

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES "A", JAIPUR
श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE SHRI SANDEEP GOSAIN, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 1290 & 1291/JP/2019
निर्धारण वर्ष / Assessment Year :2014-15 & 2015-16

Jaisingh Yadav, 1, Mehta Ki Dhani, Chandra Nagar- A, Govindpura, Kalwar Road, Jaipur.	बनाम Vs.	A.C.I.T., Central Circle-3, Jaipur.
स्थायी लेखा सं./जीआईआर सं./ PAN/GIR No.: ACWPY 5493 R		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by: Shri Avinash Khandelwal (CA)
राजस्व की ओर से / Revenue by : Ms. Chanchal Meena (Addl.CIT)

सुनवाई की तारीख / Date of Hearing : 07/10/2020
उदघोषणा की तारीख / Date of Pronouncement : 21/10/2020

आदेश / ORDER

PER: SANDEEP GOSAIN, J.M.

Both these appeals have been filed by the assessee against the two separate orders of the Id. CIT(A)-4, Jaipur dated 18/09/2019 for the A.Y. 2014-15 & 2015-16 respectively. Grounds taken by the assessee in both these appeals are reproduced as under:

Grounds of ITA No. 1290/JP/2019 (A.Y. 2014-15)

- "1. The learned AO has seriously erred in law and facts in making addition of Rs. 1274700 in the income of assessee as undisclosed income. Hon'ble CIT (Appeals) has seriously erred in rejecting the appeal of assessee and confirming the additions without considering the appeal submission and on wrong premise. The learned CIT (Appeals) erred in referring the copy of ITR of female family members of assessee as certain loose documents which contained incriminating transaction and also erred in stating that the appellant

divided these transactions in the name of family members during assessment proceedings.

2. *The learned AO has erred in not giving assessee an opportunity of being heard in respect of rejecting the retraction affidavit filed by assessee. Learned CIT (Appeals) confirmed the addition without considering the above ground.*
3. *The Learned AO has erred in rejecting the retraction affidavit on the ground that there is no misrepresentation by survey party and that there is considerable delay in filing of retraction statement. The learned AO has not considered all the contents of affidavit, related circumstances of case and has disregarded the fact that copy of statements of assessee were provided to him on 11/05/2017.*
4. *The calculation of undisclosed income of Rs. 1274700 is totally incorrect. Expenses incurred by female members for earning their income have been assumed as undisclosed income of assessee. Even expense incurred to earn his own income has been included in amount of alleged undisclosed income of Rs. 1274700. The learned CIT (Appeals) neither considered it nor opined on it.*
5. *The learned AO erred in considering the ITR filed by family members as incriminating material found during search and in making addition in income of assessee on the basis of ITR of female members.*
6. *The appellant craves leave to argue additional grounds of appeal at the time of hearing before Hon'ble ITAT.*

Grounds of ITA No. 1291/JP/2019 (A.Y. 2015-16)

1. *The learned AO has seriously erred in law and facts in making addition of Rs. 292867/- in the income of assessee as unexplained expenditure. The learned CIT(Appeals) has erred in confirming the additions made by AO without considering the facts of the case.*
2. *The learned AO has erred in applying provisions of Section 292C despite of the fact that bills of Rs. 292867/- had been issued in name of shop owned by his nephew Manoj Kumar Yadav and nephew had accepted the said bills by filing an affidavit in related proceedings. The learned CIT has erred in not considering the fact on record.*

3. *The learned AO has erred in stating that there were boundary expenses in the AY-2015-16 and that assessee failed to explain about it. The AO has also erred in stating that page no. 20-28 of Exhibit 6 were hand written papers containing transaction of construction of shop for Rs. 292867/-. The learned CIT (Appeals) has erred in not considering the mistakes of AO and confirming the additions in hand of assessee.*

The appellant crave leave to add, alter or amend any grounds of appeal raised above at the time of hearing.

2. The hearing of the appeals was concluded through video conference in view of the prevailing situation of Covid-19 Pandemic.

3. Firstly, we take ITA No. 1290/JP/2019 for the A.Y. 2014-15.

Briefly stated facts of the case are that the assessee is engaged in the activities of digging, tilling and leveling of agriculture farms and commission on sale of agriculture produce of other farmers & other sources being interest from bank. A search was conducted on 19/11/2016 in the case of Kedia & Yadav group to which the assessee belongs. According to the revenue, various assets/books of account and documents were found and seized as per annexure prepared during the course of search. The A.O. issued notice U/s 153A of the Income Tax Act, 1961 (in short, the Act) to the assessee. In compliance thereof, the assessee filed his return of income on 30/06/2017 for the year under consideration declaring total income of Rs. 2,31,580/-. Finally, the A.O. completed the assessment U/s 143(3) r.w.s. 153A of the Act vide order dated 10/12/2018 at a total income of Rs. 15,06,280/-.

4. Being aggrieved by the order of the A.O., the assessee carried the matter before the Id. CIT(A), who after considering both the parties, had dismissed the appeal filed by the assessee by upholding the order of the A.O. Against which, the assessee is in further appeal before the ITAT.

5. Grounds No. 1 to 5 of the appeal are interlinked and interrelated and against challenging the order of the Id. CIT(A) for upholding the order of the A.O. in making addition of Rs. 12,74,700/-, therefore, we thought it is fit to dispose off these grounds by passing a consolidated order.

