

आयकर अपीलीय अधिकरण, चण्डीगढ़ न्यायपीठ "ए", चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH
BENCH 'A' CHANDIGARH

BEFORE: SMT. DIVA SINGH, JUDICIAL MEMBER &
SHRI VIKRAM SINGH YADAV, ACCOUNTANT MEMBER

आयकर अपील सं./ ITA No. 1616/CHD/2019
[Assessment Year 2011-12]

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| M/s Atop Fasteners Pvt. Ltd., Plot No. 181, Industrial Area-II, Chandigarh. | बनाम VS | The DCIT, Circle 1(1), Chandigarh. |
| स्थायी लेखा सं./PAN /TAN No: AACCA4741P | | |
| अपीलार्थी/Appellant | | प्रत्यर्थी/Respondent |

निर्धारिती की ओर से/Assessee by : Shri Parikshit Aggarwal, CA
राजस्व की ओर से/ Revenue by : Shri Sandeep Dahiya, CIT

तारीख/Date of Hearing : 12.01.2022
उद्घोषणा की तारीख/Date of Pronouncement : 09.03.2022

VIRTUAL HEARING

आदेश/ORDER

PER DIVA SINGH

The present appeal has been filed by the assessee wherein the correctness of the order dated 07.10.2019 of CIT(A)-1 Chandigarh pertaining to 2011-12 assessment year is assailed on the following grounds

1. That on the facts, circumstances and legal position of the case, the Worthy CIT(A) in Appeal No. 744/2013-14 dated 07.10.2019 has erred in passing that order in contravention of the provisions of Section 250(6) of the Income Tax Act, 1961.
2. That on the facts, circumstances and legal position of the case, the Worthy CIT(A) has erred in confirming the action of Ld. AO wherein he made addition of Rs. 2,00,00,000/- on account of recovery of cash from debtors by merely

relying on the statement during survey action and totally ignoring the retraction and submissions filed.

3. That on the facts, circumstances and legal position of the case, the Worthy CIT(A) has erred in confirming the action of Ld. AO wherein he made addition of Rs. 2,40,00,000/- on account of alleged unrecorded excess stock by merely relying on the statement during survey action and ignoring the retraction & submissions filed.

4. That on the facts, circumstances and legal position of the case, the Worthy CIT(A) has erred in confirming the action of Ld. AO wherein he made addition of Rs. 35,70,000/- on account of alleged unrecorded wages and salaries by merely relying on the statement during survey action and ignoring the retraction & submissions filed.

5. 5. That on the facts, circumstances and legal position of the case, the Worthy CIT(A) has erred in confirming the action of Ld. AO wherein he made addition of Rs. 24,30,000/- on account of alleged unrecorded expenses comprising of cutting oil and diesel oil by merely relying on the statement during survey action and ignoring the retraction & submissions filed.

6. That the appellant craves leave for any addition, deletion or amendment in the grounds of appeal on or before the disposal of the same

2. The relevant facts of the case are that the assessee who is stated to be in the business of manufacturing of automobile parts, tractor parts and spring washers was subjected to survey u/s 133A at its business premises on 21.09.2010. During the course of survey proceedings at the business premises of the assessee at plot No Plot No. 181, Indl. Area, Phase-II, Chandigarh and C-162, Phase 8B, Industrial Area, Mohali (Punjab) certain discrepancies were noticed and confronted to the assessee. As a result thereof, the assessee's C.M.D. surrendered Rs. 5 Cr under the following heads :

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| a. | Cash recovery from Sundry Debtors | Rs. 2.00 Cr. |
| b. | Expenses incurred out of undisclosed sources | Rs. 0.60 Cr. |
| c. | Excess in stock as per physical verification | Rs. 2.40 Cr. |

3. However, at the time of filing of the return filed on 30.09.2011, the assessee did not honour the surrender made. The Assessing Officer, accordingly, confronted this lapse to the assessee. The assessee relying on detailed objections filed submitted that the surrender was made incorrectly on mistaken facts and evidences confronted at the time of survey. The AO recording these objections in the assessment order proceeded to make the additions as per the surrender letter. Recording the objections refuting the allegations of cash recovered from sundry debtors in para 2.1 page 2.4; excess stock found as per physical verification, in para 2.2 pages 4-9 of his order; expenses incurred from undisclosed sources in para 2.3 pages 9-13 ultimately rejected the claim relying on the statements of the workers Shri Narendra Singh and Shri Sunil Kumar and most importantly the "voluntary" surrender made by Mr. Satwant Singh Harish the CMD at the time of survey. The explanation was treated as on afterthought. Accordingly he made the addition of the said amount to the returned income of the assessee.

4. The assessee carried this issue in appeal before the First Appellate Authority who considering these submissions

apart from some further supporting arguments on facts were more or less a repetition of the original submissions made before the AO. Considering these the CIT(A) rejected the assessee's explanations and the additions made by the AO were confirmed. Aggrieved by this, the assessee is in appeal before the ITAT.

5. The ld. AR referring to the fact that the assessee was subjected to the survey u/s 133A on 21.09.2010 invited specific attention to para 1.1 of assessment order to highlight that the fact that the assessee fully participated in the assessment proceedings before the AO. Relying on the said para, it was his submission that all the relevant details and facts in the replies made to the queries raised along with supporting documents were made available to the AO at the first instance. Thus, it was his submission that the surrender initially made in good faith believing that facts as confronted were correct was retracted when the assessee examined the complete and correct facts always available on record at the time of the Survey itself which were not properly confronted by the survey team to the Director. Attention was invited to paper book pages 396-399.

6. The record of the survey team it was submitted was made available to the assessee vide this letter dated

28/05/2011. On examining the alleged discrepancies leading to the surrender, it was submitted, it was noticed that in fact the surrender was made on incorrect facts. The detailed shortcomings in the calculations of the quantities and their values seen to be adhoc estimates with many mistakes in identification in quality and value were noticed and after getting the facts confirmed were pointed out. Attention was invited to the respective orders of the authorities below and the Paper Book pages 40-42 and 43-50 in respect of debtors Reconciliation and multiple mistakes on facts and law.

7. Reliance was also placed on the pages 51 to 56 demonstrating that surrender on account of stock in hand was also based on mistaken belief of facts and law. Detailed calculation challenging valuation adopted for finished stock at pages 57 to 61 of the pages made available both to the A.O. and the CIT(A) and now filed before us was referred to.

8. Similarly, referring to pages 62-70 demonstrating incorrect facts which led to "extraction of surrender" for diesel and cutting oil and allegation of expenses of Salaries and Wages read with pages 71-75 and 76-82 of the Paper Book, the arguments of mistaken belief on facts and law and incorrect facts confronted by the Survey team were relied upon.

9. It was vehemently reiterated that only on receiving the calculation sheets shown to him at the time of survey which were subsequently on request made available that these many mistakes were noticed and hence surrender made was retracted.

10. The assessing officer and the Ld.CIT(A) it was argued have just relied on the statement of surrender and have not shown any of the mistakes pointed out to be incorrect. For ready reference, the specific para of the assessment order relied upon demonstrating that full participation in the assessment proceedings as noticed by the A.O. himself, which was relied upon before the CIT(A) also was highlighted so as to argue that it would show the level of meticulous participation of the assessee before AO. The relevant extract from the assessment order heavily relied upon is reproduced hereunder:

“1.1 Sh. Rajeev Singhi, CA, Counsel of the assessee attended the assessment proceedings from time to time as per noting sheet entries with whom the case was discussed. The desired details in this regard were called for and are placed on record. Books of a/c were produced and were test checked. The Assessee is in the business of manufacturing of Automobile Parts, Tractor Parts and Spring washers.”

11. Inviting further attention to the assessment order, it was submitted that the reasons for not adhering to the

surrender made on each of these counts were elaborately explained and spelled out in factual details before the A.O. and have largely been extracted in the order by him. These have not been shown to be incorrect. The arguments in respect of each of the addition made, it was submitted, remain more or less identical before the CIT(A). The said authority also did not point out to any mistake in the submissions and sustained the addition relying on the letter of surrender made on mistakes.

12. Though placing reliance thereon for the sake of completeness, he submitted that he would sum up the arguments on facts ground-wise. The facts for challenging the addition in ground No. 2, it was submitted are extracted in para 2.1 page 2 of the assessment order. These also explained the reason for retraction. The submissions dated 10.12.2013 in response to questionnaire etc. dated 27.08.2013 is extracted. Carrying us through the said reply, it was submitted that submissions qua the alleged excess stock found in replies dated 26.12.2013 and 30.12.2013 extracted in para 2.2 at pages 4 to 9 of the assessment order are being heavily relied upon.

12.1 The submissions with respect to Ground No. 3 in support of the retraction as advanced before the A.O. it was

submitted has been reproduced in pages 8 onward of the assessment order. The A.O. has extracted the reply dated 30.12.2013.

12.2 The remaining additions constituting of alleged expenses incurred out of undisclosed sources agitated vide Ground No. 5 it was submitted are extracted in para 2.3 (page 9 to 12) of the assessment order.

12.3 For addition challenged on account of alleged unrecorded wages and salaries agitated vide Ground No. 4 attention was invited to submissions recorded at pages 12 to 13 of the assessment order.

13. Carrying the Bench through these detailed submissions, it was argued that these have been rejected by the AO without controverting any of the shortcomings pointed out. The detailed explanation based on the evidences has been discarded as an *elaborate after thought*. Reliance by the AO was blindly placed upon the *surrender of the CMD Mr. Satwant Singh Harish* which it has been elaborately explained before the CIT(A) to be on multiple mistaken belief on facts and law. These submissions on facts and evidences are not controverted.

14. The Ld. AR carrying the Bench through his statement/surrender recorded at page 83 – 97 of paper book drew specific attention to Question no. 5 at page 85 wherein said Director in response to the question raised at the outset has stated that he is just returning from official tour of Chennai to Chandigarh/Mohali after four days. Referring to this undisputed fact on record, it was argued that the possible confusion and worry on account of survey action of the department can be well understood and it is this frame of mind of a confusion occurring in the Director returning from work travel arriving some time in the late hours when whatever information is conveyed by the Survey team is taken to be true facts. The department's repeated Guidelines available in the form of Circulars, Notification, repeatedly highlighting advising and emphasizing that during the survey etc. surrender should not be extracted from the assessee's and instead efforts should be made by the Survey Team to discover facts and evidences, it was submitted, has been given a complete go-by. The Question No. 6 put to the Director @ page 86 of the Paper Book would show that Company Accounts were known to company Accountant Shri Kamal Mehta. It was argued that a lot of irrelevant questions were asked and abruptly in Question 17 and 19 where the Director responds, "...it is possible may not be

entered.....ESI, PF duly paid”; “may be verified from record” leading abruptly to assertions made in Q.21, Q. 22, Q. 23 where the Director says “clerical mistakes”. Relying on this surrender, the Tax authorities choosing to ignore the detailed submissions based on evidences, which were made available and were relied upon by the department itself repeatedly shied from the responsibility to address the shortcomings and instead chose to blindly rely on the so called voluntary surrender. Reading from the record, it was argued that the evidences to support the incorrect surrender have been repeatedly discarded without rebutting them to be unreliable. The detailed calculations, mistakes, inconsistencies, rough estimates and arbitrary conclusions which formed the basis of the surrender has repeatedly been left unaddressed by the Revenue.

15. The *statement of Mr. Narendera Singh (Paper Book page no. 106-107)* the packing supervisor is ignored and blind reliance is placed on it because he had signed the documents. The said person, it was submitted, had no knowledge apart from his own area of expertise i.e. packing and hence, he was in no way a competent person to comment upon the quality, quantity or value of the stock.

