was a forced statement. But I am reasonably impressed by the contention that this statement was subject to variation on either side after verification i.e. assessee could reduce the disclosure made

or the Assessing Officer could enhance the same if the facts and evidence so warranted. May be, even if this fact is not mentioned in the statement itself the point will still remain since it is no body's case to get say any extra tax then is due. The reality remains that there is no evidence what-so-ever with the department even in consequence of a serious action like search and seizure followed by detailed security which could support the earning of speculation income of Rs. 10,50,000/- in this year. In other words, there is no evidence to support the very existence of this income except the so called statement u/s 132(4) of the Act. It defies logic that an assessee will or should admit any income which he had not earned and which the department had not found out. I do not find anything against the arguments that disclosure u/s. 132(4) was subject to variation and once the assessee had access to seized documents and he realised subsequently that there was no occasion to make this disclosure, he was having an inherent right to clarify the situation so that he could be taxed only on real income and not on an income which was not there at all, since there was no evidence to prove otherwise too. In addition, the very important fact

that remains that inspite of the search, no material/evidence was found to show that the assessee was having any other undisclosed assets which could be linked with this disclosure. In view of the totality of the circumstances, arguments given by the assessee and reasoning as above, the addition made is deleted."

**KailashbenManharlal Chokshi v. CIT, (2008) 220 CTR 138, High Court of Gujarat**

Section 143, read with Section 132 of the Income-tax Act, 1961 - Assessment - Additions to income Assessment year 1989-90 - Whether a statement recorded under section 132(4) at mid night can be considered to be a voluntary statement, if it is subsequently retracted by assessee and necessary evidence is led contrary to such admission - Held, no - During search conducted at assessee's premises, his statement was recorded under section 132(4) wherein he disclosed certain undisclosed income - After two months, he retracted from said disclosure contending that it was made at mid night under pressure and coercion - He also gave proper evidence in support of his retraction - Assessing Officer, however, made addition on basis of disclosure made by assessee in statement

recorded under section 132(4) - Whether merely on basis of admission, assessee could be subjected to such addition, when despite retraction revenue could not furnish any corroborative evidence in support of . such admission - Held, no

**Deepchand & Co.v. ACIT, (1995) 51 TTJ 421, ITAT Bombay Bench**

"We have examined the facts of the case. We have considered all the arguments advanced on behalf of both the parties. We have further looked into the case law relied upon by both the parties. In our opinion there is no supporting evidence to confirm the additions except the statements of two partners recorded at the time of search. It would not be out of context to mention here that the statements recorded by the search party during the search of more than two days and two nights cannot be considered to be free, fearless and voluntary. There is a considerable substance in the assessee's contention that the statements were recorded under pressure and force. The Tribunal has held that retraction should be allowed if it is based on proper principles and evidence. In the ordinary course no assessee would say that he had much concealed

unaccounted money as mentioned in the statements herein. At the most what was expected to say was that certain income from the business was not disclosed but putting in the mouth of the assessee that so much amount was unaccounted and concealed would itself indicate that the admission was forcible and not voluntary. ”

**ACIT v. Anoop Kumar, (2005) 147 Taxman 26, ITAT Amritsar Bench (SMC)**

“In fact, all the additions made by the Assessing Officer based on the documents and evidence found during the search stood confirmed. It was also a fact that the total income so computed by the Assessing Officer fell below the income disclosed under section 132(4). It was not the case of the department that difference in the income assessed and income disclosed under section 132(4), represented some other concealed income. Therefore, it was clear that there was no material available with the department to justify the addition so far as the difference between the income computed by the Assessing Officer and income disclosed under section 132(4) was concerned. In other words, the so-called disclosure under section 132(4) was bald and had no legs to stand and in such a case retraction

was justified. The ultimate addition to be made in a case would depend on the facts and circumstances of the case and not purely on the disclosure made under section 132(4) which also stood retracted subsequently. ”

7.1 We further note that in CBDT Instruction F. NO. 286/2/2003-IT (Inv. II), dated 10.03.2003 it has been made clear that reliance shall not be solely placed on statements recorded in search survey. Relevant extracts of the same are reproduced as under;