6. The Id AR appearing on behalf of the assessee has reiterated the same arguments as were raised before the Id. CIT(A) and have also relied upon the written submissions filed before the Bench. The contents of the written submissions are reproduced below:

1. ITRs filed by family members has been wrongly considered as incriminating material: The ITRs filed by female members of the family of the assessee as well as his brother for AY- 2014-15 were found during the course of search (PB Page Nos. 24-49) and these have been made the base of making addition the income of assessee. It may be noted that these ITRs were already filed and were in possession of Income tax department before the date of search. Thus a document which is already in possession of income tax department cannot be regarded as incriminating material unearthed during search proceedings. Moreover, these ITRs were related to different members of the extended family of assessee and impounding the ITRs filed by those members is not a valid legal action.

Apart from these ITRs there is no other document found during the search which could indicate that the income declared by assessee or these female members was incorrect. Hence it is clear that there was no incriminating material qua this addition in income of assessee.

2. The addition in income is only on the basis of statements recorded under section 132(4) during search proceedings and without any incriminating document. The statements recorded under Section 132 (4) of the Act of the Act do not by themselves constitute incriminating material.

2.1 The learned AO has made addition of Rs. 1274700/- in income only on the basis of statements recorded under section 132(4) during search proceedings and there is no incriminating document to substantiate the finding of AO. The assessee has retracted from his search statements by filing an affidavit dated 19/06/2017 (PB Page Nos. 1-5).

Furthermore during assessment proceedings, to verify the truth of the retraction affidavit filed by assessee, the statements of assessee were recorded u/s 131. In those statements, the assessee reiterated the contents of retraction affidavit and stated that he had not surrendered any undisclosed income as alleged in statements recorded on 19/11/2016. However the learned AO neither considered it nor referred it in assessment order and proceeded to make addition solely on basis of statements dated 19.11.2016.

2.2 Excerpts of Reply to show cause notice during assessment proceedings:

"Explanation regarding Business income declared by Female Members of family:

Reference should be made to affidavit cum retraction dated 19/06/2017 filed by the assessee wherein he has clearly stated that Q.No. 43 was not asked from him. Rather he had been shown the ITRs of female

members and was asked whether the ITRs were correct, to which he replied that work of filing of ITR was done by his nepdhew Manoj and the ITR must be correct.

Female members of the family are engaged in dairy farming and earn income from sale of Milk and manure. Each female member owned 3-4 cows/buffaloes and sold milk to individuals, sweet shops and other dairies. The cows and buffalows were there in the courtyard when search was conducted at the premises of assessee but without mentioning this fact, the officials have proceeded to consider the income as undeclared income which is totally unjustified. In their ITRs female members have shown gross receipts from sale of milk and cow dung and have claimed expenses on account of cattlefeed, medical exp., labour etc and declared net profit u/s 44AD.

The assessee also submits that he belongs to Yadav community who are traditionally engaged in dairy farming and they do not consider it as a business and rather it is a part of their agriculture activities and thus he said that . Although as per Income Tax law income from dairy farming is income chargeable to tax and thus female family members have filed their return of income. Thus the income declared by female members in their ITR is genuine and there is no case of undisclosed income.

Explanation regarding his own business income

It is further stated that assessee claims that he has been misquoted while recording his answer to Q.No. 41 of his statements on 19/11/2016 and this could create misunderstanding. The question and its answer recorded are reproduced below:

प्रश्न- 4। क्या आप कोई व्यवसाय (business) करते हैं या पिछले सात साल में कभी कोई व्यवसाय किया है?
 उत्तर- जी नहीं, मैंने पिछले सात साल में कोई व्यवसाय नहीं किया है।

The assessee's submission was that he is not engaged in any other business except agriculture work. To his understanding, he is engaged in work relating to agriculture activities (as stated above) for other farmers and thus he is not engaged in business activities. Although for taxation purposes the income from such work is being categorized as business income and has been disclosed as such in the return of income filed by assessee. If required, the assessee is ready to get confirmations from farmers from whom he has received income."

We had requested to learned AO for certified copy of statement u/s 131 and other relevant documents vide letter dated 07/05/2019 which is still awaited.

Assessee is illiterate and does not understand the nitty gritty of taxation:

We would like to draw your attention towards the fact that assessee, in his statement recorded on 19/11/2016, stated that he is illiterate and that he cannot read the contents of affidavit (Answer to Q.No. 1). He has also stated that work of filing of ITR is done by his nephew Manoj Yadav (Answer to Q. No. 9). In answer to Q.No.31 & 32 he has stated that he has not shown transaction of sale of land to Kedia realestate and has not paid tax, while in fact the same was disclosed in his ITR but because he had claimed deduction under section 54B hence no tax was paid by him. (Relevant pages of statement recorded on 19.11.2016 are attached at PB Page Nos. 6 - 8).

These submissions of assessee shows that he does not understand the manner in which income is calculated and ITR is filed and what is taxable and what is not.

The assessee has rightly stated in his statements that female members does not earn more than 3-4 lakh from Dairy which is substantiated by gross receipts declared by each female members in their ITRs, but it seems to have been misinterpreted to be total receipts of all female members.

2.3 No corroborative evidence/ material brought on record by AO:

The learned AO has not brought on record any material or corroborative evidence to prove that assessee had any other source of income other than that declared by him and that assessee earned more than what he had declared in his return of income. The learned AO has not made any findings and has mechanically added the amount while she ought to have supported the addition by findings on the basis of seized material.

It is a settled principal of law that no addition can be made only on the basis of statements particularly when there is no material available with department to prove that the surrender made was correct. In the present case the department does not have any material on record to prove that surrender by assessee was correct.