16. *Similarly, statement of Mr. Sunil Kumar* the junior most Accountant aged about 24 years has also been relied upon

blindly (Paper Book page 98-100). The fact that he himself accepts that he was handling only recording of purchases etc. in journals and thus cannot be expected to be conversant with the level of credibility given to him it was submitted was completely ignored. Specific attention to answers in response to Q.No. 1, 2, 4, 6 & 7 was invited to substantiate these facts where he clearly records, "*I cannot verify it from my books of accounts as this is not available in my computer*".

17. Carrying us through the submissions of these two employees of the assessee on whom reliance has been placed by the department it was pointed out that the Accountant was drawing a meager salary of Rs. 5,000/- which would show his competence and at that relevant point of time. It was argued that even a domestic worker was drawing more salary than him. Thus his capability and core strength on his subject, it was argued can be well understood, he was just employed as a new person about a year and a half ago. The survey team choosing to rely on the statement of these two people who were neither qualified to comment on the issues nor aware of facts and the Director who had just returned from Chennai after an absence of 4 days not conversant with the day to day running of the business, hence completely ignorant of the alleged shortcomings

noticed by the Survey Team having no access to legal help or any expert advice blindly accepted and trusted the correctness of the Survey team's version of facts. However, once it was seen with the help of responsible staff and accountants, it was evident that facts were wrongly presented to the Director the surrender in these circumstances, it was argued cannot be permitted to be given a greater precedence over and above the irrefutable evidences of calculation mistakes, arbitrary estimates and mis-appreciation of facts etc. The onus it was submitted was on the Revenue to show that still surrender was to be honored. The AO, it was submitted, failed to rebut these evidences and the submissions thereon at the assessment stage and again at the stage of Remand by the CIT(A).

18. The issue, it was submitted, was carried in appeal before the First Appellate Authority before whom the assessee again repeated the facts as argued before the AO. It was submitted, that it is an undisputed fact that the assessee's books were incomplete at the time of survey. It is further a fact that no defects in the books of account during the assessment proceedings had been pointed out by the AO. The department it was submitted is merely repeating and supporting its case based on the surrender made admittedly

on incorrect facts. Attention was invited to the fact argued and recorded in the impugned order that the assessee mainly deals with large companies like Hero Honda (Now Hero Moto Corp.), Honda Motor Cycles and Scooters (P) Ltd. International Tractors. Swaraj Mazda, V.E. Commercials, Premier Indo Plast (P) Ltd. Swaraj Engines, Mahindra and Mahindra Ltd. etc. It has been argued that there is long list of such reputed customers like this. The sales made to these established companies, it was submitted, has always been completely through cheques. The assessee deals in excisable commodities. The record is available and has been seen by the AO. The books of account have been accepted. These submission on facts made before the AO has been repeated before the CIT(A) also. It has been argued that there cannot be any question of sales without bills. Referring to the respective orders, it was argued that no such instance of any variation has been pointed out either by the survey team or by the A.O. or the CIT(A). The assessee's accounts for the year ending 31.03.2010 it was submitted were audited. It was re-iterated that no defect has been pointed out, therein. These have been examined by the A.O. at the assessment stage or thereafter. The surrender, it was submitted, has repeatedly been shown to have been made on account of mistaken facts and circumstances where the assessee blindly

believed the department's version that there were mistakes. It was argued that infact there was no mistake. However, this fact, it was submitted was realized later on when the assessee sat down to examine the basis of the survey team's case alongwith all the records including the bills raised and payments made etc. Relying on the written submissions extracted in the impugned order itself, reading again from the assessment order page 3 which it was submitted which had been repeated before the CIT(A) also, it was highlighted that the assessee has argued that *it was also realized that if the surrender was accepted, it will result in falsification of books of accounts of the assessee. The assessee realized that in case the surrender is not retracted then the Sundry Debtors amount will have to brought down to Rs.4,71,18,000/- as on 31.03.2010 by falsely issuing cash receipts from some of the debtors. The assessee noticed that it was not possible to do so as none of the debtors of the assessee ever pay assessee in cash.* No violation has been pointed either by the Survey team or by the tax authorities till date. It was submitted that it has been argued before the tax authorities that the assessee has all along followed the policy of never making or receiving cash payments as it is not permitted under Income Tax Act. It was submitted that the assessee has repeatedly argued before the tax authorities that in case the books of

account of the assessee are properly analyzed it can be found that none of the debtors have ever made any cash payment to the assessee. The tax authorities have never refuted this fact.

19. It was submitted, that the assessee has given its detailed submissions repeatedly on record and till date the Department has not pointed out what was the exact difference in the books of account and balance sheet and no list of debtor was prepared or referred to either by the A.O. or the CIT(A) where this difference can be said to have been found out. The assessee, it was submitted, had obtained copies of the documents taken by the search officials sometime in the end of May, 2011 and no such list was made available or provided to the assessee or referred to by the Revenue till date despite the overwhelming evidences on record to support the claim that on each of the counts the surrender was incorrect and retraction was justified. No detailed list of debtors in which difference in amount as per balance sheet as on 31.03.2010 and books of account for the year ending March 31, 2010 has been referred to by either the A.O. or the CIT(A). Mere surrender is relied upon. The assessee, it was argued, has carried a detailed exercise of reconciling each and every debtor. Reconciliation statement

is enclosed. He argues that there are some differences but these differences, it was submitted, are what we would find in any normal business. These submissions being advanced, it was stated have been recorded in the respective orders and are not fresh arguments. Referring to the record, it was submitted that the assessee repeated his argument that differences many a times are on account of various normal routine nature e.g. the assessee sent the material in the last week of March 2010 but the same was received by the party after 31st March, 2010. Thus, the assessee debited the amount before 31.03.2010 and the debtor credited assessee's a/c after 31.03.2010. Similarly in some of the cases the assessee dispatched the cheque on or before 31.03.2010 but the company received the same after 31.03.2010. In some of the cases the debtor/ customer deducted some amount on account of defect in material or inferior quality or even rejected the material but the assessee company has not accepted the claim of the debtor. It was submitted that there are instances where a debtor has two or three different units. The payment received from one unit was credited to the other unit of the same company. These differences get reconciled/ settled after the necessary entries are passed in subsequent years at both ends but these type of differences are normal routine events and their existence, it was

submitted, does not falsify the balance sheet or the books of account. Hence, they cannot be the basis for the surrender. These kinds of differences it was submitted do not reduce the amount from Sundry Debtors.

20. Reading from the submission extracted in the impugned order, it was submitted, that the assessee has carried detailed exercise and has reconciled all the debtors. The assessee in order to cross check and verify whether the surrender made was correct on facts or not could only satisfy himself after cross checking the facts from the debtors. Having satisfied himself on the correct factual position. Reconciliation statements prepared were made available to the tax authorities. These have been prepared after follow up from the parties about the State of affairs and all these details/Reconciliation have been placed on record before the Revenue to justify the correctness of assessee's claim. None of these have been rebutted at any stage by the department. It was submitted that a reading of the written submissions extracted in the orders would show that the assessee has argued that the books correctly reflect the position of the assessee's sundry debtors as on 31 03.2010 and consequently the assessee does not want to falsify his books of account by way of surrender of Rs.2.00

crores. It has been repeatedly pleaded that accepting it as a difference in terms of the surrender would lead to many practical difficulties as fictitious payments will have to be created and adjusted etc. The surrender made on incorrect facts, it was submitted, could not be honoured because of these many practical difficulties. The assessee it was submitted, had enclosed before the CIT(A) statement of account as on 31.03.2010 received from debtors along with copy of account of each debtor appearing in assessee's books of account and reconciliation statement explaining the nature of difference and reasons thereof. These are available at Paper Book pages 282 to 299 also. The mistakes inaccuracies as per the department's Survey team's version of best without prejudice to the main arguments, it was submitted, also show that they are also full of many mistakes. Paper Book page 404 and 405 was referred to.

21. Maintaining the stand of mistaken facts which argument on facts would address ground No. 3 attention again was invited to the assessment order and the impugned order.

22. Inviting attention to page 4 of the assessment order, it was submitted, that the assessee addressing the wide range of auto components manufactured ranging in size from 4mm

to any size/thickness and diameter weighing from 1 gm to 50 gm it was submitted that all these were lumped together by the Survey team and weighed arbitrarily, values applied again arbitrarily based on the estimated weight without identifying the individual component was done. Attention was invited to the submission before the A.O. and the Ld.CIT(A) Sl. No 13 Copies of stock statement provided by the department to the appellant (Chandigarh Unit) Paper book page 108-117) Sl.No. 14 Copy of detailed calculation of overvaluation adopted by the department in calculating finished stock (Chandigarh Unit) Paper Book page 118-123; Sl. No.15 Copies of supporting bills to substantiate the overvaluation of finished stock done by the department at Chandigarh Unit Paper Book page 124-149; Sl. No.16 Copies of stock statement provided by the department to the appellant (Mohali Unit) Paper Book page 150-193; Sl. No. 17 Copies of supporting bills to substantiate the overvaluation of goods for inspection done by the department at Mohali Unit, Paper Book page 194-206; Sl. No. 18 Copies of supporting bills to substantiate the overvaluation of raw material done by the department at Mohali Unit, Paper Book page 207-281 and written submissions dated 16/04/2015 before CIT(A) Paper Book pages 282-299. These evidences and submissions demonstrated that arbitrary and

unsustainable information was shown to the Director. The Director believing it to be correct accepted them in good faith and thus agreed to surrender arising on account of mental confusion and pressure. These obvious arbitrary calculations, it was submitted, have no sanctity. The tax authorities aware of this keep relying on the surrender made. Referring to the Remand Report at Sl. No. 20 Copy of remand report of the Ld. AO dated 18.03.2019 Paper Book page 295-301. For ready reference para 2.1 of the assessment order also reproduced in page 2 of the impugned order was read out at length. Till date, it was submitted, the department has failed to rebut these evidences showing that the surrender was made considering these incorrect and arbitrary calculations where rough estimation in weight and value were patently evident. Referring to the record it was submitted, that it has been argued that the sheer magnitude of the exercise required only to weigh the stock stated to have been undertaken physically the assessee has argued requires atleast 71 hours 40 minutes. Each coil to pick up weigh would require this amount of time. This assertion it was submitted has been made in the order at page 30 of CIT(A). It has also been argued that even if for a moment it is conceded that by a superhuman effort the survey team weighed it in about 10 or 11 hours then where did the

equipment or gadgets used to carry out this mammoth exercise come from and used. It was submitted that practically within the limited hours of survey of about 11 hrs. or so the whole exercise was impossible. The fact that there were discrepancies in the valuation has been argued. It was his submission that actually no meaningful exercise was done. The surrender was only made when the Director on his arrival after 4 days' tour of Chennai was led to believe that the survey team had found discrepancies in stock recorded. The Director was led to believe that there were mistakes in the accounts which he understood to be posting and clerical mistakes. However, when the survey team's calculations and estimations were made available to the assessee then at the first instance itself it was seen that these were incorrect. They were challenged not only on the grounds of arbitrary quantification but also on valuation of finished goods. The rate adopted by the department, it was submitted, was shown as per record to be totally imaginary and arbitrary. These facts remain unrebutted. No effort to segregate even the major items like coils either in quantity or quality was made let alone effort to match item with the sale bills of the assessee. The detailed exercise done by the assessee remains unrebutted. The department, it was submitted, has adopted simple average method for valuation

of finished goods lying loose for inspection at C-162, Phase-II, Mohali. The Survey Team has picked up the first 129 items noted its rates without comparing it with the Actual cost of production. The actual cost of production can be arrived at by deducting GP Margin from the sales value and sales value could have been compared with from the sales bills available with the assessee. Instead of this it was argued the Officer chose to take average of first 129 items out of 294 items and then multiplied the quantity with the average rate so employed. Thereafter he did not even bother to write down in narration. This, it was submitted, it was a very rough arbitrary and crude method of arriving at value of stock especially when all the data was available with the assessee. Reading from the objections extracted in the order, it was submitted, the assessee had pointed out to the AO that even in case of average method a judicious method would have been to arrive at weighted average rate. The weighted average rate of these 129 items worked out to Re. 0.97 per piece as against Rs3.09 per piece. It was submitted that it has been argued that this itself shows the variation in value of stock. *“It was submitted that it had been argued that if we analyze these 129 items we find that there are 35 items which have value more than Rs3.09 and remaining 94 items are less than Rs 3.09 being value adopted by the Department. The total*