“Instances have come to the notice of the Board where assesseees have claimed that they have been forced to confess the undisclosed income during the course of the search & seizure and survey operations. Such confessions, if not based upon credible evidence, are later retracted by the concerned assesseees while filing returns of income. In these circumstances, such confessions during the course of search & seizure and survey operations do not serve any useful purpose. It is, therefore, advised that there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income-tax Department. Similarly, while recording statement during the course of search & seizure and survey

operations no attempt should be made to obtain confession as to the undisclosed income. Any action on the contrary shall be viewed adversely. ”

7.2 We also note that following pleadings and evidences were made in this regard before AO and Ld. CIT(A) submitting that statement recorded allegedly during the course of search was not free and fair and therefore addition cannot be made on that basis. At page no. 79-83 of the Paper Book, it is noted that the search was completed at the locker of the assessee on 25.3.2009 and letter of retraction was made within 48 hours of such completion. It is also noted from page no. 57-58 of the Paper Book that no witnesses were present at the time of recording of statement which is evident from statements itself that there is no mention of any witness or any signatures of witnesses on statements. Also AO has also not provided the names of person present at the time when the statements have been recorded. Thus the above facts demonstrates that no witness were present at the time of such record. At Page No. 84-87 of the Paper Book there is a copy of retraction letter dated 27.03.2009 filed before ADIT (Inv.) along with affidavit of Smt. Sushmita Gupta and Shri Rajiv Kumar Gupta elucidating that statements were made under force, coercion and duress. She has further clarified that the same were made under mental tension and utter confusion; At page No. 89-90 of the Paper there is a copy of letter dated 20.04.2009 filed by the assessee to Ld. ADIT (Inv.) explaining that

surrender made in statements recorded during search was product of coercion, duress, threat and mental tension and thus, the same was retracted by the assessee. At page no. PB 312-316 of the Paper Book there is a copy of letter dated 29.10.2010 filed before the Ld. ACIT stating that amount surrendered by the assessee along with her husband has been retracted vide letter dated 27.03.2009. It was further emphasized that surrendered amount was illegal, without any basis and was under mental tension, duress, coercion, treat and undue influence. At page no. 370-383 (PB 373) of the Paper Book is the copy of submission filed before the Ld. CIT(A) reiterating that surrender made by assessee and her husband was not voluntary and was under undue pressure from the search officials with assurance to conclude search. However, the assessee explained the source of each and every asset/loose paper found during the course of search and submitted before AO and Ld. CIT(A) that as to why additions cannot be made in respect of such assets/loose documents. The AO made an abrupt addition of Rs. 1,50,00,000/- which was affirmed by Ld. CIT(A) as against amount of Rs. 15, 58,632/- offered by the assessee suo-moto before the Ld. CIT(A). We also note that the case laws cited by the Ld. CIT(DR) are not exactly on the same facts and circumstances of the present case, hence, does not support the case of the Revenue.

7.3 Keeping in view of the facts and circumstances of the case and respectfully following precedents as well as the CBDT Instructions (Supra),

we delete the addition in dispute and allow the grounds raised by the assessee.

8. As regards, Revenue's Appeal No. 533/Del/2013 in the case of DCIT vs. Rajiv Kumar Gupta, who is husband of Smt. Sushmita Gupta in whose case the addition in dispute has been deleted by us in the preceding paragraphs, which was made by the AO on substantive basis and confirmed by the Ld. CIT(A) is concerned. Since we have deleted the addition on substantive basis in assessee's wife case in the preceding paragraphs, the action of the Ld. CIT(A) of deletion of addition of Rs. 1.50 crores in assessee's own case (Rajiv Kumar Gupta) on protective basis is upheld and accordingly, the grounds raised by the Revenue are rejected. As a result, the Revenue's appeal is dismissed.

9. In the result, the appeal filed by the Assessee stands allowed and the Appeal filed by the Revenue stands dismissed.

Order pronounced on 21/12/2018.

**Sd/-**

**[N.S. SAINI]**  
**ACCOUNTANT MEMBER**  
*Date: 21/12/2018*

**Sd/-**

**[H.S. SIDHU]**  
**JUDICIAL MEMBER**

**SRBhatnagar**

**Copy forwarded to: -**

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

Assistant Registrar, ITAT, Delhi Benches