The assessee has placed reliance on the following judgements in support of his submission:

- (i) Pullangode Rubber Produce Co. Ltd. vs State of Kerela [1973]19 ITR 18 (SC)
- (ii) CIT Vs. Bhanwar Lal Murwatiya [2008] 215 CTR 489 (RAJ.),
- (iii) CIT v/s Ashok Kumar Soni 291 ITR 172 (Raj.),

- (iv) Krishan Lal Shiv Chand Rai vs Commissioner Of Income-Tax 1973 88 ITR 293 P H-
- (v) Gajjam Chinna Yellappa Vs Income tax Officer [2015] 59 taxmann.com 69 (Andhra Pradesh and Telangana) Chitra Devi v/s ACIT (2002) 28 Tax-world 454 (ITAT JP)
- (vi) Shri Pawan Lashkary ITA No 808/JP/2011 dated 06.01.2012

3. In case no incriminating material is found, no addition or disallowance can be made in relation to that assessment year in exercise of powers under section 153A of the Act.

Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.

The assessment proceedings of the year under consideration was not pending as on the date of search and there is no incriminating document found, relating to the year under consideration, during the course of search therefore there cannot be any addition in the income of assessee. Thus the addition of Rs. 1274700/- made by learned AO need to be deleted.

We would like to draw your attention to under mentioned case wherein jurisdictional Rajasthan High Court and Jaipur ITAT and other High Courts have consistently expressed similar views and reiterated the above mentioned legal position:

- i. Jai Steel (India), Jodhpur v. ACIT (2013) 36 Taxman 523 (Raj)

- ii. Pr. Commissioner Of Income Tax-Central, Jaipur Vs Smt. Daksha Jain DB ITA No. 125/2017 (Raj)
 - iii. Commissioner of Income Tax (Central-III) v. Kabul Chawla (2016) 380 ITR 573 (Del)
 - iv. Pr.CIT, Delhi-2 Vs Best Infrastructure (India) Pvt Ltd. (and others) ITA Nos. 11 to 22 of 2017-01.08.2017 (Delhi)
 - v. Principal Commissioner of Income Tax Central-2, New Delhi v. Meeta Gutgutia 2017 (295) CTR 466 (Del).
 - vi. Commissioner of Income Tax v. Continental Warehousing Corporation (Nhava Sheva) Ltd. [2015] 58 taxmann.com 78 (Bom)
 - vii. Ratan Kumar Sharma vs. DCIT ITA 797& 798 /Jaipur/2014; Vikram Goyal vs. DCIT ITA 174/Jaipur/2017 ; Jadau Jewellers & Manufacturer PL Vs. ACIT (686/ Jaipur/2014); Prateek Kothari Vs. ACIT (312/Jaipur/2015); Basant Bansal Vs ACIT [2015]63 taxmann.com 199(Jaipur Trib)
4. Arbitrary and Illogical calculation of undisclosed income

Without prejudice to the illegality of addition made by learned AO, as submitted above, the calculation of undisclosed income is arbitrary and illogical and lacks any legal basis.

The chart prepared by Income tax official to calculate the undisclosed income is as follows:

नाम	कुल प्राप्तियां	धारा 44AD में घोषित Profit का प्रतिशत	कुल घोषित प्रॉफिट	प्राप्तियां- प्रॉफिट
जयसिंह यादव	391200	82.2 :	321580	69620
गोपालीदेवी	452080	47.92 :	216640	235440
प्रेम देवी	428020	50.18 :	214780	213240
सजना देवी	403010	50.94 :	205280	197730
संतोषदेवी	387980	51.64 :	200370	187610
ममता देवी	397830	53.90 :	214430	183400
मीनाक्षी देवी	395080	52.50 :	277420	187660
Total	2855200		1580500	1274700

The calculation has been done in respect of assessee and 6 female members of assessee's family.

It can be seen in above table that difference of gross receipts and declared profit has been treated as undisclosed income of assessee i.e the expenses incurred to earn gross receipts has been considered to be undisclosed income .

In the present case there is no denial to the fact that females are engaged in Dairy business and there is no objection on the profits being shown by them and that profit is accepted to be assessed in the hands of females only. It is only the expenses they have claimed which is considered to be undisclosed income of assessee.

This contention is highly illogical and is contradictory to the very basic principal that to earn any income one has to incur expenses. In the ITRs of females, they have claimed expenses on account of fodder, medicines and other general expenses necessary for rearing of cattles.

- 4.1 Once income is considered to be of some assessee, then the expenses claimed by that assessee cannot be considered as undisclosed income of a different assessee. Thus when the income declared by female members has been accepted to be assessed in their own hands then how can the expenses claimed by them could be added as undisclosed income of assessee.

As regard the assessee's own business expenses amounting to Rs. 69620/- being considered as undisclosed income, we are to state that the net profit declared by assessee has been assessed as business income while the expense incurred to earn that profit has been considered to be undisclosed income which is incorrect and without any legal or factual basis. The assessee is engaged in business of digging, tilling and levelling of farm

land and in turn he has to incur expenses on account of diesel, repairs etc which has been claimed as expenses for earning income.

4.2 It is also to be noted that the assessee and the female members have been declaring their business earnings since AY -2010-11 continuously (and up to AY 2017-18) but it is in this assessment year only that such an arbitrary addition on account of alleged undisclosed income has been made. In all other assessment years the income declared by assessee has been accepted and therefore there is no reason that arbitrary addition of Rs. 1274700/- can be made in income of assessee.