Qty of 129 Items is 13,06,120 units. Out of this 9,64,000 units are priced at less than Re 1.00 per piece. The total value stock comprised in 129 items other wise work out to Rsl2,69,143/- This price is as per rates mentioned in the list and the same have not been compared with the sales bills to arrive at the actual Cost of Production. The total price of this quantity on the basis of average rate workout to Rs 40,35,911. Which means the excess value worked out by the Department against these items only is Rs.27,66,678/- which is 318 % higher than the value mentioned in the Stock statement itself One can well imagine the volume of defects in valuation of stock worked out by the Department. The working has been done purely for the sake of pressurizing the assessee to surrender. It is because of these defects in the valuation of stock that the assessee has retracted from surrender. The surrender would have done great injustice to the assessee. We are ready to submit any other information that may be required to prove our contention." Reading from the record it was submitted that the assessee had also provided detailed comparative Chart Enclosed Comparative Chart of Valuation of "Stock of Finished Goods on inspection and packed Finished Goods on the basis of actual cost of production(Sales Value as per Bills - GP Rate) vis'-a-vis value adopted by the Department."

23. These submissions referring to para 2.4 of the assessment order, and the impugned order it was submitted have not been rebutted and have instead been simply discarded on the grounds of being elaborate after thought. The so called shoddy estimated *Inventory* of stock wherein multiple shortcomings was blindly relied upon. The fact that it was full of shoddy estimations, incorrect weighing, identification mistakes; classification; valuing defects elaborately pointed out were all repeatedly ignored by the tax authorities. The assessee's elaborate arguments that weighing itself could not have been done in 11 hours have been dismissed in para 2.5.2 by the AO holding that the assessee himself accepts that there has to be a level of estimation. The statement of Shri Narinder Singh identified by the Department itself as a Packing Supervisor alongwith the surrender by Director was considered to be adequate evidences to justify that the mistakes pointed out deserves to be ignored.

24. Before the CIT(A), the assessee, it was submitted, again elaborately argued that surrender made on the basis of mistaken belief of facts and law is meaningless. This argument is common to all the additions made and sustained. It was reiterated that the surrender was made on

the basis of facts as conveyed to the assessee. The Director returning after four days of absence from out of station was lead by the survey team to believe that discrepancies of very high magnitude have been noticed, the assessee in confusion, it was submitted, he has blindly accepted that whatever he was led to believe was correct. However, only after obtaining the copies of what was confronted to the assessee from the department, the assessee with his accountants' team etc. carried out a detailed re-conciliation. It was noticed that the facts were incorrectly appreciated. On becoming aware of the correct facts, retraction of the uninformed incorrect surrender was made not in a gap of few years as wrongly alleged but within a few months as is evident from page 15 of the impugned order. The mistake was noticed and pointed out.

25. It was further submitted that the present case is not a case of 'statement under oath' u/s 132(4) of the Income Tax Act but is a statement in a survey u/s 133A. The judicial precedent available on this it was submitted relied upon before the CIT(A) even in the context of statement u/s 132(4) in favour of the assessee has also been ignored and the department's case solely and only rests on the statements of two persons incompetent to qualify the version of the Survey

Team and the surrender of the Director who believed what the Survey team explained. This surrender based on facts as confronted and available on record has repeatedly been demonstrated to be a case of many mistakes of facts and law. The CIT(A) instead of looking into this as requested relied upon the AO's Remand Report which in principle again relies on the surrender and statements of these two employees who also in no way cast any doubt on assessee's version of facts. Relying on the report the Ld. CIT(A) dismissed the claim without addressing the issues referred ignoring the evidences and the judicial precedents. The evidence remains un rebutted on record.

26. Addressing ground Nos. 3 and 4, it was submitted that the addition of Rs. 60 lacs was made and sustained on account of surrender made for alleged unaccounted expenses pertaining to cutting oil and wages and salaries. It was reiterated that the surrender had been made by the Director based on facts as confronted by the Survey Team. The assessee in its confusion could not readily explain that the payments for cutting oil and diesel booked for one unit were not paid in cash as alleged by the Survey team and were infact paid for by cheque by the Mohali unit. All supporting documents along with invoices of the payments by cheques

were made available on record. These details it was submitted necessarily need not be personally known to the Director and it can be seen from the record and it has been pleaded that no legal or financial advise on facts was available to the Director at the time of signing the surrender. It was submitted that the fact remains that these were not readily recalled in confusion by the Director returning hastily back from travel after four days if at all he was aware of the financial management. The fact remains that correct facts could not be recalled or accessed and admittedly could not be pointed out by him. However it was submitted all these facts were available on record before the Survey team. No doubt, posting in the accounts were not fully updated. However, when argued with supporting evidences before the tax authorities, the evidences cannot be discounted placing premium on an ignorant surrender made on account of mistakes on facts etc. These payments by cheques etc, it was submitted, cannot be created or manipulated subsequently. The record was there but due to mental pressure and confusion surrender was made. These evidences have not been rebutted, these have been were brushed aside holding as under :

2.7 Addition on account of Expenses incurred out of undisclosed sources

During the course of survey u/s 133(a), it was found that for the period 01.04.2010 to 21.09.2010(DOS) the assessee has incurred expenses on account of salary and wages and diesel and cutting oil amounting to Rs.35,70,000/- and Rs. 24,30,000/- respectively which were not recorded in the books of account. When this fact was confronted to the CMD of the company he did not question the contention of the Department and offered this amount' as "surrender for the F.Y. 2010-11".

2.7.1 Now after more than 3 years of making that statement the assessee has retracted from it by submitting copies of accounts of suppliers of diesel and cutting oil i.e. M/s Chatha Service Station and M/s Highway Enterprises and has stated that books of account was not complete as on the date of the survey. The assessee has further stated that the Department has not provided it with bills etc from which the amount of these expenses has been found by the survey team. Therefore, by its own admission these amounts of expenses incurred out of books have been entered into the ledger accounts only after having been detected by the Department.

27. Addressing the impugned order, it was submitted that for sustaining the addition in the face of the detailed explanation the Ld. CIT(A) was required as per law to refer to atleast some evidence available to justify the addition. No such reference has been made as in the absence of any evidence he is only relying on the surrender.

28. This position of fact is common to all the addition. The said action, it was submitted, is contrary to the settled legal position which requires that if retraction is based on evidences, then giving greater sanctity to the surrender the evidences cannot be ignored they have to be examined.

29. Referring to para 7.2 of the impugned order, it was submitted, that it is evident on record that the assessee has pleaded confusion in not recalling the fact of payments made

by the other unit by cheque but the department when confronted with evidences still feels shy to examine it and still chooses to blindly rely on the surrender made.

30. Similarly for sustaining the addition made on the grounds of surrender on account of salaries and wages, it was submitted, it is a matter of fact that books of account of the assessee were not completed upto date, however, the ESI and PF etc. on the salaries stood deducted. This argument supported by evidences till date has not been rebutted by the Revenue. It was submitted that merely because in the ledgers/Registers etc., it was not posted upto date, the assessee in confusion agreed to the surrender believing that the Survey Team is confronting some correct facts. However, the assessee on reconciling the record has noticed that there was no unrecorded expenditure in the true sense of the word.

31. It was submitted that it may be noted that all the surrenders are in round figures as suggested but once the record shows the position to be to the contrary, the mere reliance on surrender as per law becomes meaningless. The AO, it was submitted, dismissed the claim holding as under :

2.7.2 As for the amount paid for salary and wages out of books the assessee has stated that it has paid ESI and PF on these expenses but has not submitted any proof of such payment. Moreover, this in any case

does not explain why wages and salary for a period of nearly 6 months was not recorded in the books. It is only logical to conclude that such sums were spent out of undisclosed income. Therefore, the contention of the assessee cannot be accepted and the discrepancy on account of unrecorded expenses of Rs. 60,00,000/- is added back to the total income of the assessee.

32. The assessee carried the issue before the CIT(A). The CIT(A) ignoring the detailed submissions extracted in his order relying upon the AO's report which in effect relies herein also on the surrender made has dismissed the assessee's claim.

33. The department has repeatedly failed to refer to any evidence unearthed by the survey team. Whatever was confronted to the assessee till date has been shown to be incorrect and arbitrary estimates and some unsupported doubts created in the mind of the Director. No evidence has been referred to nor is it available and merely reliance is placed on the surrender and when questioned by the assessee as to which is the document which was shown no document has been shown or brought on record till date.

34. Accordingly, it was his submission that considering the position of law, the additions in the absence of any evidence and based only on the ignorances of the CMD and demonstrated mistakes of the survey team the facts need to be appreciated correctly and mere reliance on the surrender letter, it was submitted, is contrary to the settled law.

35. The decisions relied upon before the CIT(A) and also filed in the Paper Book filed before the ITAT, it was submitted, supports the view canvassed.

36. The Ld. CIT DR Mr. Dahiya strongly objected to the filing of the decisions without bringing out the gist of the proposition of law for which purposes it was being relied upon.

37. The Ld. AR in response agreed to address the specific decisions cited.

37.1 Addressing the first decision in the assessee's Paper Book ***M/s Asmi Stonex V ITO, ITA No. 867/JP/2017*** (available at Paper Book pages 1-47) the ld. AR carrying us through the facts of the said case, drew specific attention to page 3 para 8 of the said decision wherein the Revenue's insistence of relying on Survey Team's report was critically viewed. In the facts of the present case also, it was submitted, the facts confronted by the Survey Team on clearer examination can be seen to be incapable of any credible reliability as they were similarly shoddy estimates and considering principles of law in, *Pullangode case of the Apex Court* which is relied upon in the present proceedings also as well as the decision of the *Madras High Court in Kadar Khan's case* which has ultimately been upheld by the

Apex Court also and the CBDT guidelines considered and relied upon by the Jaipur Bench in M/s Asmi Stonex case (supra) in regard to extracting of surrender etc. during survey which proposition is relied upon in the present case also. It was his submission that no addition on facts was maintainable.

37.2 Referring to decision at Sr.No. 2, **DCIT Vs M/s Hemadri Machine Tools (Mum-ITAT)** ITA No. 714/Mum/2020 (available at Paper Book pages 48-80). Specific attention was invited to page 71 of the Paper Book to highlight the proposition that once a retraction on the surrender is made, the law requires that *“It was obligatory on the part of the AO to substantially corroborate the same by other independent and cogent evidences in support of the facts so claimed by him”*. It was highlighted that herein also the ITAT referring to the very same instructions CBDT in its *Instruction F. No. 286/2/2003-IT (Inv-11), dated 10th March, 2003* and *Circular F.No. 286/98/2013-IT dated 18.12.2014* (page 71&72 of Paper Book) dismissed the departmental appeal. The said decision, it was submitted, fully supports the present case.

37.3 Referring to the decision referred to at Sr.No. 3 **CIT Vs Ashok Kumar Jain (Raj.HC) 369 ITR 145** (available at

page No. 81-84 of Paper Book) on a reading from the Head Note itself, it was submitted :

“Addition—Addition on basis of surrendered amount—Deletion of addition—Survey u/s. 133A was carried out at business premises of Assessee—During course of survey some incriminating documents were found, inventorised and impounded, inventory of cash & stock also prepared—AO was satisfied and accepted Rs.1.5 crore and passed assessment order for AY. 2007-08—In revised return, for AY 2008-09, Assessee surrendered sum ofRs.3 crore only instead of Rs.5 crore which he admitted during course of survey—Merley because Assessee had surrendered mount of Rs.5 crore, during course of survey addition of Rs.2 crore was made by AO—IT(A),sustained order passed by AO to tune of Rs. 50 lacs—ITAT deleted addition made by AO—Held, AO had not found or bothered to find or trace anything additional as result of survey from Assessee except relying on recorded statements at time of survey—This view found favour with two appellate authorities that funds were arising from same business and had a direct nexus and income was invested/utilized during the year under consideration—ITAT, after appreciation of evidence concluded that amount of Rs.1.5 crore, which was surrendered/offered in AY 2007-08, was available as fund which came to be used partly in investment of share capital, creditors or other investments as well as other defects, unverifiable creditors etc.—In case Assessee had not adhered to surrender made during course of survey, then it was for AO to bring on record cogent material and other evidences to support addition rather than rely on statements simplicitor—No substantial question of law.”

37.3.1 This proposition of law in the face of a retraction of the surrender, it was submitted, has been addressed by the Hon'ble Rajasthan High Court and it fully supports the present case.

37.3.2 The assessee in the facts of the present case it was submitted, has repeatedly brought overwhelming evidence on record which has not been rebutted by the Revenue and mere mistaken surrender is being relied upon. This action, it was submitted, is contrary to the settled legal position on retractions.

37.4 Referring to decision referred to at Sr.No. 4 in **DCIT Vs Vikas Jewellers (Jaipur ITAT) 63 CCH 290** (available at Paper Book page 85-93) it was highlighted that even in a case where statement u/s 132(4) which admittedly has greater evidentiary value as it is a statement recorded 'under oath' has been looked into in regard to the calculation mistakes pointed out despite a surrender. In the facts of the present case, it was submitted, that the statement is not u/s 132(4) but in a survey u/s 133A and by a Director returning after hectic travel from Chennai being out of station for 4 days rushing back on account of Survey carried out in his absence blindly accepted at whatever hours of the night whatever calculation the Survey Team showed him. It is a matter of record that the calculations shown were grossly shoddy efforts in estimating Quantity; weighing estimate, valuing etc. salaries and wages allegedly not recorded cutting oil expenses alleged expenses incurred; amounts received back from sundry debtors etc. were all unsupported incorrect facts and the Director overwhelmed and confused accepted everything whatever the Survey Team conveyed. It was argued that the law requires that these calculations be looked into and

supporting record of the survey report be looked into and this repeatedly has not been done.

37.5 For similar purposes, attention was invited to decision referred at Paper Book Sr.No. 5, **Sanjeev Kumar Vs ITO 31 ITR 680** (available at Paper Book page No. 94 to 104) wherein surrender was permitted to be retracted considering the legal position as considered by the Apex Court in Pullangode's case (para 11-13 of the said decision).

37.5.1 It was submitted, it had been held that in the face of the retraction, the onus was on the Revenue. Specific Paper Book page 102 para 13 of the order was relied upon. The onus in the present facts it was argued had repeatedly not been discharged.

37.6 For similar proposition, attention was invited to the decision at Sr.No. 6, **M/s Alankar Jewelers Vs DCIT** (Indore-ITAT) ITA No. 992/Ind/2019 (available at Paper Book pages 105 to 129) wherein without supporting evidences in the face of the retraction based on evidences retraction was permitted.

37.7 Attention was also invited to decision at Sr.No. 7 **M/s Bansal Strips (P) Ltd. & ors Vs ACIT (Del-ITAT) 100 TTJ 665** (available at Paper Book pages 130 to 156)

wherein similar allegation of impossibility of physical stock taking in a few hours as was challenged by the assessee before the CIT(A). The Tribunal therein deleted the addition based on surrender noting that , *“simplified procedure was adopted without observing patience and preservance”*.

37.7.1 It was submitted that therein also, the Revenue had relied on the fact that staff members of the assessee had put their signatures on the Inventory prepared by the Search Team. The Court therein, it was submitted, held that *“It does not have the effect of rendering authenticity to the Inventory”*.

37.7.2 It was noticed that there was no material to show that the employees concerned were properly authorized to certify the quantity of stock physically present. Thus, the Inventories were treated to be unilateral document.

37.7.3 The legal position on similarity of facts, it was submitted, fully supports the assessee.

37.8 Drawing attention to the decision rendered at Sr.No. 8 of the Paper Book, **CIT Vs S. Khader Khan Son 352 ITR 157** (available at pages 157-158) which

position of law of the Hon'ble Madras High Court was affirmed by the Apex Court as department's SLP stood dismissed in appeal.

37.8.1 Various orders of the ITAT and the High Courts referred to therein have been relied upon. The legal position namely; *“Addition-Addition on the basis of statement recorded during survey under s. 133A—Sec. 133A does not empower any IT authority to examine any person on oath, hence, any such statement has no evidentiary value and any admission made during such statement cannot, by itself, be made the basis for addition—This view is clearly supported by CBDT, circular dt. 10th March, 2003”* (Paper Book page 159)

37.8.2 Heavy reliance was placed on the legal position summed up by their Lordships in the Head Note itself ; *In the instant case, there was a survey operation conducted under s. 133A in the assessee's premises and a statement was recorded from one of the partners. Assuming there were discrepancies and irregularities in the books of accounts maintained by the assessee, an offer of additional income for the respective assessment years was made by the partner of the firm. But, such statement, in view of the scope and ambit of the materials collected during the course of survey action under s. 133A shall not have any evidentiary value, as rightly held by the CIT(A) and the Tribunal, since such statement was not attached to the provisions of s. 133A. It could not be said*

solely on the basis of the statement given by one of the partners of the assessee firm that the disclosed income was assessable as lawful income of the assessee. Since there was no material on record to prove the existence of such disclosed income or earning of such income in the hands of the assessee, it could not be said that the Revenue had lost lawful tax payable by the assessee. A power to examine a person on oath is specifically conferred on the authorities only under s. 132(4) in the course of any search or seizure. Thus, the IT Act, whenever it thought fit and necessary to confer such power to examine a person on oath, has expressly provided for it, whereas s. 133A does not empower any ITO to examine any person on oath. Thus, in contradistinction to the power under s. 133A, s. 132(4) enables the authorised officer to examine a person on oath and any statement made by such person during such examination can also be used in evidence under the IT Act. On the other hand, whatever statement recorded under s. 133A is not given an evidentiary value. What is more relevant, in the instant case, is that the attention of the CIT(A) and the Tribunal was rightly invited to the circular of the CBDT dt. 10th March, 2003 with regard to the confession of additional income during the course of search and seizure and survey operations. Pullangode Rubber Produce Co. Ltd. vs. State of Kerala 1972 CTR (SC) 253 : (1973) 91ITR 18 (SC), Paul Mathews & Sons vs. CIT (2003) 181 CTR (Ker) 207: (2003) 263 ITR 101 (Ker) and CIT vs. G.K Senniappan (2006) 203 CTR (Mad) 447: (2006) 284 ITR 220 (Mad) relied on. (page 159-160)

37.9. Similarly, reliance was placed on decision at Sr.No. 10 **CIT Vs Atam Valves (P) Ltd.** (P&H HC) 184 Taxman 6

(available at Paper Book pages 167-169). Head Note thereof was relied upon.

37.10 Attention was also invited to ***K.T.M.S. Mohd. & ANR V Union of India (S.C) 197 ITR 196*** (available at Paper Book pages 170 to 187). Referring to the Head Note of the said decision, it was submitted that the Court clearly held considering the statement given by a family member in FERA proceedings that the Court or any Authority intending to act upon the inculpatory statement as a voluntary statement should apply its mind to the retraction. The Court/Tribunal is expected to consider whether the statement was not under any inducement, coercion, threat or promise etc. The Court held therein that merely because a deponent has made contradictory statements at two different stages in a judicial proceeding is not by itself always sufficient to justify a prosecution.

37.11 Referring to Sr.No. 12 in ***Pr. CIT Vs M/s Sunshine Import and Export Pvt. Ltd. (Bombay HC) 424 ITR 195***(available at Paper Book pages 188 to 192), it was submitted that the Hon'ble Bombay High Court again after examining the legal position of 133A with statement u/s 132(4) followed the view taken by the Hon'ble Madras

High Court in Khader Khan Son, cited supra affirmed by the Apex Court.

37.12 Relying on Sr.No. 13, **Pullangode Rubber Produce Co. Ltd. Vs State of Kerala & Anr (S.C) 9 ITR 18** (available at Paper Book pages 193-195) it was submitted it needs no elaboration as it has been relied upon and referred to in almost all the decisions cited. However, attention was specifically invited to the following ratio of the Court; *“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.”*

37.13 A specific attention was invited to Sl. No. 14 **Pushpa Vihar Vs ACIT (1994) 48 TTJ 0389** (available at Paper Book pages 196-203) wherein in a survey u/s 133A carried out at the premises of the assessee statement of concealed income of a partner of the firm was recorded. The possible mistakes in understanding of a partner who was junior most were considered and relief sought on facts despite a surrender was held to be allowable. The relevant extract of the head note is as under:

*“**B, who is a partner of the firm,** admitted in original statement the amount of concealed income. **Later on, there was retraction** and it was stated that what he stated originally was in relation to the sale and not in relation to the income. Also he is a non-matriculate and the **junior most***

partner in the firm. The possibility of committing a mistake by him in explaining the affairs of the firm cannot be ruled out altogether. There is no cogent material on record to support or to justify the veracity or falsehood of the statement. The Revenue agreed to accept what B stated at that time. No incriminating document seized. Even on 2nd Dec, 1987, when another survey operation was conducted at the assessee's premises, nothing, significant was found. The argument of Revenue that there were possibility of getting higher figures of sales but same could not be obtained as during the survey the management stopped the A.C. room and also stopped making special preparations despite customers, requests, appears to be jejune. This allegation is not based on any material which could be relied or accepted as evidence. The principle upon which the case falls to be decided is simply this : "**whether the system of law permits the assessee to alter the admission made before the tax officials in the course of survey proceedings?" It is incumbent on the Revenue to follow the fine norms of jurisprudence. Else the whole process of law will be set at naught.....**"

As a matter of fact, no defect of any reckon was pointed out in the books. The addition was wholly on the basis of assessee's admission. **There is absolutely nothing on record to justify that the book results were manipulated.** It is quite possible, that **the partner who at the time of survey gave this statement might have misunderstood the contents comprised in the statement concerning his disclosure.** In the surrounding circumstances, and having regard to the given facts, it cannot be concluded that **what the assessee said originally was sacrosanct** and the assessee is not at liberty or it does not lie in his mouth to correct the error, originally committed by giving a different version of truth. In the absence of any other material apart from the original admission, there is nothing to support the addition. It is not possible to agree with the CIT(A). Accordingly, the Assessing Officer is directed to delete the addition made on this count.— Kishore A. Meswani (ITA No. 7161/B/87 dt. 7th Aug., 1990) and Krishna vs. Kurukshetra University AIR 1976 SC 376 applied”

(emphasis supplied)

37.13.1 In the facts of the present case, it was submitted the Director exhausted and worried returning back after absence of 4 days from official tour of Chennai faced with the survey team's conclusion under confusion and mental pressure agreed that what the survey team is showing may be correct. Thus, surrender made in confusion cannot be given so much importance when

survey team's Inventories were incorrect arbitrary estimates and conclusions were not borne out from record. Reliance placed on the statement of a Packing Supervisor and the junior most Accountant just fit for posting on ledger and maintaining record when shown to be incorrect cannot be ignored. The facts of ESI/PF deductions recorded; payments made by the other unit by cheque over a period of time cannot be ignored.