5. No additions made on the same ground in case of assessee's brother Sh. Gopal Lal Yadav

It is also to be noted that similar question regarding income of female members and alleged surrender of undisclosed income in that respect was done in the statements recorded u/s 132(4) in case of the assessee's brother Sh. Gopal Lal Yadav. Sh. Gopal Lal Yadav also retracted from the said surrender statement and submitted his reply in response to show cause notice during assessment proceedings (Copy of relevant portions of statements, retraction affidavit and reply of assessee are enclosed at PB Page No. 9 - 11).

It may be noted from the assessment order of Shri Gopal Lal Yadav for AY 2014-15 that the learned AO has accepted the reply of assessee and has not made any addition on this ground (Copy of assessment order is at PB Page No. 12-14). Thus while AO has accepted the submission in one case but has rejected the submission on same issue in the case of assessee which is not tenable.

Moreover looking to the approach of AO in assessment proceedings, the assessee filed affidavits of female members in appellate proceedings before learned CIT(A) wherein female members have stated that they

have been earning income from animal husbandry/ dairy and that the income declared in their ITRs is their own and is not related to any other person. The copy of Affidavits are attached at PB Page No. 15-20.

6. Furthermore the contention made in affidavits should be accepted unless rebutted. These affidavits have not been rebutted by lower authorities till date. It is settled law that in case where affidavit has been filed yet the contents thereof have not been rebutted by AO/authority, the facts mentioned therein have to be read as the facts binding upon the income tax authorities. Reliance is placed on the following cases:

Mehta Parikh & Co. 30 ITR 181(SC); ITO Vs Dr. Tejgopal Bhatnagar 20 TW 368 (JP); Paras Cotton Company Vs CIT (2003) 30 TW 168 (JD); CIT Vs Bhawani Oil Mills (P) Ltd 239 CTR 445/49 DTR 212 (Raj)

7. Finding of learned CIT(A) in his order confirming the addition made by AO

The learned CIT has mentioned that "at the appellant premises certain loose documents which contained incriminating transactions were found. When confronted he owned up all these transactions." While it may be noted no such loose papers were found which had incriminating transactions.

The learned CIT has further commented that "in the assessment proceedings the appellant divided these transactions in the name of family members by filing an affidavit" while it may be noted that no such submission has been made by assessee.

The learned CIT(A) has also stated that "the fact of earning of income in the name of various family members was never stated in the initial statement" while in fact the ITRs in name of various members was found which has been made the basis of addition.

It is clear that learned CIT(A) has confirmed the addition made by learned AO on the basis of wrong assumptions and without going into the facts of the case.

8. The copy of statement of assessee recorded under section 132(4) were not given to assessee in spite of repeated oral reminders to ADIT(Inv) together with letters dated 11/01/2017 & 21/03/2017 . It was on 11/05/2017, that the assessee received copy of his statements from Central Circle-3. The assessee then found that there is alleged surrender of income being recorded in his statement taken on 19.11.2016. Till the receipt of the copy of statement the assessee genuinely believed that he had not surrendered any income for taxation and that no incriminating material have been discovered in search, therefore he did not file any retraction statement. But on receipt of copy of his statements on 11/05/2017, he was astonished to note the surrender of income and after complete understanding of the contents of his statements dated 19.11.2016, he sworn in a Retraction Affidavit on 19/06/2017 wherein he retracted from the surrender of any undisclosed income for taxation.

After the filing of retraction affidavit the learned AO remained silent on the face of it and carried no enquiry thereon to verify the correctness thereof.

The assessee also referred in his retraction affidavit (para no. 7) that some of the questions asked from him and replies said to be made by him were completely identical to the questions and answers recorded in case of statements of his brother Gopal Lal Yadav, while the time of statements recorded was different and the persons recording statements were different in both cases. This fact concludes that the statements were not recorded properly. The assessee has also referred to various question numbering 34, 35, 36, 43 & 47 which have either not been asked at all or have been asked in different manner but the reply has been recorded as per the wish of the person recording the statement.

The assessee had also mentioned about mental harassment during recording of statements on 19.11.2016 in the retraction affidavit.

The contention of learned AO that the statements were recorded in presence of 2 witnesses is also of no relevance as the witnesses were only for sign purpose and they neither listened to what the assessee said during recording of statements nor did they read his statements before signing as witness. The assessee had submitted this fact in his retraction statement and had requested the AO that if required he may call for affidavits from witnesses but learned AO did not ask for any detail in this regard.

However looking to the approach of learned AO, the assessee obtained affidavits from the witnesses and submitted in appellate proceedings before learned CIT(A). Witnesses have also declared that they were sleeping for whole night and that they are not aware of search related activities during night. Copy of Affidavits of witnesses is at PB Page No. 21-22. Further affidavit of Manoj Yadav was also submitted before CIT(A) in support of fact that he did not read or narrate the contents of statements of Sh. Jai Singh Yadav taken on 19.11.2016. Copy of Affidavit enclosed at PB Page No. 23.

9. Moreover the learned AO has referred to the judgement of Hon'ble Rajasthan High Court, Jaipur in case of Shri Roshan Lal Sancheti, Bhilwara (Raj)[DB ITA No.47/2018 dated 30.10.2018], but the said case is not applicable here because:

the statements recorded under section 132(4) have not been confirmed in statements recorded under section 131. In fact in the statements recorded under section 131, the assessee reiterated the submissions made by him in his retraction affidavit dated 19/06/2017.

Moreover in the said case of '*Roshan Lal Sancheti*' the delay in retraction statement was almost 7 months, but in the present case there is not much delay. The time gap between the date of receipt of copy of search statements and the date of sworn in of retraction affidavit is just more than a month.

Thus the grounds of rejection of retraction affidavit filed by assessee are not correct and are based on wrong facts. Further the learned AO has not provided an opportunity to assessee before rejecting the retraction affidavit filed by assessee. No enquiry was made in this regard by learned AO during assessment proceedings.