37.14 Attention was invited to the decision mentioned at **Sr.No. 15 Utkal Steels Ltd. V DCIT (Cuttak) 77 TTJ 720** (available at Paper Book pages 204 to 217) for the proposition where stock is not weighed physically as it was partly estimated physically and partly by adopting sampling method. In the facts it was held that the difference in valuation thus arrived at could not be used for addition in a search and seizure case. Heavy reliance was placed on this as facts remain identical.

37.15 Decision relied upon at Serial No. 16 **Jyotibhaichand Bhaichand Saraf & Sons (P) Ltd. V DCIT** (Pune ITAT)(available at Paper Book pages 218-232) was relied upon to show that even in the case of a statement recorded u/s 132(4) it is open to the assessee while making a retraction that the statement was made on

a mistaken belief of fact and law. The law requires that it be considered and addressed. Addition made accordingly it was submitted may be deleted.

37.16 Reliance was placed on the decision mentioned at Sr.No. 17 ***DCIT vs Vipin Aggarwal (CHD ITAT) 46 ITR 367*** (available at Paper Book pages 233 to 246). In the facts of the said case it was submitted that retraction of statement made u/s 133A was treated as an after thought by the Assessing Officer. In the facts of the said case it was submitted it had been held that confessional statement alone in the absence of evidence cannot be a valid stand for addition. The retraction was held to be justified.

37.17 Drawing attention to the decision mentioned at Sr.No. 18 ***Jain Trading Co. vs ITO (Bom ITAT) 25 CCH 732*** (available at Paper Book page 247 to 251) was specifically relied upon to support that when purchases and sales were accepted mere surrender in survey not sufficient evidence. Supporting the retraction was not upset by the AO. The AO having not raised even a finger of doubt at the assessment statement furnished by the assessee, addition was held to be not justified. The position on facts is identical. The evidence has not been rebutted.

37.18 Referring to the decision mentioned at Sr.No. 18 **DCIT vs Vipin Aggarwal (CHD ITAT)** 46 ITR 367 (available at Paper Book page 233-246) it was submitted, that without conceding the assessee also without prejudice to the main claim draws strength from this decision that if at all the availability of funds at assessee hands is to be considered then the benefit of telescoping these should be considered and the funds can be said to have been utilized in the alleged stocks found. Thus no addition was maintainable. Even otherwise since profit declared stands accepted as books of accounts have been accepted, even then no addition could be made. It was submitted that this is a without prejudice to the main argument.

37.19 Similarly relying on Sr. No. 20 to 22 i.e. **CIT V Akme Projects Ltd. (Del High Court)**85 CCH 32 (pages 272-275); *CIT & Anr Vs Golani Brothers Anr* (Bom High Court) 160 DTR 24 (pages 276 to 282) and Mukesh Kumar Sharma V DCIT (CHD ITAT 0 ITA No. 19/CHD/2012 (pages 283-286) and the CBDT Circular Clarification F No. 286/2/2003-IT(Inv) it was his submission that no addition could have been made.

38. The ld. CIT-DR on the other hand submitted that rejection or non-rejection of books of account of the assessee by the AO has no meaning. The very fact that surrender is made by the Director shows that the assessee knowing its affairs accepts that its accounts are partly correctly recorded and partly not recorded. Thus, the argument that all payments were made or received by cheque has no meaning as cash transactions admittedly are never recorded. The decisions relied upon, it was submitted, have no relevance as in the facts of the present case, the assessee has not been able to show what pressure was placed on the assessee. No evidence of any coercion has been referred to or relied upon. Merely saying that the presence of survey team is stressful it was submitted cannot be allowed to be pleaded as a relevant argument to show by inference that any coercive action or pressure was put on the assessee.

39. The statement of surrender was voluntary and, now after a lapse of few years it was submitted the assessee without any evidence cannot plead coercion. The assessee fully knowing the shortcoming of its business has made the surrender consciously without pressure. The employees of the assessee whose statements are relied upon now shown to be Packing Supervisor or Junior Accountant cannot be

allowed to be disregarded. They were assessee's employees and during a survey etc. whosoever will come forward to help the survey team his statement and help is taken by the team. The Survey Team has confronted the assessee with all facts and the assessee has surrendered. This retraction after 2 or 3 years has correctly been discarded as an elaborate after thought.

40. The reliance placed on books of account which were admittedly incomplete, thereafter completed to suit the assessee it was submitted is a meaningless exercise. Accordingly it was his argument that on account of these facts and reasons, it has been correctly dismissed by the CIT(A).

41. Referring to page 404 & 405 of the Paper Book it was submitted that the assessee has led elaborate arguments to show that instead of additions of "x" amount on different heads, addition at best could be made of Minus "x" amount. It was his vehement submission that this very argument, demonstrated that the assessee's books of account even today has two versions.

42. It was his vehement stand that the assessee is trying to argue its case from all angles ignoring the vital fact that actual hard cash of huge amount was found by the survey

team which lead to the addition for payments received outside books from Sundry debtors. Thus all these arguments and calculations, it was submitted, is a time wasting exercise.

43. The reliance placed on books of account not rejected, it was argued, has no meaning for unrecorded transactions. The non recording of these in books anyway, it was his submission is a meaningless exercise as hard cash has been found by the survey team of such large amounts. These facts on record cannot be ignored and the occasion to telescope and consequent benefit claimed is not permissible in law.

44. Thus, in the face of these facts the addition as per surrender made it was submitted may be maintained. All the documents on the basis of which surrender has been made, including stock found and its valuation etc. it was submitted have been signed by the Director himself who knows what is going on.

45. It was his vehement stand that the arguments of telescoping have no relevance. The books of account including cash book on the day of survey are admittedly incomplete. Thus, relying on these books to say that cash found from the premise be ignored should not be entertained. As per law it is to be taken as "Income from

other sources". It was his submission that in the face of hard cash being found by the Survey Team, the excess cash found outside books of accounts necessarily pertains to that year when it was found hence, it has to be brought to tax in that year. It was his submission that in cases of unrecorded transactions this is the only way the department can expose the reality, hence, since it is an asset and found during the survey the finding of both the AO and CIT(A) that it was from sundry debtors it was submitted may be upheld. It was reiterated that no coercion at any stage is demonstrated, the surrender is voluntarily made.

46. The argument that survey team could not have weighed the stock within the time, it was submitted, is a meaningless argument. The survey team, it was argued was very capable and competent and these documents have been signed by the Director knowingly then the argument today so made is devoid of merits.

47. It was his submission that apart from relying on the very elaborate order of the CIT(A), he would want to rely on certain decisions of the Apex Court. It was his submission that they being latest in point of time and that also of the Apex Court are relevant hence, the orders of the ITAT and the decisions of the Courts relied upon by the ld. AR it was

submitted need not be addressed as these are distinguishable and in the face of the decisions of the Apex Court and of the jurisdictional High Court have consequently no relevance.

48. Similarly, the expenditure incurred outside books of accounts, it was submitted, may also be upheld. The argument that the books were partly recorded read along with the meager salary of Rs. 5000/- as paid to the accountant itself demonstrates that over and above the recorded salary part of it was being paid in cash and was hence not recorded. The explanation offered at this stage it was his prayer may be discarded.

49. Similarly the explanation now offered by the assessee that for addition made for cutting oil expenses the other unit was paying by cheque may be discarded.

50. The position of law it was submitted has been addressed in very categorical words and was very clear and the Revenue is heavily relying on the following case laws which are decision of the Apex Court and the jurisdictional High Court:

- i) Navdeep Dhingra V CIT 56 taxmann.com 75 (P&H)
- ii) Vikrant Dutt Chaudhry V CIT, Panchkula 88 taxmann.com 727 (P&H)

- iii) Pradeep Kumar Biyani V ITO (2019) 101 taxmann.com 131 (S.C)
- iv) Bnnalal Jat V ACIT (2019) 106 taxmann.com 128 (S.C)

51. Accordingly it was his submission that relying on the decisions and the orders the grounds of the assessee may be dismissed.

52. The ld. AR in reply submitted that none of the decisions relied upon by the Revenue are applicable to the facts of assessee's case. It was submitted that before addressing the issues on facts which need to be corrected he would first want to address the decisions relied upon by the Revenue to make his point.

52.1 Addressing the decision of the jurisdictional High Court in the case of **Navdeep Dhingra Vs. CIT 56 taxmann.com 75 (P&H)** it was submitted that the legal precedent laid down therein has no application to the present case. In the facts of the said case it was submitted that the assessee only advanced the argument of coercion. The argument was not supported by any evidence demonstrating either mistake of fact or law. These were not pleaded in that case nor was it demonstrated unlike the assessee's case where the assessee has adequately demonstrated the confusion on returning from out of station.

Evidences demonstrating that the departmental survey teams report etc was full of mistakes and arbitrary estimations which have no legal footing to stand on have all been made available right from the assessment stage to the Revenue and these remain unrebutted till date.

52.2 Addressing the decision also of the jurisdictional High Court in the case of **Vikrant Dutt Chaudhary Vs. CIT**, relied upon by the Revenue it was submitted is a decision where the facts are entirely peculiar. Receipts of money over and above the disclosed amount was at issue and the evidences of receipt of cash based on a photocopy of the original document was being considered. The photocopy was supported by the statements recorded of the concerned persons. The doubts raised on its evidentiary value in the absence of original document was held to be not relevant as all the statements of the parties recorded under oath were available. This case it was submitted has no applicability to the issue at hand as, in the facts of the present case supporting documents are also available and admittedly a mistaken surrender is made. The department has not rebutted the evidence till date. The evidence showing that the surrender was a case of mistake of facts has not been upset.

52.3. Addressing the decision of the Apex Court in the case of **Pradeep Kumar Biyani** cited supra it was submitted that the facts are entirely distinguishable. It was submitted that apart from the confessional statement of assessee's brother in the facts of the said case, the Court had also taken note of the fact that it was a case of decline in the gross profit declared by the assessee despite the evidence that profits in this very same line was noticed to be high. The fact that the assessee had repeatedly failed to provide Stock Register before the AO in that case despite several opportunities was also an important and glaring fact on record which lent credibility to the statement of assessee's brother. In the facts of the assessee's case, complete books of account have been made available to the AO at the assessment stage. No defects in the books of accounts of the assessee has been pointed out by the AO. The books of accounts even during the survey were completed upto a specific date was not complete as due to some explained reason, they were not updated but they were presented when called forth at the assessment stage and were not faulted with by the A.O. till date. The reliance placed on a mistaken surrender in confusion can be retracted and this decision does not say that retraction is not permissible. The facts before the Apex Court, it was argued were peculiar and distinguishable and

in no way this decision lays claim the proposition that retraction on facts is not maintainable.

52.4 The decision of the Apex Court in **Bannaklal Jat Constructions (P) Ltd. Vs. ACIT (2019)** 106 taxmann.com 128 (SC) it was submitted also supports the legal position that Courts can permit a retraction but places onus on the assessee to show that the statement made by the Director “was wrong and such rectification had to be supported by a strong evidence” that earlier statement was recorded under duress/coercion. In the facts of the assessee’s case the Director in response to Question 5 has stated that the he is returning from Chennai after four days and his reply to various questions shows his confusion. Retraction is not based on mere plea of confusion but is supported by detailed reconciliation evidences of cheques, corroboration from all the parties etc. the recording of deductions under PF/ESI the shoddy arbitrary estimation on weighing and valuation etc. The onus placed upon the assessee it was argued stands discharged. None of the evidences it was argued till date is shown to be incorrect. The case law relied upon by the Revenue in the facts of the present case it was submitted does not have any relevance.

53. Addressing the argument advanced by Ld. CIT DR that surrender is based on the fact that all documents of the Survey team's Report etc. were signed by the Director. It was submitted is incorrect. Ld. AR invited attention to the respective statement to again highlight that the Director initially was not present at the time of survey and had reached Mohali / Chandigarh etc by Chennai flight very late at night. Thus, the alleged weighing exercise was not done in his presence he reached there when everything was more or less concluded. At that stage returning in stress, exhausted and worried, he believed whatever he was shown by the Survey Team. Till date on facts the Director is not denying the fact that surrender was made by him. He has also not raised any queries or denied that some office employee appended his signatures, to documents of Survey Team made available to the assessee. However, the submission of the DR that it was signed by the Director is contested. It was submitted that only surrender letter (Page 83-97) is signed by him. However, on facts, it was submitted that relying on the evidence placed on record, the assessee is questioning that no person reading the Survey team's documents can make a surrender. Assessee has demonstrated the calculation presented to be rough shoddy estimates. Incorrect facts and conclusions of the Survey

team based led to the surrender. The department has not placed any supporting evidence and is only relying on a mistaken surrender letter of the Director. However signature of Director was only on the statement of surrender and not any other documents. Not repeating his submission on the facts on record namely statement of junior accountant and packing Supervisor, it was submitted that even if they have signed the Survey team's estimated arbitrary Inventory list, this fact cannot be taken to be an authentication of a shoddy arbitrary incorrect estimation confronted to the Director. Page 110 to 117 etc. and other pages of the Paper Book were referred to show that these documents of the Survey Team though signed by some employee of the assessee were not signed by the Director. The capability of the junior most accountant was addressed to say that he was not qualified to comment on the affairs of the assessee. The fact remains on record that complete books, have been shown to the AO, the survey Reports are with him but still books of account are not rejected by him, no penalty for any such shortcoming has been levied. He blindly ignoring the voluminous record of the shortcomings in the documents shown proceeds to make the addition. The facts which lead to the surrender have not been rebutted by him without rebutting these, still the AO chooses to rely on surrender made on mistaken facts makes

the addition. Thus the argument of the Ld. CIT DR, it was submitted, are not correct on facts and not relevant for rebutting the evidence consistently led before the tax authorities.

53.1 Addressing the timing of the Retraction questioned by the department and relied upon by the ld. CIT-DR, it was submitted that the retraction was made within a few months since the Survey Team's folder was made available to the assessee only on 28.05.2011. The fact that surrender was not adhered to was evident from the return filed on 30.09.2011 was a factual retraction. In the return filed surrender was not offered. On the receipt of impounded documents, it was submitted, the assessee had noticed that facts as confronted/made known which led to the surrender was itself based on multiple mistakes on facts and law. The violations of procedures, mistakes committed on facts and law have been supported by voluminous record and is not a mere unsupported argument. All these remain unrebutted.

53.2 Addressing the arguments of the ld. CIT-DR that hard cash of an exorbitant amount was found during the survey it was submitted, is an incorrect fact argued. It was submitted that this was not even the case of the AO or the CIT(A). Referring to the record it was submitted that almost

no cash was found. Referring to page 402 of the Paper Book Volume II, it was submitted Rs. 33,400 was found. This fact is evident from the department's record itself. The argument that a lot of cash was found and cannot be telescoped, it was submitted, is misplaced. No big amount of cash was found. The belief formed by the Survey team that payments outside books have been received is mere conjecture and surmise as it is not supported by any evidence. Maintaining that no addition can be made without prejudice argument to this main argument, it was submitted, has been advanced that the alleged payments received from sundry debtors could be telescoped to explain the alleged inconsistencies in stock which also is a without prejudice argument. The fact that there were no inconsistencies is also the main argument but without prejudice argument. The fact that the allegation of inconsistencies in stock has been shown to be rough and shoddy unsupported estimations; sales stand accepted; books stand accepted; profit stands accepted; hence even if the arguments of receipt of unrecorded payments in cash on mere conjectures and stock has been upheld by the First Appellate Authority even then accepting the prayer for telescoping as per law is permissible and consequently even then these conjectures lead to no case for maintaining either of the additions sustained. This argument is without prejudice

to the main argument that surrender was on incorrect facts and law, retraction is permissible in law. Legal precedent for telescoping was also hence cited as a without prejudice argument to the main argument.

53.3 Accordingly, it was his prayer that considering the facts and the legal precedent, the additions may be directed to be deleted.

54. We have heard the rival submissions and perused the material available on record. On a consideration of the claims and counter claims of the parties we find on going through the repeated elaborate submissions advanced on behalf of the assessee before the Ld. A.O., Ld. CIT(A) and again before us juxtaposed with the findings of the AO and the First Appellate Authority along with the vehement arguments of the Ld. CIT DR on the other side wherein we have seen that the detailed explanations with supporting evidences, reconciliation statements assailing the survey teams records submitted to be arbitrary estimations and conjectures etc. on facts confronted to the Tax Authorities at every stage remain completely un rebutted on record. We further note that ultimately in the arsenal of the Revenue we only have the surrender statement of the Director and his employees as the sole argument in support/defense of the

order passed. The argument of the Revenue that it was voluntary and no coercion could be demonstrated even if accepted, we find does not absolve the department from not addressing the supporting evidences and submissions that the surrender suffers from the malaise of being based on repeated incorrect and mistaken facts. Even if for a moment the argument that the surrender so made was by the Director just returning from a working trip from Chennai was on account of confusion etc. relying on facts and conclusions as confronted by the Survey Team is kept aside, the legal position in the face of the retraction based on explanations and evidences cannot be ignored. The Revenue has to rebut it and place supporting evidences. This, we find is repeatedly missing. We have also noticed on a reading of the impugned order itself that the Director is shown to be a technocrat. Reference made to arguments extracted at Page 7 of the impugned order. The Director is claimed *to be a mechanical Engineer with zero accounts background did not have benefit of financial advice* and again at Page 14 of the impugned order, the pleading has been recorded by the CIT(A) that the concerned Director was *a technocrat having little knowledge of accounts*. On which account it is claimed that he repeatedly said; *“Time and again he stated in his statement that the accountant must be knowing the details regarding accounting details. In reply to*

Q.No.22 of the statement recorded the Managing Director stated that "it may be clerical error hence I offer Rs. 2.00 crore on account of his mistake'. He was under mistaken belief that there is clerical error on the part of accountant hence the clerical error is income of the appellant company". Perusal of the same page again brings out it has been pleaded that "He simply believed the Survey Officers" This is a repeated stand on record. Before us also it has been argued that he was not conversant with the day today running of business. These arguments have been advanced before the tax authorities and comes out from a reading of the statement recorded by the Survey team. The surrender was admittedly made in the absence of legal and professional advice from his accountants etc. It is evident from record that faced with what he was convinced to be the survey team's evidence, he agreed to make a surrender is a fact staring from the face of the record itself. When it was conveyed to the Director that there was variation in stock found vis a vis books and receipt of unrecorded amounts from debtors allegedly received outside books which as per arguments advanced before us, he understood this to be a case where some clerical errors were there on record. His naivety and ignorance is evident from the fact that he did not even question to wonder where is the money for the alleged unrecorded recoveries or any such evidence. He admittedly was financially ignorant of the

affairs as he did not even take into consideration the fact that no cash was found. Nor did he question the fact of absence of evidence of the claim that there were unrecorded payments from Sundry debtors. It clearly emerges that it is a case of total belief in the Survey team's version and a mistaken belief that there were some grave clerical errors. Admittedly, as per the accepted position amongst the parties itself, the books of account were not upto date, no money was found, thus on what basis the information was being conveyed that these were payments received outside books. Similar is the position for the allegation that excess stock was found. We have seen that this was an arbitrary estimation/ approximation. Shortcomings in the calculation in weighing classifying unscientific arbitrary estimates remain unrebutted. We find in the face of the overwhelming evidence available on record the surrender made on mistaken facts and appreciation of law has no relevance. Similarly the valuation of the finished stock considering with the evidence on record again is seen to be arbitrary estimates hence, lacks credibility is evident on the face of the record itself. The responses of the Director to the specific questions raised shows that he was entirely operating on believing the version of the Survey team. The responsible person, his Accountant Mr. Kamal Mehta (Q.No. 6) it is seen was apparently never

questioned. On a reading of the surrender it is seen that relatable to the surrender conclusions were presented and most questions asked were not relatable to the surrender made. The absence of knowledge of the Director and the surrender gives strength to the argument raised that he was not qualified in the day to day affairs of the company. Thus, it needs no further support. Thus, the fact that it could not be recalled that diesel expenses were being paid by cheques by the Mohali Unit is possible. No fact or evidence has been placed before us to rebut this consistent claim. Explanations have been repeatedly given that at the relevant time, activities were carried out in Mohali Unit and these payments booked by the Chandigarh Unit were consequently paid by cheque by Mohali Unit. Sometime after November, 2011, it has been claimed these have been paid by the Chandigarh Unit. This claim has been made right from the assessment stage (pages 10 to 11 of assessment order). It remains unrebutted on record. Thus the fact that he was unable to recall or was not aware of hence, the responsible Accountant should ideally have been questioned remains evident. Whatever may be the case i.e. lack of recall or knowledge, the fact remains that the evidences of their payment by cheque was readily available. This argument/explanation based on supporting evidences

remains unrebutted. Similarly, allegations of unrecorded salary and wages expenses are based on no evidence except the surrender. Responses to Q. 17 at page 92 that he agrees with the Survey team's allegation and says "*it is possible*" that may not have been recorded by the Accountant, however, "*we have duly paid ESI & P.F.*" regularly when read alongwith Q. 21 with abrupt surrender in the face of the bald baseless allegation as we have now seen the surrender admittedly is made operating on blind belief. Till date no rebuttal to the claim has been placed on record by the Revenue. Where books of accounts were not complete, the fact that he believed the assertions of the Survey Team to be correct and made the surrender in hand supports the argument that adhoc amounts were suggested and accepted. It is a matter of record that the assessee has been crying hoarse right from the assessment stage that when the documents of the survey team were seen it was noticed that the surrender was incorrectly made. Evidences supporting the claim have consistently been placed before the tax authorities and have also been specifically referred to for our consideration. These remain unrebutted by the tax authorities and also by the Ld. CIT DR. We have gone through the judicial precedent cited and discussed at length in the earlier part of this order and find that the

department's arguments that retraction of a surrender made is not permissible in law is not correct. The Courts have repeatedly addressed this legal position and we find that the issues for consideration are purely factual in nature. On a reading of the decisions cited, we are of the view that the legal precedent that even a statement given under section 132(4) in certain circumstances subject to evidence on record is amenable for retraction has the approval of all Courts. The judicial precedent that the sanctity of the statement u/s 132(4) is higher and the two statements i.e. statement u/s 132(4) and u/s 133A are not at par is not in dispute. The statements of the Director and the employees in the facts of the case in hand is under section 133A. The available legal position that retraction of statement even under section 132(4) is permissible provided the supporting evidences are made available is not in dispute. The arguments of the Revenue that statement once given does not require them to support the surrender statement with evidence when retracted by the assessee and questioned by the Courts/Tribunals also does not require them to look at the evidence made available is an incorrect appreciation of position of law. Such an argument cannot be accepted as it flouts the settled legal position on the issue. We may agree with caution with the argument on behalf of the Revenue

that the claim of coercion strictly may not be successful. The Ld. DR is possibly correct in arguing that direct evidence to support the allegation of coercion cannot be said to be demonstrated in the facts of the present case. However, we cannot lose sight of the fact that mistakes of facts and law have been consistently pointed out on record. The detailed explanations, reconciliations, Statements and evidences available on record remaining unrebutted by the Revenue, we have seen strike at the basis of the surrender and the records of the Survey team available on record. It is seen that facts confronted by the Survey team were admittedly incorrect. We shall address these facts subsequently also while addressing the arguments of the Revenue. On an appreciation of the detailed exhaustive arguments consistently on record, we hold that the basis of retraction stands demonstrated. The shortcomings in the supporting documents of the department, the survey report etc., we have seen are casual, adhoc estimates relying on a completely unscientific method. These have been believed to be correct position on facts and law by the Director is evident. We have seen that repeatedly at two stages, these claims have not been rebutted and even today reliance is placed on the statement of the Director etc. which we on examining the rival claims have seen to be based on incorrect appreciation

of facts and law. We find that the generalistic argument that there is always an element of estimation in the present facts of the case is not sufficient to give any credibility to the totally arbitrary exercise placed on record on the plea that it be honored because the CMD has surrendered. We have given our utmost consideration to the same and are of the firm view that retraction on facts is justified.