We would also refer to CBDT Instruction F No. 286/2/2003-IT (Inv) dated 10/03/2003 regarding 'confession of additional income during the course of search and seizure and survey operation' wherein it has directed as under:

"Instances have come to the notice of the Board where assessees 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 assessees while filing returns of income. In these circumstances, on 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 Departments. Similarly, while recording statement during the course of search it seizures 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.

Further, in respect of pending assessment proceedings also, assessing officers should rely upon the evidences/materials gathered during the course of search/survey operations or thereafter while framing the relevant assessment orders".

It may be noted above that even CBDT in its own directions has stated that retraction affidavits are filed while filing return of income, then how can the assessee's retraction, filed well before filing of ITR, be considered to be late and rejected on this premise.

Further It is a well settled principal that the directions of CBDT are binding on authorities and thus in absence of any evidence/ incriminating material the statements do not serve any useful purpose & no addition can be made in the income of assessee.

The assessee pointed out many deficiencies in the statement recorded under section 132(4) in is retraction affidavit dated 19/06/2017 and looking to the fact that learned AO has kept silent and has not controverted any of the assertions of assessee, the statements recorded u/s 132(4) should be disregarded and any addition made on the basis of those statements should be deleted.

10. The learned CIT(A) has stated in his order that he has read the reply of assessee and gone through the documents and case laws submitted by assessee, but he has not passed reasoned order and in fact has stated wrong facts while confirming the addition made by learned AO. Therefore the order of CIT(A) should be set aside and demand should be deleted in full.
11. It is submitted that while making the addition in income, the learned AO has not invoked any provision of law. While determining the income, the learned AO has made addition of Rs. 1274700/- by stating as follows:

"Addition on account of undisclosed income as discussed above in Para -6"

It may be noted that the learned AO has not mentioned any section of Income Tax Act under which the addition in income has been made. Thus the addition made in income is illegal and void.

Without prejudice to above, otherwise also any addition in income on account of undisclosed income can be made only under section 68. But section 68 is invoked only if "any sum is found credited in the books of an assessee maintained for any previous year".

In the present case the addition has been made on the basis of assumptions and retracted statement and not on the basis of any sum found credited in books maintained by assessee.

ITRs of other persons cannot be regarded as books of assessee and thus the provisions of Section 68 can also not be invoked in the present case.

The assessee has forwarded a separate application for admission of this additional ground of appeal under Rule 26 of ITAT Rules 2017, which may please be approved. Looking to the above submissions we request you to please delete the addition of Rs. 1274700/- and oblige."

7. On the other hand, the Id DR has relied on the orders of the authorities below

8. We have heard the Id. Counsels of both the parties and have perused the material placed on record. We have also deliberated upon the decisions cited in the orders passed by the authorities below as well as cited before us and we have also gone through the orders passed by the revenue authorities. From the facts of the present case, we noticed that the addition of Rs. 12,74,700/- was made in the hands of the assessee by considering the same as 'undisclosed income'. The Id AR, although, forcibly argued before us that no incriminating material was found during the course of search, therefore, the entire proceedings initiated U/s 153A of the Act

against the assessee are liable to be quashed. In this respect, we noticed that during the course of search on 19/11/2016 in the case of Kedia & Yadav Group to which assessee belongs, the income tax return filed by the female members of the family of the assessee as well as his brother Shri Gopal Lal Yadav for the year under consideration were found during the course of search and the documents which were found and seized during the course of search have already been annexed by the assessee in his paper book at page No. 24 to 49. We have perused these documents and found that these documents are in the shape of income tax return filed by the female members of the family of the assessee and his brother Shri Gopal Lal Yadav and only these documents were made the basis for making addition in the income of the assessee. In our view, since these income tax returns or computations sheets were already in possession of income tax department before the date of search. Thus, when once the documents which are already 'in possession' of income tax department, then the same cannot be regarded as "incriminating material" unearth during the search proceedings. Even otherwise, these income tax returns which were seized during the search also do not relate to the assessee but relates to different members of the extended family of the assessee. The assessment proceedings of the year under consideration was not pending as on the date of search and therefore, in these circumstances, the completed assessment

can be interfered by the A.O., while making the assessment U/s 153A only on the basis of some incriminating material unearthed during the course of search, which were not discharged in the course of original assessment. Admittedly, apart from these income tax returns and computation sheets seized, there is no other document found during the search which could indicate that the income declared by the assessee or his family members were incorrect. From the record, we also noticed that the additions were made only on the basis of these documents as well as on the basis of statement of the assessee recorded U/s 132(4) of the Act during the search proceedings. The said statement of the assessee recorded U/s 132(4) of the Act was also retracted by the assessee later on by filing affidavit dated 19/06/2017. During the assessment proceedings, in order to verify the truth of retraction affidavit filed by the assessee, statement of assessee was recorded U/s 131 of the Act. In those statements, the assessee made categorical statement that the contents of retraction affidavit were correct and he had not surrendered any 'undisclosed income' as alleged in the statement recorded U/s 132(4) of the Act on 19/11/2016.