55. We have seen that the ld. CIT-DR has argued that surrender was voluntary and no force/pressure or coercion could be demonstrated. We have hesitated to give any firm finding on this argument and deem it necessary to only point out that there have been instances in the past wherein CBDT had felt the need to address the mal-practices of Survey teams in obtaining confessions etc. while Search/Survey proceedings were under way. These surrenders were later on retracted. To address this malaise, F.No. 286/2/2003-IT (Inv) dated 10.3.2003 was issued. Again considering the surrender etc. of undisclosed income under coercion/pressure during survey etc. the CBDT F.No. F.No. 286/98/2013-IT(Inv-II) dated 18.12.2014 again issued another Circular as a guideline in the backdrop of their retraction cautioning the Survey team that these surrenders/admissions/confessions were retracted as these

were not backed by credible evidence. It was noticed that these actions show the department as a whole and the officers in poor light. Thus the allegations of unfortunate resort to such unsustainable persuasive actions is neither new nor unique in the facts of the present case. Reference at this point of time may be made to the Board's Circulars on the issue:

(i) F.No. 286/2/2003-IT(Inv) 10.3.2003

No confessional statement in the course of search, seizure and survey.

March 10th 2003

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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, 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

(emphasis supplied)

(ii) F.No. F.No. 286/98/2013-IT(Inv-II) 18.12.2014

Admissions of Undisclosed Income under coercion/pressure during Search/Survey

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Subject: Admissions of Undisclosed Income under coercion/pressure during Search/Survey - reg. Ref: 1) CBDT letter F.No. 286/57/2002-IT(Inv.II) dt. 03-07-2002 2) CBDT letter F.No. 286/2/2003-IT(Inv.II) dt.10-03-2003 3) CBDT

letter F.No. 286/98/2013-IT(Inv.II) dt. 09-01-2014 Sir/Madam, **Instances/complaints of undue influence/coercion have come to notice of the CBDT that some assesseees were coerced to admit undisclosed income during Searches/Surveys conducted by the Department. It is also seen that many such admissions are retracted in the subsequent proceedings since the same are not backed by credible evidence. Such actions defeat the very purpose of Search/Survey operations as they fail to bring the undisclosed income to tax in a sustainable manner leave alone levy of penalty or launching of prosecution. Further, such actions show the Department as a whole and officers concerned in poor light.** 2. I am further directed to invite your attention to the Instructions/Guidelines issued by CBDT from time to time, as referred above, through which the Board has emphasized upon the **need to focus on gathering evidences during Search/Survey** and to **strictly avoid obtaining admission of undisclosed income under coercion/undue influence.** 3. In view of the above, while reiterating the aforesaid guidelines of the Board, I am directed to convey that any instance of undue influence/coercion in the recording of the statement during Search/Survey/Other proceeding under the I.T.Act,1961 and/or recording a disclosure of undisclosed income under undue pressure/ coercion shall be viewed by the Board adversely. 4. These guidelines may be brought to the notice of all concerned in your Region for strict compliance. 5. I have been further directed to request you to closely observe/oversee the actions of the officers functioning under you in this regard. 6. This issues with approval of the Chairperson, CBDT (K. Ravi Ramchandran) Director (Inv.)-II, CBDT -

(emphasis supplied)

56. A perusal of these would show that these mal-practices carried on in the field have been often restored to and were noticed by the Board adversely necessitating the Board to address how a survey team is to operate repeatedly. The Circular/Notification of the Board are binding on the officers is well settled by the Courts and the Tribunal.

57. Considering the facts of the present case, we find in the absence of any rebuttal by the Revenue consistently at every stage where apart from placing sole reliance on the surrender by the Director it is evident that the survey team totally flouted the procedure and did not build their case on

any fact or evidence let alone credible fact or evidence. No meaningful exercise was done prior to the surrender. The arbitrary methodology applied does not have any legal sanctity. The claim that sundry debtors payment have been received outside books where admittedly no cash was found again becomes a hollow claim based on no facts. The argument advanced by the ld. CIT-DR that huge cash was found is not as per record. No evidence of such a claim has been referred to by the two tax authorities despite the massive reconciliation evidence on record which remains unrebutted. Admittedly as per paper book page 402 (Vol. 2) physical cash of only Rs 33,480/- was found and not as argued by the ld. CIT-DR some huge exorbitant amounts justifying any surrender. The assessee's detailed reconciliation is available on record made available both before the A.O. as well as the Ld. CIT(A). It has been seen again by the A.O. in the remand proceedings and despite this no defect had been pointed out therein.

58. We have seen the evidence and noticed that the allegation leading to the surrender for salaries and wages paid outside books of account is also not based on any evidence. No statement of any employee is available to support the allegation. Infact no such question also appears

to have been put by the Survey Team to any of the employees. No evidence of employees found working who were not found mentioned in the record has also been made available or referred to by the Revenue either on the record or before us. What was the basis of the claim of the survey team is not evident. On the contrary we find that the argument that the Director said that possibly books were not updated but statutory deductions stood deducted with in time and only appropriate posting in the ledger may not have been upto date. This fact is not rebutted by the Revenue consistently. Hence scope for manipulation subsequently in incomplete books of accounts at the time of survey, it is seen is completely ruled out. Despite this constant claim, the Revenue is only relying on the surrender made ignoring the consistent argument based on facts and evidences that the surrender was made on incorrect facts. The Appellate Forum cannot participate in this meaningless exercise of closing one's eyes as an ostrich and pretending that the evidence does not exist.

59. Similarly, addressing the allegation of oil expenses allegedly not recorded in the books of account it is seen that it is claimed when making the surrender Mr. Satwant Singh, Director accepted that whatever was put to him. Paper book

page no. 94 Question 21 reflects that abrupt statement is made in the question that expenses worth Rs. 24,30,000/- had not been entered in incomplete books of account. No question where have the expenses been booked is there nor reference to any evidence etc. or question referring to it have been put. This assertion in the question without any evidence as per record, it is seen was believed to be correct by the Director. Consistently it has been argued on the basis of record available that all payments have been paid by cheques from the Mohali unit. The invoices, cheques and bank details referred to in the paper book at the time of hearing before the A.O./the CIT(A) and before us remain unrebutted by the Revenue. No argument let alone a counter evidence has been relied upon by the Revenue except for the surrender.

60. Addressing the argument advanced by the Revenue that each of the documents has been authenticated by the Director we find on considering the records is an incorrect argument. The Ld. AR has also disputed the above claim of the Revenue. We have seen on a perusal of the record that some employee(s) of the assessee have signed these and this fact is not disputed by the Ld. AR also however the submissions of the DR that it was signed by the Director is

disputed by the assessee and we find that the said claim of the Revenue is incorrect on facts.

61. We have examined and found that facts leading to the addition qua the unrecorded stock is a collection of unsustainable shoddy estimates which led to the surrender made and have found that retraction on facts is justified. It is also, however, relevant to address the statement of Factory Supervisor Mr. Narinder Singh (Paper Book page 106-107) which has been relied upon by the ld. CIT-DR. On considering the same in the light of the judicial precedent cited and noticing detailed objections of the assessee on his competency and capability in as much as that he was not the authorized person. We find that we have to agree with the submissions on behalf of the assessee and are of the view that neither his responses nor signatures lend authenticity to the estimates relied upon by the Revenue. The fact that an office employee of the assessee has signed the inventory list this fact read alongwith the questions put to him, we are of the view only verifies the fact that the Inventory list was made in his presence with his assistance however , it in no way can be said lead to authenticating the arbitrary estimates as correct and true. The exercise we find has been arbitrary and at best is a rough and ready estimation method

which was resorted to. The arguments of the ld. AR that he was neither a competent person nor the authorized person hence, his appending of signatures be discarded, we find have not been countered by the Revenue. The estimates being arbitrary as noticed earlier also remain unrebutted on record.

62. It would also be necessary for us to refer to the statement of Mr. Sunil Kumar, the Accountant (Paper Book page 98-100) relied upon by the ld. DR. On considering the same for the purposes of the allegation of unrecorded stock, we find that it also does not lend any authenticity or credibility to the calculations. Notwithstanding the arguments that he was neither the authorized person nor the competent person, it is also evident from the responses to the questions posed by the Survey Team that the evidence is again meaningless. It is seen that in response to question no. 3 he states that although inventory is prepared in his presence however he is unable to verify it from his computer as these were not available with him. Question no. 2 put to him shows that he says that he makes the sale bill, keeps excise record and purchase bills etc. Again in response to Question no. 6 he agrees stock inventory is correctly prepared in his presence however he cannot verify it from his

books as the books were not complete. Response to Question no. 7 shows that on being questioned on his knowledge as to upto which date books of accounts are complete he has responded that sales vouchers are printed upto 15/09/2010 and again Sales Vouchers are printed upto 06 June 2010. What is the meaning of two different dates. The statement is contradictory. He further goes on to say that books of account are not complete. Hence the answers clearly show that infact the Accountant cannot verify anything as possibly requisite record was not available to him as he was a junior and new Accountant. The Ld. DR's allegation that he is drawing a meager salary of Rs. 5000/- demonstrates that some salary was recorded and over and above that also paid in cash it is seen is an argument advanced without any evidence and is based on conjectures and surmises. It is not even the case of the tax authorities as per record or of the Survey team. However, on giving our careful consideration to this argument, we have seen that no such question was put by the survey team to Mr. Sunil Kumar aged 24 years. No effort to bring his educational level has been made by the survey team to show that commensurate with his qualification the salary was less. No question has also been raised to ask why his salary was low as now alleged by the ld. DR. We have seen no question was put to him by the Survey team asking

whether any payment of salary was also received in cash over and above the recorded salary of Rs. 5,000/-. The argument advanced without any evidence or basis at this stage is completely devoid on merit. Simple question put by Survey team was “ what remuneration is being paid to you” as Question no. 4 and it was answered directly as “ I am getting salary of Rs. 5000/- per month (Rs. Five Thousands only)”. The argument that salary was commensurate with his competency and skill being junior accountant maintaining record stands established as even the survey team did not cast any aspersion on the meagerness, if any on the salary being low as now being presented by the Ld. CIT-DR. The survey team satisfied with his salary of 24 years old Sunil Kumar working in the firm for 1½ years appears to have been satisfied as they neither questioned him further on it nor his education or the so called meager salary. Thus on considering his statement we find repeatedly agreeing that the report made by the survey team was correctly made in his presence has no relevance as the fact that he could not verify from the record which was not available to him is repeatedly on record. Further he was not having the competency to comment on the methodology and he was not authorized to do so, remains unrebutted. Thus, on various counts his statement is a case of multiple missed

opportunities of not asking relevant questions at best. We further find that even otherwise there is no fact or evidence to support the allegation that salary over and above what was recorded was being paid. Thus, this argument of the Revenue is devoid of merits.

63. We have also considered the argument of the ld. CIT-DR in support of the order that the retraction was not immediate and was after a few year is entirely incorrect. Survey under section 133A was carried on 21.09.2010. The Survey team's record supporting the surrender were made available as per unrebutted evidence to the assessee on record on 28.05.2011. The return of income was filed on 30.09.2011. In the return of income, the surrendered amount was not offered. The retraction was not after a few years. We are of the view that it is not correct to hold that retraction need necessarily be made only by way of writing a specific letter. The filing of return within a few months after carrying out a proper study of documents, considering reconciliation with its Sundry debtors, the basis of the allegations of unrecorded stock, salary wages and expenses etc. is a time consuming exercise supported by unrebutted evidences. Thus, it was a clear and categorical retraction from the surrender made and within reasonable time. The

reconciliation of the stock and the sundry debtor was a mammoth exercise carried out and overwhelmingly detailed supporting evidence were relied upon before the A.O. at the first instance is an undisputed fact on record. The fact that the evidence submitted remains unrebutted on record leaving the departments case sheltering behind the flimsy straw of the surrender by the Director has already been addressed by us. On considering the entirety of facts available on record and the submissions of the parties, we find that we are left with no option but to delete the entire addition on account of each of the heads which have been elaborated at length in the earlier part of this order. We have also gone through the statement of the Director on which heavy reliance has been placed by the Revenue and find ourselves in agreement with the submissions of the ld. AR that the surrender was made on the basis of mistaken belief of fact and law is borne from the record.

64. Having so held, it would not be out of context to also refer to some remaining arguments of the parties. One of which being the valiant argument of the Ld. CIT DR that the survey team actually weighed the entire stock which as per the assessee's repeated submissions recorded in the orders statement would have taken over 71 hours has to be taken

with a huge pinch of salt and cannot be accepted by us as an evidence that actual weighing was done. The availability of the requisite paraphernalia stated to be not available at the assessee's end to carry out the exercise has been seriously questioned by the assessee at the assessment stage which remains unrebutted on record. It has also been argued before the CIT(A). Reference may be made to page 33 of the impugned order. No effort has been made by the Revenue to show where the equipment for weighing was arranged for. It need also be noted that books of accounts of the assessee have not been rejected no penalty for non maintenance of accounts in the manner they ought to have been maintained we find has been vested upon the assessee. The assessee has consistently claimed that the assessee is dealing in excisable commodities and all records have been duly maintained. These have not been faulted with.

65. In the facts of the present case the assessee has repeatedly alleged pressure/coercion at multiple times before the Tax authorities and relying on those written submissions extracted in the order has also made such a plea before us. Ld. CIT-DR on the other hand has objected to the raising of the said plea on the grounds that the statement of surrender itself records that it was voluntarily given without any force

and even otherwise apart from mere pleading, no fact or evidence has been shown by the assessee either before the tax authorities or before the ITAT to substantiate its claim. On a consideration of the overall facts which we have elaborated at length and the position of law which also has been addressed in the earlier part of this order, we are of the view that though in the strict term of its use, the onus placed upon the assessee to get an order in its favour holding that surrender was made under coercion may be a little difficult. The facts in favour of the assessee available on record namely; the shoddy estimates and the arbitrary exercise of quantifying and valuation which stand unrebutted on record definitely makes out a case that some level of unfair persuasive tactics were employed by the Survey team which led to the surrender. Similarly the claim that unrecorded payments have been received from sundry debtors, it is seen is based on no fact or evidence as neither cash nor any document supporting such an allegation or conclusion has been referred to be cited by the Survey team or the tax authorities. The fact is that admittedly only Rs. 33,000/- odd cash was found. Till date, no supporting evidence has been referred to or placed on record except the statement of the Director. Further, the allegation of unrecorded salaries and wages, we have seen is not

supported by any document showing that the number of employees found working were more than the actual number as per record nor has any statement of any employee been recorded from where it can be seen that part salary was recorded and part was unrecorded. No such question was put to any of the employees and no evidence has been referred to. Similarly for the expenses of cutting oil etc. the Director does not question the basis of the assertion made in Q No. 21. It appears that he does not know as he may not have been responsible as argued by Id. AR for the day today functioning of the business, the fact that ultimately it was shown that this stood paid by the other unit by cheque, all this remain unrebutted on record. The retraction is supported by evidence confronted to the AO, the CIT(A) and relied upon before the ITAT remains unrebutted till date, it clearly brings out a case that the surrender was made based on facts as confronted which resulted in the action of surrender. So these facts lead to forming of belief for making the surrender no doubt voluntarily, but admittedly was based on confusion and misappreciation of facts. We have taken into consideration the definition of coercion as available under Section 15 and "undue influence" as available in Section 16 of the Indian Contract Act. We have also taken into consideration the legal position which places the burden on the one who pleads that

he has been coerced the onus to demonstrate it is on that person. The assessee possibly uses the terms coercion loosely alongwith pressure and not coercion perse.

65.1 Having so considered the definition wherein facts on record demonstrating the mistaken belief of facts and law are patent on the face of the record, we deem it appropriate to refer to certain submissions advanced on behalf of the assessee evident on record. The assessee as per the letter dated 10.12.2013 extracted in the assessment order page 2 has submitted as under :

*"Survey was conducted on business premises of the assessee on 21.09.2010. The assessee had surrendered a sum of Rs. 5.00 Crores under **undue mental pressure** at that time. The presence of so many officials of the Department causes extreme mental pressure and any normal person will be under confused state of mind. The assessee **always gets confused starts giving wrong answers even if the records and entries therein are correct.** Any normal person will like to get rid of the pressure cooker situation and normally offers to surrender even for their correct entries and records. It was one of such situations under which the assessee surrendered a sum of Rs. 5.0 crores. He latter found that the surrender was under confused state of affair it was later on retracted. **The way the surrender has been obtained from the assessee it-self speaks of the pressure which must have been there on the director of the company which forced him to surrender this amount.** Retraction from Surrender under each head is discussed here below.*

(emphasis supplied)

65.2 A perusal of the submissions extracted at page 9 of the assessment order again justifying the retraction of the surrender has made the following submissions extracted in the assessment order itself.

*"The **working has been done purely for the sake of pressurizing** the assessee to surrender."*

(emphasis supplied)

65.3 As per record, the following submissions extracted again in the assessment order necessitating the detailed reconciliation and cross checking of facts is evident from page 8 of the assessment order :

"The assessee is in process of compiling the reconciliation statement with its Debtors. This exercise was never conducted in past. Thus extracting the details of account statement of past years, finding the details of rejections, partial rejections, quality rejections or other amounts debited by the debtors on these or other accounts like rate difference, discounts, transportation or other charges claimed by the assessee but rejected by the debtors and not communicated to the assessee company is consuming lot of time. The debtors are not coming forward to reconcile the account statement of past years also. We have requested them to reconcile at least the account of last two years and the remaining years will be reconciled in phased manner. So this process is time consuming and we request that we should be granted at least two months time to reconcile the account statement of debtors. Detailed Note on retraction of surrender under other heads and other details asked for shall be submitted in the next hearing."

65.4 A perusal of page 12 of the assessment order again addresses the justification for retraction after pointing out the various defects etc. addressing the mental framework as under :

*"The assessee made surrender **under utter confusion and later on verified** all the facts including confirmation of debtors and found glaring defects in ; method of stock taking, physical verification of stocks lying loose, valuation of stock and also about **other inaccurate and false information; which confused the assessee and under pressure of circumstances he surrendered** income to the tune of Rs5.00 crores which was later on retracted.*

.....

(emphasis supplied)

The whole exercise of survey seems to have been for the purpose of obtaining surrender of income. No list of employees whose salary or wages was prepared and no detailed, list of bills which were not recorded was prepared to confront the assessee. The Survey Officer has himself approximated the expense. All the records were open for inspection then where was the need for approximation. No verified list of employees was made. The photocopy of list of employees is neither verified by any officer of the Department nor has been signed or verified by any employee of the assessee or assessee's director. There is no detail as to how these amounts have been arrived at. The assessee has

stated that PF etc has regularly been deposited. The detail was available in Mohali Office and all the entries for wages paid are entered by Mohali Office where Books were stated to be incomplete by an employee of accounts Department of the Assessee company. Now expense out of undisclosed income and expenses not recorded because the books were not complete are two different situations. If the assessee had any intention to meet expenses out of undeclared income then no PF or ESI would have been paid on the same. Photo copy of Trading Account supplied by the Department contains detail of Wages. In past also the assessee always debit Wages of Production staff to Operating Expenses and Salaries to staff and senior staff is debited/charged under the head Administrative Overheads. Total Wages and Salaries expense during the year ending 31.03.2011 is Rs34,14,222/-and Rs31,77,172 respectively. In addition to this there is bonus, ESI and provident fund payments by the assessee company. Further daily wage labour charges are Rs. 1,86,254/-

The question asked by the Survey Officer regarding unrecorded Wages and Salaries expenses was wrong and without any basis and is on approximation basis and hence surrender under this head has been) retracted.

The assessee, later on, verified all the facts including confirmation of debtors and found glaring defects in ; method of stock taking, physical verification of stocks lying loose, valuation of stock and other inaccurate and false information on the basis of which the surrender was **obtained by the Department; which confused the assessee and under pressure of circumstances he surrendered income** to the tune of Rs5.00 crores which was later on retracted. We have enclosed detail of:-

- a) Diesel Purchased, Cutting Oil Purchased.
- b) Copy of Account of Highway enterprises which had supplied cutting Oil.
- c) Copy of Account of Chatha Filling Station who have supplied diesel.
- d) Copy of Machinery account and all other Fixed Assets Purchased/installed with supporting Bills/Invoices.
- e) Comparative Chart of Valuation of "Stock of Finished Goods on inspection and packed Finished Goods on the basis of actual cost of production(Sales Value as per Bills - GP Rate) vis'-a-vis value adopted by the Department."

(emphasis supplied)

66. Accordingly, we are not so convinced with the claims advanced on behalf of the Revenue that there was no pressure whatsoever on the assessee while making the surrender, however, for the purposes of the present proceedings, we have held that the surrender admittedly on facts was made on mistaken belief of facts and law and in the face of the voluminous plethora of evidences countering each of the factors considered relevant by the Revenue for

addition, we have found that reliance is only placed upon statement of the Director and the employees.

67. Accordingly, considering the position of law, facts and submissions on record, the additions are directed to be deleted.

68. The appeal of the assessee is consequently allowed.

Order pronounced on 09 March,2022.

Sd/-

(VIKRAM SINGH YADAV)

लेखा सदस्य/ Accountant Member

“Poonam”/A.G.

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

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File

Sd/-

(DIVA SINGH)

न्यायिक सदस्य/ Judicial Member

आदेशानुसार/ By order,
सहायक पंजीकार/ Assistant Registrar