8.1 It is also an admitted fact that no corroborative evidence or material was brought on record by the A.O. to prove that the assessee had any other source of income other than that declared by him and that the assessee earned more than what he had declared in his return of income. The A.O.

had not recorded any finding and had mechanically added the amount while the A.O. ought to have supported the addition by recording findings on the basis of seized material. It is a settled law that no addition can be made only on the basis of statements particularly when there is no material available with the department to prove that the surrender made was correct. In the present case, the department has not placed on record any material to prove that the surrender made by the assessee was correct. In this respect, we rely on the following judicial pronouncements:

- i) *Pullangode Rubber Produce Co. Ltd. vs State of Kerela [1973]19 ITR 18 (SC)*
Wherein the Supreme Court has held that 'An admission is an extremely important piece of evidence but it cannot be said that it is conclusive. It is open to the person who made the admission to show that it is incorrect'.
- ii) *CIT Vs. Bhanwar Lal Murwatiya [2008] 215 CTR 489 (RAJ.)*,
The jurisdictional High Court has confirmed the view of tribunal that (a) A retracted statement of any person cannot be made the sole basis for addition because an admission is an extremely important piece of evidence. But it cannot be stated that it is conclusive. It is open to the person who made the admission to show that it is incorrect.
- iii) *CIT v/s Ashok Kumar Soni 291 ITR 172 (Raj.)*, *The jurisdictional Rajasthan High Court has observed that 'It is trite to say that admissions are relevant piece of evidence and are not conclusive proof of fact. An admission can always be explained once this position is accepted, the question remains of appreciating evidence which is on record, which includes the evidence in the form of attending circumstances and the statements by which the previous statement is sought to be explained.'*

- iv) Krishan Lal Shiv Chand Rai vs Commissioner Of Income-Tax 1973 88 ITR 293 P H- It is an established principle of law that a party is entitled to show and prove that the admission made by him previously is in fact not correct and true.
- v) Gajjam Chinna Yellappa Vs Income tax Officer [2015] 59 taxmann.com 69 (Andhra Pradesh and Telangana) wherein the Hon'ble high court held as under:

“10. If the statement is not retracted, the same can constitute the sole basis for the authorities to pass an order of assessment. However, if it is retracted by the person from whom it was recorded, totally different considerations altogether, ensue. The situation resembles the one, which arises on retraction from the statement recorded under section 164 of the Code of Criminal Procedure. The evidentiary value of a retracted statement becomes diluted and it loses the strength, to stand on its own. Once the statement is retracted, the assessing authority has to garner some support, to the statement for passing an order of assessment.

11. In I. T. T. A. No. 112 of 2003 (see CIT v. Naresh Kumar Agarwal [\[2014\] 369 ITR 171/\[2015\] 53 taxmann.com 306 \(AP\)](#)) this court dealt with the very aspect and held that a retracted statement cannot constitute the sole basis for fastening liability upon the assessee.

12. In the instant case, the appellants specifically pleaded that the statements were recorded from them by applying pressure, till midnight, and that they have been denied access outside the society. The Assessing Officer made an effort to depict that the withdrawal or retraction on the part of the appellants is not genuine. We do not hesitate to observe that an Assessing Officer does not have any power, right or jurisdiction to tell, much less to decide, upon the nature of withdrawal or retraction. His duty ends where the statement is recorded. If the statements are retracted, the fate thereof must be decided by law meaning thereby, a superior forum and not by the very authority, who is alleged to have exerted force.

13. It is not as if the retraction from a statement by an assessee would put an end to the procedure that ensued on account of survey or search. The Assessing Officer can very well support his findings on the basis of other material. If he did not have any other material, in a way,

it reflects upon the very perfunctory nature of the survey. We find that the appellate authority and the Tribunal did not apply the correct parameters, while adjudicating the appeals filed before them. On the undisputed facts of the case, there was absolutely no basis for the Assessing Officer to fasten the liability upon the appellants. Our conclusion find support from the Circular dated March 10, 2003, issued by the Central Board of Direct Taxes, which took exception to the initiation of the proceedings on the basis of retracted statements.”

- vi) *Chitra Devi v/s ACIT (2002) 28 Tax-world 454 (ITAT JP) No addition can be made in block assessment on the basis of statement recorded during the search unless it is relatable and connected with the material found during the search.*

- vii) *Shri Pawan Lashkary ITA No 808/JP/2011 dated 06.01.2012 -Hon'ble ITAT Jaipur Bench has held that income cannot be assessed merely on the basis of statement.*

In view of the above, we are of the view that completed assessments can be interfered with by the A.O. while making the assessment U/s 153A of the Act only on the basis of some 'incriminating material' unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment. As admittedly, the assessment proceedings of the year under consideration was not pending as on the date of search and there was no 'incriminating document' found, relating to the year under consideration, during the course of search. Therefore, there cannot be any addition in the income of the assessee. The only document which the department is considering as incriminating material are only income tax returns and computation sheets

belonging to the female members of the family of the assessee as well as his brother Shri Gopal Lal Yadav which admittedly were already in possession of the department, therefore, these documents itself cannot be termed as "incriminating material". On this proposition, we rely on the following judicial pronouncements:

- i. Jai Steel (India), Jodhpur v. ACIT (2013) 36 Taxman 523 (Raj) which had held that the assessment in respect of each of the six assessment years, preceding the year of search "is a separate and distinct assessment." It was further held in the said decision that "If in relation to any assessment year, no incriminating material is found, no addition or disallowance can be made in relation to that assessment year in exercise of powers under section 153A of the Act and the earlier assessment shall have to be reiterated."
- ii. Pr. Commissioner Of Income Tax-Central, Jaipur Vs Smt. Daksha Jain DB ITA No. 125/2017 (Raj)
- iii. Commissioner of Income Tax (Central-III) v. Kabul Chawla (2016) 380 ITR 573 (Del) wherein whole gamut of assuming jurisdiction and assessment under section 153A has been discussed.
- iv. Pr.CIT, Delhi-2 Vs Best Infrastructure (India) Pvt Ltd. (and others) ITA Nos. 11 to 22 of 2017-01.08.2017 (Delhi)
- v. Principal Commissioner of Income Tax Central-2, New Delhi v. Meeta Gutgutia 2017 (295) CTR 466 (Del).
- vi. Commissioner of Income Tax v. Continental Warehousing Corporation (Nhava Sheva) Ltd. [2015] 58 taxmann.com 78 (Bom)
- vii. Ratan Kumar Sharma vs. DCIT ITA 797& 798 /Jaipur/2014; Vikram Goyal vs. DCIT ITA 174/Jaipur/2017; Jadau Jewellers & Manufacturer PL Vs. ACIT (686/ Jaipur/2014); Prateek Kothari Vs. ACIT (312/Jaipur/2015); Basant Bansal Vs ACIT [2015]63 taxmann.com 199(Jaipur Trib)

9. Apart from these, another glaring fact has also been brought before us, which shows that no addition was made on the same grounds in the case of assessee's brother Shri Gopal Lal Yadav. We have also noticed that the similar question regarding income of female members and alleged surrender of undisclosed income in that respect was done in the statements recorded U/s 132(4) of the Act in the case of assessee's brother Shri Gopal Lal Yadav and the said Shri Gopal Lal Yadav had also retracted from the said surrender statement and submitted his reply in response to show cause notice during assessment proceedings. In assessment order of said Shri Gopal Lal Yadav for the year under consideration, the A.O. had accepted the reply of the assessee and had not made any additions on this ground. The copy of order of assessment passed in the case of Shri Gopal Lal Yadav in the similar set of facts is also annexed in the paper book at page No. 12 to 14 which also goes to prove that the A.O. cannot be allowed to adopt the method of pick and choose as the A.O. had accepted the submissions in the case of brother of assessee in the same set of facts but has rejected the submissions on the same issue in the case of assessee which in our view, is not tenable. In view of the above facts and circumstances, we are of the view that since the documents found and seized during the course of search in the shape of income tax returns and computation sheets belonging to the female family members of the assessee as well as brother of the assessee

which was already in possession of the income tax department, cannot be termed as 'incriminating document' and no corroborative evidence/material was brought on record by the A.O. as discussed in detail above. Accordingly, the addition made by the A.O. and confirmed by the Id CIT(A) is hereby deleted.

10. Since, we have deleted the addition, therefore, there is no need to adjudicate the other grounds taken in this appeal.

11. In the result, this appeal of the assessee is allowed.

12. Now we take ITA No. 1291/JP/2019 for the A.Y. 2015-16. Grounds No. 1 and 2 of the appeal reads as under:

"1. The learned A.O. has seriously erred in law and facts in making addition of Rs. 292867/- in the income of assessee as unexplained expenditure. The learned CIT(Appeals) has erred in confirming the additions made by the A.O. without considering the facts of the case.

2. The learned A.O. has erred in applying provisions of Section 292C despite of the fact that bills of Rs. 292867/- had been issued in name of shop owned by his nephew Manoj Kumar Yadav and nephew had accepted the said bills by filing an affidavit in related proceedings. The learned CIT has erred in not considering the fact on record."

13. Grounds No. 1 and 2 of the appeal raised by the assessee relate to challenging the order of the Id. CIT(A) in confirming the addition of Rs. 2,92,867/- as unexplained expenditure. Both these grounds of appeal are

interlinked and interrelated, therefore, the same are being disposed of by passing a consolidated order.

14. We have heard the rival contentions and found from the record that in this appeal, the A.O. has made addition of Rs. 2,92,867/- on the basis of document seized during the course of search. The said document has already been placed on record in the paper book at page 5 to 13 as exhibit 6. From the said papers, it is clearly seen that these are bills and challans of TMT Bars issued in the name of 'Mehta Kirana Store' with name of Gopal Lal Yadav also written on it. The said document speaks volumes in itself as it clearly shows that these documents do not relate to the assessee. In this respect, the assessee had also given specific reply wherein it was pleaded that the said bill relates to 'Mehta Kirana & General Store' which is owned by his nephew Manoj Kumar Yadav and do not relate to the assessee and even the name of the assessee is no where mentioned on the said bill. It is also important to note that the similar show cause notice was issued in the case of his brother Shri Gopal Lal Yadav but no addition was made on the same ground in the case of assessee's brother Gopal Lal Yadav as A.O. had accepted the affidavit of Manoj Yadav and hence no addition was made in the case of Gopal yadav. The assessee had also furnished an affidavit of Shri Manoj Kumar Yadav which is at page No. 1 and also copy of reply of Gopal Lal Yadav which is at page No. 2 to 4 of the paper book, wherein the

said Manoj Kumar Yadav had clearly accepted that the said bill belongs to 'Mehta Kirana & General Store' which belongs to him but without going into the said details, the A.O. had made addition in the case of assessee by relying upon provisions of Section 292C of the Act. It is settled law that the presumption as envisaged in Section 292C of the Act is limited to the correctness of documents found at the time of search or survey but that presumption has not been extended by statute to presume an amount on basis thereof to be income of assessee. In the present case, the document clearly exhibits the name in which it was issued, the transaction written on it is also clear and there is no corroborative evidence to suggest that this document is part of any undisclosed activity of the assessee. The assessee has not denied about the correctness of documents but at the same time he explained that the document was related to his nephew Manoj Kumar Yadav. Further in related assessment proceeding of Gopal Lal Yadav, an affidavit obtained from Manoj Kumar Yadav was submitted wherein Manoj Kumar Yadav had owned the said transactions of 2,92,867/- as the turnover of his shop 'M/s Mehta Kirana & General Store'. Thus, it was clear before AO that the documents did not belong to the assessee but the A.O. still proceeded to make the addition in income, which is in our view, was not sustainable. On this proposition, we rely on the following judicial pronouncements:

- a. *P. R. Metrani v. CIT [2006] 287 ITR 209/157 Taxman 325 (SC)*

In this judgment, dealing with the provision under Section 132(4A) of the Act, it was held by the Supreme Court:-

"A presumption is an inference of fact drawn from other known or proved facts. It is a rule of law under which courts are authorized to draw a particular inference from a particular fact. It is of three types, (i) "may presume", (ii) "shall presume" and (iii) "conclusive proof". "May presume" leaves it to the discretion of the Court to make the presumption according to the circumstances of the case. "Shall presume" leaves no option with the Court not to make the presumption. The Court is bound to take the fact as proved until evidence is given to disprove it. In this sense such presumption is also rebuttable. "Conclusive proof" gives an artificial probative effect by the law to certain facts. No evidence is allowed to be produced with a view to combating that effect. In this sense, this is irrebuttable presumption.

The words in sub-section (4) are "may be presumed". The presumption under sub-section (4A) therefore, is a rebuttable presumption. The finding recorded by the High Court in the impugned judgment that the presumption under sub-section (4A) is a irrebuttable presumption in so far as it relates to the passing of an order under sub-section (5) of Section 132 and rebuttable presumption for the purpose of framing a regular assessment is not correct. There is nothing either in Section 132 or any other provisions of the Act which could warrant such an inference or finding."

- b.** *Principal Commissioner of Income-tax, Central-1, Kol. Vs. Ajanta Footcare (India) (P.) Ltd [2017] 84 taxmann.com 109 (Calcutta)*
Whether since both appellate authorities had examined said document and found that same could not be connected with assessee's transaction, findings of appellate authorities could not be held to be perverse - Held, yes
- c.** *Assistant Commissioner of Income-tax Vs Vatika Greenfield (P.) Ltd [2009] 121 TTJ 208 (Delhi) ITAT Delhi H Bench*

Held that Presumption as envisaged in section 292C is limited to correctness of documents found at time of search or survey but that presumption has

not been extended by statute to presume an amount on basis thereof to be income of assessee

d. *Nirmal Fashions Pvt. Ltd. Vs Deputy Commissioner of Income-tax, Central Circle-I, Kolkata*

Whether presumption under section 292C is a rebuttable presumption and all facts are to be considered before drawing an inference of undisclosed income on basis of documents, etc., found in possession or control of any person in course of search under section 132 - Held, yes

In view of the above facts and circumstances, we are of the view that AO had not brought on record any material or evidence to establish that there had been any construction activity by assessee and that the document seized are in any related to that activity. Accordingly, the addition made by the A.O. and confirmed by the Id CIT(A) is hereby deleted.

15. Ground No. 3 of the appeal reads as under:

“3. The learned A.O. has erred in stating that there were boundary expenses in the AY 2015-16 and the assessee failed to explain about it. The A.O. has also erred in stating that page No. 20-28 of Exhibit-6 were hand written papers containing transaction of construction of shop for Rs. 292867/-. The learned CIT(Appeals) has erred in not considering the mistakes of AO and confirming the additions in hand of assessee.”

16. This ground of the appeal raised by the assessee relates to challenging the order of the lower authorities in making additions by stating that there were boundary expenses in the year under consideration and the assessee has failed to explain about it.

17. We have heard the rival contentions of both the parties and perused the material available on record. From the record, we noticed that in the order of the assessment, the A.O. had referred the pages 20-28 of Exhibit NO. 6 as hand written paper containing transactions of construction of shop for Rs. 2,92,867/-. We noticed that these pages are not simple hand written pages, but these are printed bills issued by 'M/s Mohit Steels' in name of 'Mehta Kirana Store'. These bills are in respect of TMT Bars sold to 'Mehta Kirana Store' who has purchased it for reselling. There is no detail of construction of any kind and even no other documents have been found during search which could indicate about any construction activities being carried out by the assessee in the year under consideration. Therefore, in these circumstances, the AO could not have concluded that the said bills were in relation to construction of shop. In para 6.1 of the order of assessment, although, the AO has tried to relate it to the documents relating to boundary wall expenses but we noted that among all the seized documents, there is only one document at Page no. 1 of Exhibit No. 7 which is relating to construction of boundary wall at Village Bhikhawas but these expenses relate to AY 2017-18. Therefore, it is clear that these boundary wall expenses are not related in any way in respect of any construction in AY 2015-16 i.e. year under consideration. Therefore, we are of the considered view that the A.O. had made additions by misreading or

misinterpreting the documents placed on record and therefore, these additions made by the A.O. and confirmed by the Id CIT(A) are not sustainable in the eyes of the. Hence, we direct the A.O. to delete the same.

18. In the result, both these appeals of the assessee are allowed.

Order pronounced in the open court on 21st October, 2020.

Sd/-
(विक्रम सिंह यादव)
(VIKRAM SINGH YADAV)
लेखा सदस्य / Accountant Member

Sd/-
(संदीप गोसाईं)
(SANDEEP GOSAIN)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur
दिनांक / Dated:- 21/10/2020

*Ranjan

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

1. अपीलार्थी / The Appellant- Shri Jaisingh Yadav, Jaipur.
2. प्रत्यर्थी / The Respondent- The A.C.I.T., Central Circle-3, Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 1290 & 1291/JP/2019)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar