IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH: BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA Nos.62 to 66/Bang/2023
Assessment Years: 2012-13 to 2015-16 & 2017-18 respectively

M/s. Yashaswi Fish Meal and Oil Company 1, Pithrody Village Udayvara Udupi 574 118 Karnataka **PAN NO : AAAFY6841M**	**Vs.**	Deputy Commissioner of Income-tax Central Circle-1 Mangalore
APPELLANT		**RESPONDENT**

Appellant by	:	Shi V. Srinivasan, A.R.
Respondent by	:	Shri D.K. Mishra, D.R.

Date of Hearing	:	17.07.2023
Date of Pronouncement	:	01.09.2023

O R D E R

PER BENCH:

These appeals by assessee are directed against different orders of CIT(A)-2, Panaji for the assessment years 2012-13 to 2015-16 & 2017-18 all are common dated 9.12.2022. Most of the grounds in these appeals are common in nature, hence, these are clubbed together, heard together and disposed of by this common order for the sake of convenience.

2. Facts of the case in these assessment years are that the assessee has filed return of income and they are either subject to processing of return u/s 143(1) of the Income-tax Act,1961 ['the Act' for short] or assessment of the income u/s 143 of the Act as below:

Assessment year	Declared income	Processed u/s 143(1) of the Act on	Processed u/s 143 of the Act on
2012-13	61,84,811	09.04.2013	--
2013-14	3,23,61,300	02.02.2015	--
2014-15	7,21,64,030	02.01.2015	--
2015-16	29,09,36,050	06.03.2016	05.10.2016
2017-18	35,33,66,620	11.07.2018	--

2.1 There was a survey u/s 133A of the Act on 8.2.2018 in the case of assessee firm. Consequent to this, assessment was reopened u/s 147 of the Act after recording the reasons for reopening and notice u/s 148 of the Act was issued for these assessment years as follows:-

Assessment year	Notice issued u/s 148 of the Act on
2012-13	21.03.2019
2013-14	14.03.2019
2014-15	01.03.2019
2015-16	01.03.2019
2017-18	No mention of any notice issued u/s 148 of the Act exists in the body of the order that an order has ben passed u/s 143(3) r.w.s. 147 of the Act.

2.2 Finally, the assessment order for all these assessment years was framed u/s 143(3) r.w.s. 147 of the Act.

2.3 The first common ground in all these appeals is that the re-assessment order is bad in law and void-ab-initio for want of requisite jurisdiction especially, the mandatory requirement to assume jurisdiction u/s 148 of the Act did not exist and have not been complied with and consequently, the re-assessment order requires to be quashed.

2.4 The ld. A.R. submitted that there was no material found in the course of survey to make any addition for the years under appeal and that the addition made by placing reliance on the statement given at the time of survey that the said statement has been retracted by the assessee within a reasonable time and explained to

the authorities concerned that statement recorded was erroneous and no reliance could be placed upon the same for making re-opening the assessment or making any addition. He relied on the judgement of Hon'ble Karnataka High Court in the case of CIT Vs. Dr. Thippa Setty reported in 322 ITR 525, wherein held that "the statement made by the assessee u/s 132(4) of the Act were retracted not once but twice and the department had accepted the retraction. No pungent and valid reasons had been assigned by the AO for re-opening the assessment. There was no good and sufficient reason for re-opening of the assessment u/s 148 of the Act against the assessee.

3. The ld. D.R. submitted that there was a survey u/s 133A of the Act in case of assessee on 8.2.2018 and a statement u/s 131(1A) of the Act and during the survey proceedings u/s 133A of the Act was recorded on 8.2.2018 by department from one Mr. Uday Kumar Salian, S/o Late Gopal T. Salian, partner of M/s. Yashasvi Fish Meal and Oil Company and in that statement he categorically confirmed answer to question No.12 that there was bogus purchase entered by the assessee in these assessment years. Hence, the said material has been used for re-opening the assessment. Further, he submitted that sworn statement of Mr. Uday Kumar Salian was also recorded u/s 131 of the Act on 1.8.2018. Then also he confirmed entering of bogus purchase in the books of accounts and agreed to declare the adhoc lumpsum additional income. He relied on the order of the lower authorities.

4. We have heard the rival submissions and perused the materials available on record. There was survey u/s 133A of the Act in the case of assessee on 8.2.2018. Statement was recorded from Mr. Uday Kumar Salian on 8.2.2018 u/s 131(1A) of the Act during the course of survey proceedings u/s 133A of the Act. He has

confirmed the entering of bogus purchase in these assessment years as "Malpe Raised", which represents the bogus purchase. The said partner Mr. Uday Kumar Salian has retracted this statement vide his letter dated 14.2.2018 written to the Additional Director of Income tax, Pandeshwara, Mangalore and retracted the earlier statement given by him on 8.2.2018. However, the department has not considered the retracted statement and issued a notice u/s 148 of the Act in all these cases as stated above. Now the contention of the ld. A.R. is that there is no sufficient material to issue a notice u/s 148 of the Act to reopen these assessments.

4.1 In this case, the notice u/s 148 of the Act has been issued in all these assessment years on the basis of material collected during the course of survey proceedings u/s 133A of the Act conducted on 8.2.2018. During the course of survey proceedings, a statement was recorded from Uday Kumar Salian, one of the partners of the firm. In his statement recorded u/s 131 of the Act, he confirmed the bogus purchases in these assessment years. There also he offered additional income in these assessment years. That provoked the assessing officer to re-open the assessment. At the time of issuing of notice, there is no necessity of conclusive proof to suggest the escapement of income. On the other hand, the ld. AO shall have prima facie material to hold that his income has escaped from the assessment. In the instant case, there is a prima facie material available in the hands of the assessee in the form of statement recorded u/s 131 of the Act coupled with certain other documents to suggest the income escaped from assessment. With a view to examine these materials, the reassessment proceedings were initiated and which are came to the knowledge of the ld. AO subsequent to the original assessment, the doctrine of "change of opinion" cannot act as an embargo for exercise of power vested u/s 147 of the Act. The section 147 of the Act authorizes and permits

the AO to assess or re-assess income chargeable to tax, if he has reason to believe that income from any assessment year has escaped assessment.

4.2 The scope and effect of section 147 as substituted with effect from April 1, 1989, and also sections 148 to 152 are substantially different from the provisions as they stood prior to such substitution. Under the old provisions of section 147, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction under section 147(a) two conditions were required to be satisfied : firstly the Assessing Officer must have reason to believe that income, profits or gains chargeable to income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either material facts necessary for his assessment of that year. Both these conditions were condition precedent to be satisfied before the Assessing Officer could have jurisdiction to issue notice under section 148 read with section 147(a). But under the substituted section 147 existence of only the first conditions suffices. In other words if the Assessing Officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment. It is, however, to be noted that both the conditions must be fulfilled if the case falls within the ambit of the proviso to section 147. The case at hand is covered by the main provision and not the proviso.

4.3 So long as the ingredients of section 147 are fulfilled, the Assessing Officer is free to initiate proceeding under section 147 and failure to take steps under section 143(3) will not render the Assessing Officer powerless to initiate reassessment proceedings even when intimation under section 143(1) had been issued.

4.4 Same view is fortified by the judgement of Hon'ble Supreme Court in the case of ACIT Vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd. reported in 291 ITR 500 (SC).

4.5 The ld. A.R. relied on the judgement of Hon'ble Karnataka High Court in the case of Dr. Thippa Setty (322 ITR 525) (Karn.) In that case the Hon'ble High Court held that statement recorded u/s 132(4) of the Act which was retracted cannot be relied upon to reopen the assessment u/s 148 of the Act when the department has accepted the retraction. However, in the present case, the department never accepted the retraction statement filed by the assessee on 14.2.2018. Being so, at the stage of reopening of assessment by the AO, it is not necessary to have conclusive opinion of escapement of income. On the other hand, he must have prima facie of the opinion that income has escaped from the assessment in these assessment years. To that extent, in our opinion, at the time of reopening of assessment, the AO has reason to believe that income has escaped from assessment on the basis of the sworn statement recorded from the partner namely Mr. Uday Kumar Salian in view of the bogus purchase said to be recorded by the assessee in its books of accounts. Being so, we do not find any merit in this ground No.2 of the assessee raised before us. This ground of assessee is rejected.

5. The next commonground in these appeals is with regard to addition towards bogus purchase on the basis of sworn statement recorded from Mr. Uday Kumar Salian in his sworn statement cited above in all these assessment years.

5.1 During the course of survey proceedings, a statement was recorded from Mr. Uday Kumar Salian, one of the partner of the

assessee firm. In the statement recorded u/s 131 of the Act dated 1.8.2018 he has admitted additional income of Rs.45,02,01,134/- for the assessment year 2012-13 to 2018-19. Similarly, there was a statement u/s 133A of the Act dated 8.2.2018 which is as below:

Sl.No.	AY	Issue		Additional income
1	2012-13	Bogus purchase		5,50,00,000
2	2013-14	Bogus purchase		5,50,00,000
3	2014-15	Bogus purchase		5,50,00,000
4	2015-16	Bogus purchase		5,50,00,000
5	2016-17	Bogus purchase		5,50,00,000
6	2017-18	Bogus purchase	10,50,00,000	12,00,00,000
		Partners Personal expenses debited to books	1,50,00,000	
7	2018-19	Bogus purchase (Up to 6.2.2018)	4,52,01,134	5,52,01,134
		Partners personal expenses debited to books	1,00,00,000	
	Total			**Rs.45,02,01,134**

5.2 However, for the assessment years 2012-13, 2013-14, 2014-15, 2015-16 & 2017-18 did not include additional income offered in these assessment years, which was admitted during the course of survey proceedings and also in the statement recorded u/s 133A & 133 of the Act. The AO thus made additions in these assessment years as per the income offered in statement recorded u/s 131 & 133A of the Act as above. Against this, assessee is in appeal before

ld. CIT(A) who has confirmed the order of the AO. Against this assessee is in appeal before us.

6. The ld. A.R. submitted that there was a minor reduction in profit percentage from financial year 2014-15 to 2015-16, this was raised by the officials during the survey proceedings. The same was due to various reasons affecting internally and externally. However, to purchase peace and to cover up the reduction in profit percentage and also to cover up discrepancies, commissions and omissions, if any from the assessment year 2012-13 to 2016-17, Mr. Uday Kumar Salian had agreed to declare a sum of Rs.5,50,00,000 for the year 2016-17. Accordingly additional income of Rs.5,50,00,000 was offered to tax and revised Return of Income for the assessment year 2016-17 incorporating the additional income was filed on 31.03.2018 vide acknowledgement no. 598177411310318. This was also brought to the notice of Assistant Director of Income Tax, Mangalore. On verification of the statement, it is understood that the additional income was quantified and recorded as Rs.5,50,00,000 per annum from financial year 2011-12 to 2016-17. No such admission was made, further no evidence has been found either during the survey proceedings or during the search proceeding at the premises of the partners. It appears that the quantification is based on the mis- interpretation of the surrender and not corroborated by any evidence. It may be noted that our turnover for financial year 2011-12 to 2016-17 is as under:

Financial year	Turnover (Rs.)
2011-12	44,77,79,591
2012-13	83,75,14,526
2013-14	179,79,56,596
2014-15	368,05,48,941
2015-16	326,64,53,656
2016-17	365,90,60,017
2017-18	382,32,87,327

6.1 The ld. A.R. submitted that even assuming but not admitting that there is inflation in purchases as noted in the statement, the inflated purchases cannot be equal in all the years, much less when there is substantial variation in the turnover. The additional income declared for the assessment year 2016-17 was only to purchase peace and avoid litigation. No evidence from the same was detected either during the search or survey proceedings and the quantification appears to be mere estimation without any basis. The assessee has already paid the tax due on the surrendered additional income and further fastening with additional tax liability for the additional income as recorded in, the statement which was quantified based on wrong interpretation of the surrender made would cause genuine hardships and also be against the principles of justice. He submitted that assessee has received notices u/s 148 of the Act for the assessment years 2012-13 to 2016-17 and it is presumed that the same is for the additional income recorded in the statement as submitted earlier, as the same is due to wrong interpretation of the surrender made by Mr. Udaya kumar Salian and no income chargeable to tax has been escaped assessment. In view of the same the ld. A.R. requested to drop the proceedings initiated u/s 147 of the Act.

6.2 The ld. A.R. submitted that assessee has been declaring substantial income and net profit for various years, which are as under:

Financial year	Turnover (Rs.)	Net profit (Rs.)	Percentage
2011-12	44,77,79,591	61,84,810	1.38%
2012-13	83,75,14,526	3,23,61,301	3.86%
2013-14	179,79,56,596	7,21,64,031	4.01%
2014-15	368,05,48,941	29,07,58,136	7.90%
2015-16	326,64,53,656	22,97,71,519	7.03%
2016-17	367,90,60,017	35,33,66,621	9.66%
2017-18	382,32,87,327	41,45,73,740	10.84%

He submitted that the net profit is after claiming depreciation, remuneration, and interest on capital of partners. As could be noticed there from the income declared by the assessee is substantially high as compared to other comparable cases. If at all the income is assessed as estimated in the statement., the same will result in assessment of unreasonably higher income defeating the principle of assessing the real income. During the survey proceedings, a print out containing details of purchases was found. The ld. A.R. submitted that in line of business of the assessee, the purchases are made from boat owners, these boat owners do not issue any bills for their sales and hence vouchers are raised by the assessee for the purchases. A sheet containing date wise breakup of purchases made against bills and against vouchers raised by the assessee was found. The purchases made against vouchers raised by the assessee was inferred as inflation of purchases and an additional income of Rs. 4,52,01,134 was estimated. Hence, he submitted that the purchases made are actual and are used for the purpose of the business. The dealing in fish is an unorganised sector and in this line of business it is obvious that the purchases are made

against the self-made vouchers and same cannot be inferred as inflation.

6.3 He further submitted that during the survey proceedings when asked about the investment in SEZ unit it was stated that the approximate investment in the SEZ unit in the year 2017 was Rs.5,00,00,000. However, on inspection of the statement, it is observed that an additional amount of Rs.5,00,00',000 is treated as investment in Mangalore SEZ unit during the Financial year 2016-17 met out of alleged inflated purchase. In this regard, he submitted that Memorandum of Understanding was entered into between Mangalore SEZ ltd and our firm on 29.03.2017. As per the said agreement he submitted that assessee is entitled to setup its unit in the said land only after getting approval 'from the Development Commissioner of Mangalore SEZ as per the norms of SEZ Act 2005 and Rules 2006. As per the terms of said agreement, a sum of Rs.3,82,50,000 being 50% of the one-time non-refundable premium amount was paid and the said amount is also duly reflected in the books of accounts of the firm. As per the terms of MOU, a unit can be set up only after obtaining necessary approval and the approval from Development Commissioner Mangalore SEZ was obtained only on 15-06-2017. In view of the same, the ld. A.R. submitted that no investment/ development activity can be carried out in the SEZ unit without approval of development officer which is obtained only in Financial year 2017-18 (15.06.2017). Moreover, MOU was entered on 29.03.2017 i.e 2 days prior to the financial year end. It would be irrational to estimate the investment of Rs. 5,00,00,000 in only two days. Hence the estimation of Rs.5,00,00,000 for FY 2016-17 towards investment in SEZ unit is not correct and without any basis.

6.4 The ld. A.R. further submitted that during the survey proceedings, details about personal expenditure of the partner was asked and in response thereto it was stated that the approximate personal expenditure of all the partners put together would be around Rs.1-1.5 crores. It may be noted that personal expenditure of the partner is met by the firm. On verification of the statement, the additional income of Rs.1,00,00,000 for the FY 2016-17 and 1,50,00,000 for FY 2017-18 was estimated. In this regard, he submitted that the estimation is not correct and is not based on any material. No materials/evidences were detected either during the survey or search proceedings to prove that the personal expenditure of the partners are charged to the firm. The partners capital balances is in proportion to their profit sharing ratio over the years and all the partners withdraw equal amounts from the firm. In this scenario it is very unlikely that the personal expenditure of the partners which are not common is booked in the books of accounts of the firm. In light of the above, he submitted that the estimation of additional income of Rs.1,00,00,000 for financial year 2016-17 and 1,50,00,000 for financial year 2017-18 is not correct and appears to be misinterpretation of the answer given.

6.5 The ld. A.R. submitted that the assessee's partner Mr. Uday Kumar Salian was under the bonafide belief that the statements were recorded according to his answer and did not think that it was misinterpreted. The procedure of statement recording took long hours and various print outs were taken thereafter. Mr. Udayakumar Salian and other partners were asked to sign the print outs taken. They had no opportunity to verify the contents of the printouts taken. A request to furnish copy was made with the officials before vacating the premises and the assessee was informed that copies would be furnished at the Income Tax office.

Subsequently, at the time of assessee's visit to Income Tax office, once again signatures were taken on the print outs taken by the officials. The assessee's request to furnish copies of the print outs signed by assessee at the time of survey and thereafter at the Income Tax office was not fulfilled. As the copies of the statements were not furnished earlier, assessee was under the belief that Rs.5,50,00,000 was declared as additional income and the tax on the same was also paid and the issues were all settled. The ld. A.R. stated that the assessee was surprised on receipt of Notices dated 01.03.2019 issued u/s 148. Thus, once again a request was made to furnish copies of the statements recorded. Though the due date to furnish Return of Income in response to Notices u/s 148 was nearing, copies of the statements were not furnished. In the absence of the same Returns of Income were filed on 01.04.2019 declaring the income returned originally. In view of the above, the ld. A.R. submitted that the additional income as agreed during the survey proceedings has been duly offered to tax in the revised return of income and there is no additional income to be assessed in the hands of assessee's firm.

6.6 Thus, the ld. A.R. submitted that the summary of income declared by assessee over the years is as follows:

FY	2017-18	2016-17	2015-16	2014-15	2013-14	2012-13
Turnover	3,84,46,57,493	3,67,64,40,084	3,29,88,92,109	3,68,05,48,941	1,79,79,56,596	83,75,14,526
Gross profit	87,35,70,168	88,51,14,145	58,43,90,889	66,22,54,952	26,52,12,067	13,65,93,393
GP%	22.72	24.08	17.71	17.99	14.75	16.31
Net profit %	13.71	13.93	8.16	8.87	5.24	5.89

As could be noticed there from the Net profit (before deducting interest on capital remuneration and depreciation) declared by the assessee is substantially high as compared to other comparable Cases. If at all the income is assessed as estimated in the statement, the same will result in assessment of unreasonably higher

income defeating the principle of assessing the real income. Further, the sales are found to be genuine by the Revenue and thus the corresponding purchases are bound to be genuine when all the evidences related to purchases are produced and no defect is pointed out by the revenue.

6.7 Further, the ld. A.R. submitted that the allegation that partners as per their mutual understanding have agreed to take Rs.50,00,000/- in cash per annum in addition to the remuneration, interest on capital and profit share earned during the year and hence Rs. 5.50 crores is estimated as additional income for each year for the F.Ys 2011-12 to 2016-17 does not corroborate with the factual position. Details of partners for the financial years 2011-12 to 2016-17 is as under:

FY 2011-12			FY 2012-13			FY 2013-14	
1	Ahmed Saheb		1	Ahmed Saheb		1	Ahmed Saheb
2	F.M. Yakub		2	F.M. Yakub		2	F.M. Yakub
3	Mohammed Mujeeb Sikandar		3	Mohammed Mujeeb Sikandar		3	Mohammed Mujeeb Sikandar
4	Mrs. Ammabi		4	Mrs. Ammabi		4	Mrs. Ammabi
5	Muktar Ahmed Isak		5	Muktar Ahmed Isak		5	Muktar Ahmed Isak
6	Nagaraja Suvarna		6	Nagaraja Suvarna		6	Nagaraja Suvarna
7	Sadananda Salian		7	Sadananda Salian		7	Sadananda Salian
8	Sadhu Salian		8	Sadhu Salian		8	Sadhu Salian
9	Sudhakar Kunder		9	Sudhakar Kunder		9	Sudhakar Kunder
10	Sunder G. Salian		10	Sunder G. Salian		10	Sunder G. Salian
11	T.S. Feroz Ahmed		11	T.S. Feroz Ahmed		11	T.S. Feroz Ahmed
12	Uday Kumar Salian		12	Uday Kumar Salian		12	Uday Kumar Salian

F.Y 2014-15		F.Y 2015-16		F.Y 2016-17			
				Upto 28.04.2016		28.04.2016 to 31.03.2017	
1	Ahmed Saheb	1	Ahmed Saheb	1	Ahmed Saheb	1	Ahmed Saheb
2	F.M.Yakub	2	F.M.Yakub	2	F.M.Yakub	2	F.M.Yakub
3	Mohammed Mujeeb Sikandar	3	Mohammed Mujeeb Sikandar	3	Mohammed Mujeeb Sikandar (Retired on 28.04.2016)	3	Mrs. Ammabi
4	Mrs. Ammabi	4	Mrs. Ammabi	4	Mrs. Ammabi	4	Muktar Ahmed Isak
5	Muktar Ahmed Isak	5	Muktar Ahmed Isak	5	Muktar Ahmed Isak	5	Nagamma S. Salian
6	Nagamma S. Salian	6	Nagamma S. Salian	6	Nagamma S. Salian	6	Nagaraja Suvarna
7	Nagaraja Suvarna	7	Nagaraja Suvarna	7	Nagaraja Suvarna	7	Sadananda Salian
8	Sadananda Salian	8	Sadananda Salian	8	Sadananda Salian	8	Sadhu Salian
9	Sadhu Salian	9	Sadhu Salian	9	Sadhu Salian	9	Sudhakar Kunder
10	Sudhakar Kunder	10	Sudhakar Kunder	10	Sudhakar Kunder	10	T.S.Feroz Ahmed
11	T.S.Feroz Ahmed	11	T.S.Feroz Ahmed	11	T.S.Feroz Ahmed	11	Uday Kumar Salian
12	Uday Kumar Salian	12	Uday Kumar Salian	12	Uday Kumar Salian		

6.8 The ld. A.R. submitted that as could be noticed there were 12 partners upto 28.04.2016. As per Deed of Retirement dated 28.04.2016 Mohammed Mujeeb Sikhander retired from firm and thus the firm was left with only 11 partners thereafter. In view of the above the estimation of Rs. 5,50,00,000 per annum as withdrawn by the 11 partners was factually incorrect. Such bald and vague statements without any corroboration is neither sustainable nor is reasonable. He submitted that in the line of business of the assessee firm, the purchases are made from boat owners, these boat owners do not issue any bills for their sales and hence purchase vouchers are raised by the assessee firm. A sheet containing date wise breakup of purchases made against bills and against vouchers raised by us was found. The purchases made against vouchers raised by us was inferred as inflation of purchases and an additional income of Rs. 4,52,01,134 was estimated. He submitted that the purchases made are actual and are used for the purpose of the business.

6.9 The ld. A.R. submitted that the dealing in fish is an unorganized sector and in this line of business it is obvious that the purchases are made against the self-made vouchers and same cannot be inferred as inflation. The assessee has already produced all the purchase bills/self-vouchers along with evidences related to their transportation. Neither any defect in the books of accounts nor the vouchers and evidences produced have been pointed out by learned assessing officer and hence the proposed addition is totally uncalled for and would be merely based on suspicion.

6.10 The ld. A.R. further submitted that during the survey proceedings when asked about the investment in building of SEZ unit, it was stated that the approximate investment for construction of building of SEZ unit was Rs.5,00,00,000. However, on inspection of the statement, it was observed that an additional amount of Rs.5,00,00,000 is treated as investment in Mangalore SEZ unit during the Financial year 2016-17 met out of alleged inflated purchase. In this regard, he submitted that Memorandum of Understanding was entered into between Mangalore SEZ and assessee firm only on 29.03.2017. He submitted that as per the said agreement assessee firm is entitled to setup unit in the said land only after getting approval from the Development Commissioner of Mangalore SEZ as per the norms of SEZ act 2005 and rules 2006. As per the terms of said agreement, a sum of Rs.3,82,50,000 being 50%, the one-time non-refundable premium amount was paid and the said amount is also duly reflected in the books of accounts of the firm. As submitted earlier as per the terms of MOU, a unit can be set up only after obtaining necessary approval.

The approval from Development Commissioner Mangalore SEZ was obtained only on 15-06-2017. In view of the same, he submitted that no investment/development activity can be carried out in the SEZ unit without approval development officer which is obtained only in financial year 2017-18 (15.06.2017). Moreover, MOU was entered on 29.03.2017 i.e 2 days prior to the financial year end. Even one has to assume that investment is made it would be irrational to estimate the investment of Rs. 5,00,00,000 in only two days. Hence the estimation of Rs.5,00,00,000 for FY 2016-17 towards investment in SEZ unit is not correct and without any basis.

6.11 Further, the ld. A.R submitted that during the survey proceedings, details about personal expenditure of the partner was asked and in response thereto it was stated that the approximate personal expenditure of all the partners put together would be around 1-1.5 crores. The personal expenditure of the partner is met out of their income and no part of it is charged in the books of account of the firm. On verification of statement the additional income of Rs.1,00,00,000 for the FY 2016-17 and 1,50,00,000 for FY 2017-18 was estimated. In this regard, he submitted that the estimation is not correct and is not based on any material. No materials/evidences were detected either during the survey or search proceedings to prove that the personal expenditure of the partners are charged to the firm. The partners capital balances is in proportion to their profit sharing ratio over the years and all the partners withdraw equal amounts from the firm. In this scenario it is very unlikely that the personal expenditure of the partners which are not common is booked in the books of accounts of the firm. In light of the above, the estimation of

additional income of Rs.1,00,00,000 for financial year 2016-17 and 1,50,00,000 for financial year 2017-18 is not correct and appears to be misinterpretation of the answer given.

6.12 Mr. Uday Kumar Salian was under the bonafide belief that the statements were recorded according to his answers and did not think that it was misinterpreted. The procedure of statement recording took long hours and various print outs were taken thereafter. Late nights Mr. Udaykumar Salian and other partners were coerced to sign the print outs taken. They had no opportunity to verify the contents of the printouts taken. Copies of the statements were also not furnished. Thus, in view of the above assessee had not offered any additional income as alleged in Show Cause Notice dated 27.09.2019.

6.13 The ld. A.R. further submitted that two of the partners were searched and also enquiries of partners were made during the course of survey. In none of the partners cases, including those who were searched or examined, any additional personal expense or any unaccounted assets were not found by the Revenue. Further either during the survey proceedings or search proceedings at the premises of partners no assets much less corresponding to the additional income as found in the statement recorded is detected. Meanwhile, the assessee requested that if the revenue is relying on any other statements/ evidences copy of the same may be furnished to the assessee.

6.14 Without prejudice the ld. A.R. submitted that the re-opening is not as per law. Reason recorded is merely based on factually incorrect statement. The ld. A.R. stated that the sanctioning authority also did not apply his mind for the sanction. He requested to furnish copies of the sanction letter to the assessee and allowed to file objections against the re-opening and he drew our attention

to the decision of the Supreme Court in GKN Driveshaft's case in view of passing speaking order against the objections on re-opening of assessment. The admission made during the survey proceedings is brought to the notice of the revenue before issue of the Notice u/s 148 where in it is clearly stated that additional income was admitted only for assessment year 2016-17 and which is duly offered to tax. Thus, there was no reason to believe that income had escaped assessed for assessment year 2012-13 to 2015-16.

6.15 Without prejudice to the above and also to the right of the assessee to file further objections to the re-opening of the assessment, the ld. A.R. submitted that as the reasons recorded for re-opening of assessment proceedings u/s 147 is only based on statement recorded u/s 131 of the Act, in this connection he submitted that the evidentiary value of the statement recorded has been discussed by various judicial authorities and it is held that the statement recorded cannot be a sole evidence for assessment much less to re-open the assessment unless it is corroborated by documentary evidences.

6.16 The ld. A.R. further submitted that the assessment proceedings for AY 2013-14 was completed. As could be noticed there from the AO has duly verified all the vouchers for relevant assessment year. However, few vouchers were not legible and proposed to add Rs. 8,50,000 for the relevant assessment year. Assessee did not wish to litigate on this and agreed for the same. He submitted that if there was any inflation in purchases same would have been detected by the AO during the assessment proceedings, that too when the bills/vouchers were verified

by him. The assessment for AY 2015-16 was completed accepting the returned income after due verification of the vouchers and bills. Hence, the proposed addition would result to change of opinion.

6.17 The ld. A.R. drew our attention to the instructions issued by Central Board of Direct Taxes in F.No.286/2/2003-IT(Inv), dated 23.03.2003 wherein the following is stated:

> *"Instances have come to the notice of the Board where assessees have claimed that they have been forced to confess undisclosed income during the course of the search and seizure* and *survey operation. Such confession, if not based n credible evidence, are taken/retracted by the concerned assessees while filing return of income. In these circumstances, confession during the search and seizure and survey operation do not serve any useful purpose. It is, therefore, advised that there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the income tax department. Similarly, while recording statement during the course of search and seizure operation,* no *attempt should be made to obtain confession as to the undisclosed income."*

6.18 The ld. A.R. submitted that in the instant case no documentary evidence was found either during the survey proceedings at the premises of the assessee or during the search proceedings at the premises of the partners. In such a scenario the statement recorded would not serve any evidence as opined by the CBDT.

6.19 The ld. A.R. further submitted that in Attar Singh Gurmukh Singh V. ITO (1991) 191 ITR 667/59 Taxman 11 (SC) and CWT V. Rohtas Industries Ltd (1968) 67 ITR 283 (Pat), the Hon'ble Supreme Court held that the statement can be retracted if assessee proves that, the statement was not given in a proper frame of mind or was given under duress and threat or under a mistaken belief of law. It is also held that, the revenue authorities

are required to corroborate the admission in the statement with independent evidence. As evident from the reason recorded for re-opening of assessment is only based on statement no other corroborative evidence to substantiate the additional income quantified was detected.

6.20 The ld. A.R. submitted that Hon'ble Apex Court in Pullangode Rubber Produce Co., Ltd V. State of Kerala (1973) 91 ITR 18 (SC) held that the admission is an extremely important piece of evidence, has held that, it cannot be said to be conclusive and the maker can show that it was incorrect. The statement is factually incorrect for the detailed reasons stated above and in the instant case sole reliance is placed on such factually incorrect statement.

6.21 The ld. A.R. further submitted that in Satinder Kumar (HUF) V. CIT (1977) 106 ITR 64 (SC), it was held that an admission made by an assessee constitutes a relevant piece of evidence, but if the assessee contends that in making the admission he had proceeded on a mistaken understanding or on misconception of facts or on untrue facts, such an admission cannot be relied upon without first considering the aforesaid contention. The ratio is squarely applicable on the instant case as the statement itself is recorded on a mistaken understanding.

6.22 The ld. A.R. drew our attention to Hon'ble Supreme Court's in the case of CIT Vs Khader Khan And Son [2012] 25 taxmann.com 413 (SC), wherein Hon'ble Apex court held that a statement recorded during survey proceedings do not have any evidentiary value. Thus, the sole evidence relied upon issue of show cause notice do not have any evidentiary value

in the eyes of law. For the sake of convenience, the above submissions are summarised below:

- Survey proceedings had taken place at the premises of the assessee on 08.02.2018. Copies of documents impounded and statements were not furnished even after repealed arid persistent requests.

- Copies of statements were furnished only on 19.07.2019, i.e after 17 months from the date of survey.

- The additional income admitted for one year was mis-interpreted as for 6 years.

- Additional income admitted during survey is immediately offered to tax by revising the Return of Income for AY 2016-17 on 31.03.2018.

- Mis-interpretation of surrender made was brought to the notice of revenue immediately after receipt of the copies of statement recorded.

- Turnover has varied over the years and the alleged inflation of purchases has no correlation with the year wise purchases / turnover.

- Assessee has been declaring substantial income over the years and is much higher than the profits declared in the similar nature of trade

- It is normal practice in this line of business, payments have to be made to fishermen in cash and bearer cheques.

- No evidences about alleged inflation was found either during the course of survey or during the course of search at the residence of the partners.

- Details provided about investments made in SEZ unit and about personal expenditure of the partners treated as additional income, without any basis and evidences.

- Without prejudice reassessment proceedings is void an bad in law.

- Without prejudice to the above there was no reason to believe that assessee's income had escaped assessment.

- Without prejudice to the above, the reasons recorded for reopening of assessment proceedings u/s 147 is only based on factually incorrect statement recorded u/s 131 which is not corroborated by any evidences. Thus, such factually incorrect statement cannot form a belief of income escaping assessment much less cannot be a sole evidence for assessment.

6.23 Further, he drew our attention to the retracted statement filed before the authorities on 14.2.2018, which reads as follows:

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Yashaswi
Marine Ingredients
Enriching Growth

Date: 14.02.2018

To
The Additional Director of Income Tax
Pandeshwar
Mangaluru

Dear Sir,

Reg: PAN: AAAFY6841M

In connection with the survey proceedings u/s 133A in our premises, we wish to submit as under:

1. We are assessed to tax under PAN: AAAFY6841M.

2. We have been filing our Returns of Income regularly.

3. On 08.02.2018 following proceedings were carried out at our premises and residences of our partners:

Place	Proceedings
Office of M/s Yashaswi Fish Meal and Oil Company	Survey u/s 133A of Income Tax Act
Residence of Mr. Sadhu Salian	Search u/s 132
Residence of Mr. Firoze Ahmed Thonse Sheikh	Search u/s 132

4. We have been regularly paying our tax liability regularly. We have been filing our returns of income regularly and also the profit declared is also higher. This may be verified from our income tax returns. The profit declared by us is highest among other fish meal manufacturers in costal Karnataka.

5. During the survey proceedings various documents have been verified and also some of the documents were taken from our office. We were only given a carbon copy of

15 FEB 2018

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FOR YASHASWI FISH MEAL AND OIL COMPANY

Partner

Yashaswi
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the list of documents taken. We do not have copies of the documents taken away by the department. The seized documents contain the purchase book, we are receiving pressure from our suppliers for settling their dues. To settle their payments we require reconciling the purchase book. We request to furnish copy to us as early as possible.

6. We are surprised by the action taken by the department and the pressure during the search proceedings was enormous. During the proceedings various questions were asked and the reply given was being typed in the computer by the official. At the end of the proceedings post midnight of 08.02.2018, Mr. Udayakumar Salian was asked to sign various sheets and also the print out of the statement typed by the official. He was instructed to date signatures as 08.02.2018. Further, our partners Mr. Ahmed Saheb and Mr. F.M Yakub were asked to sign some statements. Similar excercise was also made at the residence of Mr. Sadhu Salian and Mr. Firoze Ahmed T S at their residence. We were not allowed to go through the contents of records signed by us. We had asked for copies of the same. It was also not entertained.

7. We were once again called to income tax office on 12.02.2018 and asked sign on few papers with dates as insisted by the officials. We were informed that we are bound to sign the papers though we were not allowed to go through the same and the failure would result in arrest of partners including the ladies. Similar threat was made even on the date of the survey/search. Though we had asked for the copies once again same was not furnished. We once again request you to kindly grant the copies of all the statements signed by us.

8. During survey proceedings certain allegations were made stating that we have inflated our purchases. We have given detailed explanations during the survey proceedings in this regard. As submitted during the survey proceedings there was dispute between us and erstwhile partner Mohammed Mujeeb Sikhander. He had retired from the firm in April 2016. Said retired partner had removed various data from our records and we were unable to produce some of the records called for. Due to the mental stress during the search proceedings we were waiting for the closure of the proceedings eagerly. Moreover, our employees were also being pressurised. In order to purchase peace we agreed to declare sum of Rs. 5.50 crores for the financial year 2015-16 to cover the discrepancy from the financial year 2011-12 to 2015-16, if any occurred due to the havoc created by the retired partner and also to cover up minor reduction in profit percentage pointed out by the officers during survey.

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Yashaswi
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9. We wish to submit that we will abide by the declaration made and we will revise our return of income for financial year 2016-17. But due to our financial conditions we may not be able to pay the taxes on the additional income declared. Hence, we request you kindly grant us time to pay the same.

10. We once again request you to furnish us the copies of the statements and the seized documents. Further, if you note any discrepancy from the documents seized we request you to kindly grant and an opportunity to furnish our explanation to the same.

11. It is our humble prayer that we may kindly be exempted from any penal consequences in relation to income declared during survey proceedings. The additional income was declared only to purchase peace and that too on an adhoc basis.

With regards

(MR.SADHU SALIAN) (MR.AHMED SAHEB) (MR.SADANANDA SALIAN)

(MR.UDAYA KUMAR SALIAN) (MR.T.S FEROZ AHAMED) (MR.F.M YAKUB)

(MR.MUQTHAR AHMED ISHAK) (MR.NAGRAJ SUVARNA) (MR.SUDHAKAR KUNDAR)

(MRS.AMMABI) (MRS.NAGAMMA S SALIAN)

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6.24 The ld. A.R. alleged that the partners as per their mutual understanding have agreed to take Rs.50,00,000/- in cash per annum in addition to the remuneration, interest on capital and profit share earned during the year and hence Rs.

5.50 crores is estimated as additional income for each year for the F.Ys 2011-12 to 2016-17 does not corroborate with the factual position. Details of partners for the financial years 2011-12 to 2016-17 is asunder:

FY 2011-12			FY 2012-13			FY 2013-14	
1	Ahmed Saheb		1	Ahmed Saheb		1	Ahmed Saheb
2	F.M. Yakub		2	F.M. Yakub		2	F.M. Yakub
3	Mohammed Mujeeb Sikandar		3	Mohammed Mujeeb Sikandar		3	Mohammed Mujeeb Sikandar
4	Mrs. Ammabi		4	Mrs. Ammabi		4	Mrs. Ammabi
5	Muktar Ahmed Isak		5	Muktar Ahmed Isak		5	Muktar Ahmed Isak
6	Nagaraja Suvarna		6	Nagaraja Suvarna		6	Nagaraja Suvarna
7	Sadananda Salian		7	Sadananda Salian		7	Sadananda Salian
8	Sadhu Salian		8	Sadhu Salian		8	Sadhu Salian
9	Sudhakar Kunder		9	Sudhakar Kunder		9	Sudhakar Kunder
10	Sunder G. Salian		10	Sunder G. Salian		10	Sunder G. Salian
11	T.S. Feroz Ahmed		11	T.S. Feroz Ahmed		11	T.S. Feroz Ahmed
12	Uday Kumar Salian		12	Uday Kumar Salian		12	Uday Kumar Salian

F.Y 2014-15		F.Y 2015-16		F.Y 2016-17			
				Upto 28.04.2016		28.04.2016 to 31.03.2017	
1	Ahmed Saheb	1	Ahmed Saheb	1	Ahmed Saheb	1	Ahmed Saheb
2	F.M.Yakub	2	F.M.Yakub	2	F.M.Yakub	2	F.M.Yakub
3	Mohammed Mujeeb Sikandar	3	Mohammed Mujeeb Sikandar	3	Mohammed Mujeeb Sikandar (Retired on 28.04.2016)	3	Mrs. Ammabi
4	Mrs. Ammabi	4	Mrs. Ammabi	4	Mrs. Ammabi	4	Muktar Ahmed Isak
5	Muktar Ahmed Isak	5	Muktar Ahmed Isak	5	Muktar Ahmed Isak	5	Nagamma S. Salian
6	Nagamma S. Salian	6	Nagamma S. Salian	6	Nagamma S. Salian	6	Nagaraja Suvarna
7	Nagaraja Suvarna	7	Nagaraja Suvarna	7	Nagaraja Suvarna	7	Sadananda Salian
8	Sadananda Salian	8	Sadananda Salian	8	Sadananda Salian	8	Sadhu Salian
9	Sadhu Salian	9	Sadhu Salian	9	Sadhu Salian	9	Sudhakar Kunder
10	Sudhakar Kunder	10	Sudhakar Kunder	10	Sudhakar Kunder	10	T.S.Feroz Ahmed
11	T.S.Feroz Ahmed	11	T.S.Feroz Ahmed	11	T.S.Feroz Ahmed	11	Uday Kumar Salian
12	Uday Kumar Salian	12	Uday Kumar Salian	12	Uday Kumar Salian		

6.25 As could be noticed there from there were 12 partners upto 28.04.2016. As per Deed of Retirement dated 28.04.2016 Mohammed Mujeeb Sikhander retired from firm and thus the firm

was left with only 11 partners thereafter. In view of the above the ld. A.R. submitted that estimation of Rs. 5,50,00,000 per annum as withdrawn by the 11 partners was factually incorrect. Such bald and vague statements without any corroboration is neither sustainable nor is reasonable.

6.26 The extract of answer to Q. No. 14 of statement of Mr. Udayakumar Salian is reproduced hereunder:

"Ans . Sir, I want to state that the mutual understanding of withdrawing/ taking Rs, 50,00,000/ - in cash from the firm in addition to the remuneration, interest on capital share of profit was made in the year 2011- 12. From that year onwards, i.e. from F.Y. 2011-12, we the 11 partners are withdrawing an amount totaling to Rs. 5,50,00,000/ - per annum from M/ s Yashaswi Fish Meal & Oil by introducing bogus purchase bills.

Now in order to rectify the mistakes in the books of accounts of our partnership concern, I am availing this opportunity and voluntarily offering a sum of Rs. 33,00,00,000/ - spread over the Financial Years 2011-12 to 2016-17. The break up of the same is produced below for ready reference.

Sl. No.	*Financial Year*	*Additional Income offered*	*Nature of Disallowance*
1	*2011-12*	*5,50,00,000*	*Bogus Purchase*
2	*2012-13*	*5„50,00,000*	*Bogus Purchase*
3	*2013-14*	*5,50,00,000*	*Bogus Purchase*
4	*2014-15*	*5,50,00,000*	*Bogus Purchase*
5	*2015-16*	*5,50,00,000*	*Bogus Purchase*
6	*2016-17*	*5,50,00,000*	*Bogus Purchase*
Total		*33,00,00,000*	

I have already stated in my answer to the earlier question that in this year also i.e. the F. Y. 2017-18, as on date, we have made the bogus purchases bills to the tune of Rs.4,28,47,574/ - and offering the same as additional income in the F.Y. 2017-18."

6.27 The ld. A.R. submitted that as could be noticed there from it is recorded as if Mr. Udayakumar has deposed as *"we the 11 partners are withdrawing"*. Mr. Udayakumar Salian who is well aware of the fact that there were 12 partners upto 28.04.2016 would not. have stated that 11 partners are

withdrawing. This proves that, the statement recorded was prepared as per the convenience of Department at the time of survey based on the facts prevalent (11 partners) on the date of survey.

6.28 He further alleged that the expenses are inflated and a sum of Rs. 50,00,000 each is shared by the partners per annum. As could be noticed from the financial statements the profit sharing ratio of the partner varied from financial year 2014-15 onwards and their capital balances is in proportion to their profit sharing ratio. In such case it is very unlikely and beyond human probabilities that the partners will share the amount of profits earned from inflating the expenditure equally as alleged. Thus, the above facts shows that the statement is factually incorrect and not recorded as deposed by the person deposing the statement but recorded as per the convenience of the officials recording the statement. The partner deposing the statement is well aware of the facts and such factual error would not have been arisen if the statement is recorded as deposed. Mr. Udayakumar Salian has filed a letter dated 14.02.2018 immediately after the search/survey stating the facts deposed by him during the survey proceedings. As could be noticed there from, he had agreed to offer additional income of Rs. 5,50,00,000 as additional income for assessment year 2016-17 and not for each financial year from financial year 2011-12 onwards. The firm is formed on 08.02.2007 the statement is recorded stating that the inflation of expenses is being made only from financial year 2011-12. After the completion of the survey proceedings the assessment could have been reopened from assessment year 2012-13 onwards. Thus, the officer recording the statement being aware of the limitation for reopening of assessment recorded the statement determining additional income for the years that could be reopened as per the provisions of the Act.

6.29 Further the ld. A.R. submitted that the Q.No. 21 reads as under:

"21. I am once again reminding you that this statement is being recorded on oath and the consequences of giving a false statement under oath has already been explained to you. Please confirm."

6.30 But the answer to the question reads as under:

Ans. I understand that this statement is being recorded under Oath and I have also understood the consequences of giving a false statement under Oath. I have offered additional incomes under different heads and different AYs in my replies to the earlier questions. In addition, I would also like to offer additional income amounting to Rs.2.50 Crore (Rs.1.50 Crore for FY 2016-17 and Rs.1.00 Crore for FY 2017 18) on account of booking of various personal expenditures of the partners in the books of the firm. I would also like to offer additional income of Rs.5 Crore on account of bogus purchases debited in the books for the FY 2016-17 which has been utilized for the investment made in our new plant coming up in the SEZ, and this additional income is over and above what is already shown in the books of the firm. To sum up the total additional income offered for taxation in the hands of the firm for the different AYs is as below -

Sl. No.	AY	Issue		Additional Income
1	2012-13	Bogus Purchase		5,50,00,000
2	2013-14	Bogus Purchase		5,50,00,000
3	2014-15	Bogus Purchase		5,50,00,000
4	2015-16	Bogus Purchase		5,50,00,000
5	2016-17	Bogus Purchase		5,50,00,000
6	2017-18	Bogus Purchase	Rs. 10,50,00,000	12,00,00,000
		Partners Personal Expenses debited to books	Rs. 1,50,00,000	
7	2018-19	Bogus Purchase (Upto 6/2/2018)	Rs. 4,52,01,134	5,52,01,134
		Partners Personal Expenses debited to books	Rs. 1,00,00,000	
	TOTAL			45,02,01,134/-

6.31 The ld. A.R. submitted that, the question is to confirm that the person deposing it is aware of the consequences of giving false statement on oath. But the

answer is recorded as if the person deposing it is agreeing to declare additional income. Further, he submitted that regarding the issue of investment in SEZ unit and personal expenditure is concerned you may appreciate that there was no whisper on these issues in the entire statement and it suddenly crops up in question No. 21 without reference to any material found during the survey. Thus, it is clear that the statement was prepared by the Department officials and not the one that is deposed by the partner of the assessee Mr. Udayakumar Salian. He drew our attention to the decision of Honourable Andhra Pradesh High Court in the case of CIT Vs Naresh Kumar Agarwal (2015) 53 taxman.com 306 (AP), wherein it was held as under:

"16. *The circumstances under which a statement is recorded from an assessee, in the course of search and seizure, are not difficult to imagine. He is virtually put under pressure and is denied of access to external advice or opportunity to think independently. A battalion of officers, who hardly feel any limits on their power, pounce upon the assessee, as though he is a hardcore criminal. The nature of steps, taken during the course of search are sometimes frightening. Locks are broken, seats of sofas are mercilessly cut and opened. Every possible item is forcibly dissected. Even the pillows are not spared and their acts are backed by the powers of an investigating officer under Section 94 of Cr.P.0 by operation of sub-section (13) of Section 132 of the Act. The objective may be genuine, and the exercise may be legal. However, the freedom of a citizen that transcends, even the Constitution cannot be treated as non-existent.*

17. ***It is not without reason that the Parliament insisted that the recording of statement must be in relation to the seized and recovered material, which is in the form of documents, cash, gold etc. It is, obviously to know the source thereof, on the spot. Beyond that, it is not a limited licence, to an authority, to script the financial obituary of an assessee."***

6.32 Thus he submitted that the findings of Hon'ble Andhra Pradesh High Court is squarely applicable on this issue as the Department officials have proceeded with the recording statement on the issue for which not even a single piece of evidence was found during survey or search proceedings.

6.33 All these proves beyond doubt that the statement relied upon by the AO is not a statement as deposed by the person making such statement hut recorded by the officer recording the statement as per the convenience of the revenue to put unnecessary tax burden on the assessee.

No corroborative evidence:

6.34 There is no corroborative evidence that proves that there was an arrangement to withdraw the money by the partner by inflating the expenditure or that proves that the expenses have been inflated.

6.35 The ld. A.R. submitted that our turnover for financial year 2011-12 to 2016-17 is as under:

Financial Year	Turnover (Rs. In `
2011-12	44.78
2012-13	83.75
2013-14	179.80
2014-15	368.05
2015-16	326.65
2016-17	365.91

6.36 Even assuming but not admitting that there is inflation in purchases as noted in the statement, the inflated purchases cannot be equal in all the year, much less when there is substantial variation in the turnover. The additional income declared for the assessment year 2016-17 was only to co-operate with the department and avoid litigation. No evidence from the same was detected either during the search or survey proceedings and the quantification appears to be mere estimation without any basis.

6.37 Summary of income declared by the assessee over the years is under:

(Rs. In crores)

F.Y	2	20	20	20	20	20
Tur	365.91	326.65	368.05	17	83	44
Gros	88.51	58.43	66.23	26.	13	7.
GP	24.19	17.89	17.99	14.	16	17
Net	40.56		32.11	9.0	4.	1.
Net	1	7.97%	8.72%	5.0	5.	3.

Note: Net profit before deducting interest on capital remuneration and depreciation

6.38 He submitted that as could be noticed there from the Net profit (before deducting interest on capital remuneration and depreciation) declared by the assessee is substantially high as compared to other comparable cases. If at all the income is assessed as estimated in the statement, the same will result in assessment of unreasonably higher income defeating the principle of assessing the real income. Further, the sales are found to be genuine by the Revenue and thus the corresponding purchases are bound to be genuine when all the evidences related to purchases are produced and no defect is pointed out by the revenue.

6.39 He submitted that though repeated requests for copies of statements were made before the Assistant Director of Income Tax, Unit-2, Mangalore to furnish copies of statements recorded the same were not furnished. Consequent to the receipt of Notices u/s 148 one more round of repeated requests to furnish copies of statements recorded were made before the assessing officer as under:

1. Letter dated 22.03.2019
2. Letter dated 16.05.2019 by Authorised representative
3. Email dated 26.06.2019 by Authorised representative

6.40 After repeated and persistent requests, the copies of statements of Mr. Udayakumar Salian purportedly recorded u/s 131 on 08.02.2018, 12.02.2018 and 01.08.2018 were furnished only on 19.07.2019. On verification of the same, it was seen that the statements dated 08.02.2018 and 12.02.2018 were recorded admitting the whopping additional income of Rs. 45,02,01,134. The discrepancies in the statement recorded were immediately brought to the notice of the Assessing Officer vide letter dated 22.07.2019. The learned AO held as under:

"7.20 In the instant case the statement is deemed to be retracted as the assessee has not filed any formal affidavit or letter retracting the declaration as being recorded under threat or coercion or mistaken facts. It is only vide letter dated 22.07.2019 the assessee is making a claim that the declaration made was not recorded as it was meant by him"

6.41 However, the learned AO failed to appreciate that the letter dated 14.02.2018 was filed with the Assistant Director of Income Tax, Unit-2, Mangalore i.e within a week of search/survey proceedings. As could be seen from the letter the admission made is clearly explained. However, the learned AO held that the retraction was made only on 22.07.2019. Though the letter was filed confirming the declaration since the statement typed by the department officials to their convenience was in accordance with what was disposed in the letter dated 14.02.2018 is required to be treated as retracted. Thus, the assessing officer's contention that the statement was not retracted immediately is not correct.

6.42 The learned AO relied on decision of Sumati Dayal Vs. CIT (1995) 214 ITR 801 (SC) and CIT Vs. Durga Prasad More 82 ITR 540 (SC), wherein it was held that matter should be considered in the human probabilities and surrounding circumstances. But learned AO failed to appreciate the following factors before arriving at the conclusion of inflation:

a. There were 12 partners upto 28.04.2016 but the allegation of AO is that 11 partners have withdrawn 50 Lakhs each from financial year 2011-12 which prima facie proves that the allegation is bald and without any substance.

b. The profit sharing ratio of partners is not equal and it is beyond human probabilities that the amount earned out of alleged inflation of expenses is shared equally among the partners.

c. The learned AO failed to appreciate the surrounding circumstances that no corresponding asset is found either during search or survey to substantiate the alleged inflation of expenses.

d. The learned AO failed to appreciate that the alleged inflation is equal to 12% of the total sales of Financial year 2011-12 and the resultant GP is nearly 30% which is absurd in the industry of the appellant. Thus, it is submitted that the circumstantial evidences too prove that the alleged inflation is without any basis and beyond human probabilities.

6.43 The learned AO has relied on the decision of Kerala High Court in the case of CIT Vs. O. Abdul Razak 76 ITR 350 (Ker) and held that the statement recorded during search will serve as an evidence against the assessee. It may be noted that the Honourable Andhra Pradesh High Court in the case of CIT Vs Naresh Kumar Agarwal (2015) 53 taxman.com 306 (AP) held as under:

"13. In Abdul Rajaks case (supra) , the Kerala High Court took the view that a statement recorded under sub-section (4) of Section 132 of the Act can constitute the basis for passing a block assessment order, notwithstanding the retraction from it, by the assessee. The discussion in this behalf reads as under:

> *"8. It cannot be doubted for a moment that the burden of proving the undisclosed income is squarely on the shoulders of the Department. Acquisition of properties by the assessee are proved with the documents seized in search. Since understatement of consideration in documents is*

the usual practice the officer questioned the assessee on payments made over and above the amounts stated in the documents. The assessee gave sworn statement honestly disclosing the actual amounts paid. The question. now to be considered is whether the sworn statement constitutes evidence of undisclosed income arid if so whether it is evidence collected by the Department. In our view, the burden of proof is discharged by the Department when they persuaded the assessee to state details of undisclosed income, which the assessee disclosed in his sworn statement, on being confronted with the title deeds seized in search."

14. With great respect to the learned Judges of Kerala High Court, who rendered the judgment, we express our inability to subscribe to that view. To the extent, Their Lordships have taken note of the fact that the burden of proving undisclosed income squarely rested on the Department, there is hardly any doubt. However, the manner in which the burden can be said to have been discharged, as mentioned in the underlined portion, runs contrary to the very basic tenets of law of evidence. Though the fact that the assessee therein retracted from the sworn statement, no discussion was undertaken about it.

15. The question of discharge of burden, arises in respect of a fact, to be proved. ***If the contents of the statement recorded from an assessee are to be proved, that very statement cannot be a proof, by itself.*** *Such a course would bring about hypellage logic, which is illustrated by a well known example.*

Q: who is a doctor?

Ans: The one who administers Medicine.

Q: What is Medicine?

Ans: The one that is administered by a doctor. Such discussion does not lead one, any further.

The discharge of burden must be in respect of the plea taken by the Department and the burden can be discharged only through material, which is over and above what was stated in their case. ***The statement assumes the character of proven fact, only when it is not denied by the assessee.***

18. At the cost of repetition, we observe that if the statement made during the course of search remains the same, it can constitute the basis for proceeding further under the Act, even if there is no other material. ***If, on the other hand, the statement is retracted, the Assessing Officer has to establish his own case. The statement that too, which is retracted from the assessee, cannot constitute the basis for an order under Section 158BC of the Act."***

6.44 The findings of Hon'ble Andhra Pradesh High Court is squarely applicable to the instant case for the following reasons:

a. The contents of the statements are proved to be incorrect.

b. The statement is retracted and the learned AO has relied on the statement for additions. No material is brought on record to substantiate the case of the Department.

6.45 The learned AO relied on decision in the case of CIT Vs. Ravi Mathur (2017) ITR-OL 245 (Raj) and held that the statement was not retracted immediately and same was made only on 22.07.2019. But the learned AO failed to appreciate that the appellant had duly filed a letter dated 14.02.2018 i.e. within a week reconfirming the admission made. The fact that the statement was not recorded as deposed and same was recorded as per whims and fancy of the officers came to the notice only when the purported statement was furnished to the assessee after 18 months though repeated requests were made before the investigation wing as well as assessing officer. The statement was furnished by the assessee on 19.07.2019 (Friday) and the second retraction was filed on 22.07.2019 (Monday) i.e. on the next working day. In view of the above it cannot be said that the appellant had not filed retraction immediately while appellant had filed retraction twice i.e. within a week of the search/survey and second retraction was filed on the next working day. Further the retraction filed provides for documentary evidence which proves that the contents of statement are factually incorrect and was not recorded as deposed but a prejudiced statement prepared statement by Department officials. Thus, following the judgement of Hon'ble Rajasthan High Court the assessment order is liable to be quashed which is entirely based on the factually incorrect statement.

6.46 The Hon'ble Apex Court in Pullangode Rubber Produce Co., Ltd V. State of Kerala (1973) 91 ITR 18 (SC) held that the admission is an extremely important piece of evidence, has held that, it cannot be said to be conclusive and the maker can show that it was incorrect. The statement is factually incorrect for the detailed reasons stated above and in the instant case sole reliance is placed on such factually incorrect statement.

6.47 The ld. A.R. further relied on the judgement in the case of Satinder Kumar (HUF) V. CIT (1977) 106 ITR 64 (SC), wherein it was held that an admission made by an assessee constitutes a relevant piece of evidence, but if the assessee contends that in making the admission he had proceeded on a mistaken understanding or on misconception of facts or on untrue facts, such an admission cannot be relied upon without first considering the aforesaid contention. The ratio is squarely applicable on the instant case as the statement itself contains incorrect facts.

6.48 He further drew our attention to Hon'ble Supreme Court's decision in the case of CIT Vs Khader Khan And Son [2012] 25 taxmann.com 413 (SC), wherein Hon'ble Apex court held that a statement recorded during survey proceedings do not have any evidentiary value. Thus, the sole evidence relied upon issue of show cause notice do not have any evidentiary value in the eyes of law.

6.49 The learned AO has relied upon the decision of Hon'ble Apex Court in the case of Surjeet Singh Chhabra Vs. Union of India AIR 1997 SC 2560 wherein it is held that once it is shown that the statement was voluntary then, the assessee

cannot retract. In the instant case, it is proved beyond doubt that the statement is not voluntary as the same contains factual inaccuracy stated above and is prepared at the convenience of Department.

6.50 The ld. A.R. further submitted that the learned AO has relied upon the decision of Hon'ble Supreme Court in the case of Awadh Kishore Dass Vs. Ram Gopal AIR 1979 SC 861 wherein it was held that unless the statement is proved wrong they are efficacious proof of facts admitted. But in the instant case as stated above it is proved that the statement relied upon by the AO is wrong and thus same cannot be considered as efficacious proof of facts admitted. Thus, he submitted that the reliance of AO on the said judgement do not substantiate the case of the department.

6.51 He further submitted that the learned AO has relied on the decision in the case of B. Kishore Kumar Vs. DCIT (2014) 52 taxmann.com 449 (Madras), but he failed to appreciate that the basic distinguishable fact is that in the said case assessee had agreed about the additional income but in the instant case no such admission is made by the appellant in the instant case.

6.52 In view of the above, the ld. A.R. submitted that none of the cases relied upon by the learned AO substantiate the case of revenue but in fact the same are in favour of the assessee under the facts of the instant case.

6.53 Hence, the ld. A.R. brought to our notice the gist of the submissions made is as under:

- Reopening is merely based on a statement which is not recorded as deposed by the person making such statement. Thus, the reopening is bad in law.

- Reassessment proceedings is bad in law since the speaking order is not passed against the objection filed in view of the Apex Court decision in GKN Driveshaft
- The purported statement relied upon for reopening is factually incorrect
- There is no corroborative evidence to substantiate the allegations
- The purported statement is duly retracted twice and same cannot be relied upon

- Judicial pronouncements relied upon by the AO is clearly distinguished on the facts of the appellant
- Various judicial pronouncements including that of the Apex Court are in favour of the appellant
- Statement during survey proceedings is not binding as per the decision of Apex Court in the case of CIT Vs Khader Khan And Son [2012] 25 taxmann.com 413 (SC)

6.54 The ld. A.R. further relied on the following judgements:

a) Hon'ble Supreme Court in the case of CIT Vs. S. Khadar Khan & Sons 352 ITR 480 (SC)
b) Judgement of AP High Court in the case of CIT Vs. Naresh Kumar Aggrawal (369 ITR 171)
c) Order of the Tribunal Cochin bench in the case of ITO Vs. V. Thomas Enterprises (ITA No.442/Coch/2018 dated 7.2.2019 for the AY 2014-15).

6.55 In view of the above, the ld. A.R. prayed before us that the additions may be deleted appreciating the facts of the case. In the unlikely event of our proceedings taking any

adverse view, then the ld. A.R. requested that an opportunity of personal hearing may be granted.

7. On the other hand, the ld. D.R. submitted that the assessee filed the reply on 4.11.2019 to the show cause notice issued by the AO vide letter dated 27.9.2019 wherein the ld. A.R. objected to the addition on various grounds whose gist is mentioned in the assessment order, which is reproduced as under:

- *`Survey proceedings had taken place at the premises of the appellant on 08.02.2018. Copies of documents impounded and statements were not furnished even after repeated and persistent requests*

- *Copies of statements were furnished only on 19.07.2019, i.e. after 17 months from the date of survey.*

- *The additional income admitted for one year was mis-interpreted as for 6 years.*

- *Additional income admitted during survey is immediately offered to tax by revising the Return of Income for A.Y. 2016-17 on 31.03.2018.*

- *Mis-interpretation of surrender made was brought to your notice immediately after receipt of the copies of statement recorded.*

- *Turnover has varied over the years and the alleged inflation of purchases has no correlation with the year wise purchases / turnover.*

- *Appellant has been declaring substantial income over the years and is much higher than the profits declared in the similar nature of trade*

- *It is normal practice in this line of business, payments have to be made to fishermen in cash and bearer cheques.*

- *No evidences about alleged inflation was found either during the course of survey or during the course of search at the residence of the partners.*

- *Details provided about investments made in SEZ unit and about personal expenditure of the partners treated as additional income, without any basis and evidences.'*

- *Copies of statements were furnished only on 19.07.2019, i.e. after 17 months from the date of survey.*

- *The additional income admitted for one year was mis-interpreted as for 6 years.*

- *Additional income admitted during survey is immediately offered to tax by revising the Return of Income for A.Y. 2016-17 on 31.03.2018.*

- *Mis-interpretation of surrender made was brought to your notice immediately after receipt of the copies of statement recorded.*

- *Turnover has varied over the years and the alleged inflation of purchases has no correlation with the year wise purchases / turnover.*

- *Appellant has been declaring substantial income over the years and is much higher than the profits declared in the similar nature of trade*

- *It is normal practice in this line of business, payments have to be made to fishermen in cash and bearer cheques.*

- *No evidences about alleged inflation was found either during the course of survey or during the course of search at the residence of the partners.*

- *Details provided about investments made in SEZ unit and about personal expenditure of the partners treated as additional income, without any basis and evidences. '*

7.1 AO, however, did not accept these contentions of the assessee for reasons lucidly explained in the assessment order. These reasons are reproduced as under: -

> *"6.1 As stated in the previous paragraphs a survey proceeding u/s 133A of the Income tax Act 1961 was conducted on 08.02.2018 in the case the appellant. In the statement u/s 131 recorded, the*

partner of the firm admitted additional income of Rs. 5,50,00,000 for this year. The appellant had sought for copies of the statement given during the course of survey. The same were provided to the appellant vide this office letter dated 19.07.2019. Subsequently, the appellant filed a letter dated 22.07.2019 explaining why the additional income admitted during the survey were not adhered to while filing the return of income.

7. Retraction of declaration:

7.1 In the statement recorded on 08.02.2018 the partner Sri Udaykumar Salian declared additional income of Rs. 5,50,00,000/- on the issue of inflated purchases for this year. It is only on 22.07.2019 appellant filed letter in this office stating that the statement of the partner was mis interpreted in as much as the additional income of Rs.5,50,00,00/- was admitted for one year but it was recorded as for each year in the statement which was not the admission by the appellant. The appellant also contends that several printouts of the papers where the partner had to affix his signature was kept before him and in order to complete the long-drawn survey proceedings the partner put his signature without reading it.

7.2 The basis for the declaration of Rs. 5,50,00,000/- as additional income is explained by the partner in reply to Question No. 12 of the statement, wherein inter-al is he has stated:

Ans. I confirm that the document marked as Annexure 1 has been taken from the computer in our office operated by my staff Miss Amitha. Sir, these pages contains the details regarding the purchases made by M/s Yashaswi Fish Meal & Oil from Malpe for the period from 01.04.2017 to 31.01.2018. It contains date wise purchases made by our partnership concern from the fisherman, commission agent at Malpe. The figures under the column " MalpePur Actual" represents our actual purchases made from various parties of Malpe and the payments; against all these purchases have been made through NEFT/RTGS. As regards the figures mentioned in the column "Malpe Raised", I would like to admit that though purchase bills have been raised in these cases, but the same are not genuine. Against these bills, bearer cheques have been issued and that amounts have been withdrawn from the bank by us. The amounts withdrawn from the banks have been used for making payments to the partners, who in mutual understanding have agreed to take Rs.50,00,000/- in cash per annum, in addition to the remuneration, interest on capital and part of the profit

earned during the year. As regards the figures mentioned under the column "Total", the same represents the purchases booked by our partnership concern in its books of accounts.

7.3 The partner has further clarified the same in his reply to Q. No. 14 as follows:

Ans. Sir, 1 want to state that the mutual understanding of withdrawing/taking Rs, 50,00,000/- in cash from the firm in addition to the remuneration, interest on capital share of profit was made in the year 2011-12. From that year onwards, i.e. from F. Y 2011-12, we the 11 partners are withdrawing an amount totalling to Rs.5,50,00,000/- per annum from M/s Yashaswi Fish Meal & Oil by introducing bogus purchase bills.

Now in order to rectify the mistakes in the books of accounts of our partnership concern, I am availing this opportunity and voluntarily offering a sum of Rs.33,00,00,000/- spread over the Financial Years 2011-12 to 2016-17. The breakup of the same is produced below for ready reference.

gl. No.	*Financial Year*	*Additional Income offered*	*Nature of Disallowance*
1	*2011-12*	*5,50,00,000*	*Bogus Purchase*
2	*2012-13*	*5,50,00,000*	*Bogus Purchase*
3	*2013-14*	*5,50,00,000*	*Bogus Purchase*
4	*2014-15*	*5,50,00,000*	*Bogus Purchase*
5	*2015-16*	*5,50,00,000*	*Bogus Purchase*
6	*2016-17*	*5,50,00,000*	*Bogus Purchase*
	Total	***33,00,00,000***	

7.4 Hence it is this mutual understanding among the partners that has necessitated the booking of bogus purchases to fulfil the unaccounted financial obligations towards the partners.

7.5 In this background it is necessary to see the mode of payments of purchases of Rs.36,89,88,138 during the year. As per the details furnished by the appellant the breakup of the payments for purchases is as follows:

Si. No.	*Description*	*Amount*

1	*Cash*	*1,27,54,667.00*
2	*Bearer Cheque*	*21,02,95,254.00*
3	*RTGS/Crossed Cheque*	*8,82,10, 148.00*
4	*Credit*	*5,77,28,069.00*
	Total	*36,89,88,138.00*

7.6 As can be seen from the above considerable portion of the purchases, i.e 60.45% is either in cash or in the form of bearer cheques.

7.7 In Q. No. 7 of the statement the partner has stated that raw materials are purchased from various places between the coast of Ratnagiri to Cochin but the main purchases are from Malpe. The partner has stated that major purchases are from local port Malpe. As stated by him in reply to Q. No. 9, outstation purchases are paid in cheques or banking channels but the local purchases are paid in cash as most of the fishermen prefer cash as they do not have bank accounts.

7.8 Further during the course of survey (Answer to Q. No.12) details of purchases recorded in the computer of the firm containing date wise purchases made by the appellant from Malpe were found. The partner stated that the purchases under the column "MalpePur Actual" represents the actual purchases for which payments have been made by NEFT/RTGS and with regard to the purchases recorded under "Malpe Raised" he conceded that these bills were not genuine. The partner admitted that in respect of these purchases' bearer cheques have been issued and amounts have been withdrawn and distributed to the partners as per the mutual understanding.

7.9 In the reply dated 04.11.2019 it is also contended that since the raw fish is purchased from small fishermen or boats who do not issue any bills, self-vouchers is the norm of the trade.

7.10 Hence the inference that necessarily has to be drawn is:

- *Large part of the purchases is either through bearer cheques/cash, which gives scope for manipulation to suit the convenience of the mutual understanding of the partners.*
- *Evidence has been found for the financial year 2017-18 in respect of inflation of Malpe purchases.*
- *The partner has admitted purchase inflation only when confronted with evidence found.*
- *The partner has not claimed at any point of time either after search or during assessment that the statement was given under threat, coercion or undue influence.*
- *The appellant has never denied the evidence found during survey and confirmed in the statement regarding inflation of purchases.*

> *As the partner Uday Kumar Salian was aware of the issues he declared additional income of Rs. 5,50,00,000 on account of purchase inflation booked in the books of the firm to accommodate the unaccounted payment of Rs. 50,00,000 per annum for the 11 partners of the firm.*

7.11 It is pertinent to note that there is no reference to the aspect of mutual understanding between partners of withdrawing of Rs. 50,00,000 per annum for each of the 11 partners of the firm in the reply filed on 04.11.2019. However, the appellant is only contending that no evidence of inflated purchases have been found for all the years.

7.12 Here, it would be proper to bring out relevant legal position on the issues in these types of cases. Merely because direct evidences are not found in respect of purchase inflation, these transactions cannot be accepted as portrayed. The matter has to be viewed in its entirety and after taking into account the various facts enlisted above.

7.13 Non-existence of evidence in each of the transaction in the line of business of the appellant should not be taken as conclusive without considering the surrounding circumstances and human probabilities. There are certain features of this case which belie the documentary evidence.

7.14 In the case of Sumati Dayal Vs. CIT (1995) 214 ITR 801, the Supreme Court, inter-alia, held as under:

> *"in such cases, a superficial approach to the problem should be eschewed and the matter has to be considered in the light of human probabilities and further that any transaction about which direct evidence is rarely available should be inferred on the basis of circumstances available on the record. In that case, the majority opinion of the Settlement Commission was approved as it was taken after considering the surrounding circumstances and applying the test of human probabilities."*

7.15 These principles apply to the present case where the documentary evidence (i.e. purchase invoices/ bills) prima facie supports the appellant's case but a closer look at the same in the light of surrounding circumstances ie.

- *scope for manipulation as the invoices are self-generated*
- *need for manipulation in view of the mutual understanding of the partners*
- *evidence of bogus booking of purchases found for FY 2017-18 during survey*

and applying the test of human probabilities reveal that the appellant has inflated its purchases. More importantly this was admitted by the appellant in the statement and has accepted and declared in the return of income for A.Y. 2016-17.

7.16 It was settled in the case of CIT VsDurga Prasad More 82 ITR 540 (SC) that the tax authorities are entitled to look into the surrounding circumstances to find out the reality of such recitals. The Hon'ble Apex Court has specifically observed as under:

> *"Science has not yet invented any instrument to test the reliability of the evidence placed before a Court or Tribunal. Therefore, the Courts and Tribunals are applying the test of human probabilities. Human minds may differ as to the reliability of a piece of evidence."*

7.17 In the case of Juggilal Kamlapat Vs CIT 73 ITR 702 (SC), it was held that the Assessing Officer could go behind the legal form and find out substance having regard to the economic realities behind the legal façade.

7.18 It is very pertinent to note that the statement of Sri Uday Salian recorded during survey and u/s 131 has been confirmed by other two partners Sri Sadhu Salian and Sri Firoz Ahmed Tonse in their statement u/s 132(4) during the course of search which was simultaneously being conducted at their residence.

7.19 The statements recorded under section 132(4) and 131 of the Income-tax Act have great evidentiary value and cannot be retracted in a summary manner. Several judicial pronouncements on this issue has held that the retraction has to be genuinely made within reasonable time and immediately after such a statement has been recorded either by filing a complaint to the superior authority or otherwise brought to the notice of the higher officials, duly sworn affidavit or statements supported by convincing evidence.

7.20 In the instant case the statement is deemed to be retracted as the appellant has not filed any formal affidavit or letter retracting the declaration as being recorded under threat or coercion or mistaken facts. It is only vide letter dated 22.07.2019 the appellant is making a claim that the declaration made was not recorded as it was meant by him.

……
……..

7.23 Hence the statement can only be retracted either by way of a duly sworn affidavit or statements supported by convincing evidence through which the appellant could demonstrate that the statements initially recorded were under pressure/coercion and factually incorrect. Apparently in the instant case none of the above parameters have been adhered to. The appellant has not brought on record any evidence to show that the statements were recorded under pressure.

7.24 In the instant case of the appellant, the statement of the partner was recorded on 08.02.2018 whereas the letter retracting the statement was ,filed only on 22.07.2019 after i.e. after a long gap of 18 months.

7.25 In view of the above discussion it is clear that the retraction filed by the appellant is not a valid retraction as per the parameters laid down in the decision of the High Court of Kerala in CIT v. 0. Abdul Razak(supra) and Hon'ble High Court of Rajasthan in CIT v. Ravi Mathur(supra). This view has been followed by the Hon'ble High Court of Chattisgarh in ACIT Vs. Hukum Chand Jain in 337ITR 238.

7.26 Further the Supreme Court in Pullangode Rubber Produce Co. Ltd. v. State of Kerala [1973] 91 ITR 18 (SC), which incidentally the appellant also has relied upon, has held that an admission is an extremely important piece of evidence though it is not conclusive. Therefore, a statement made voluntarily by the appellant could form the basis of assessment. The mere fact that the appellant retracted the statement could not make the statement unacceptable. The burden lies on the appellant to establish that the admission made in the statement at the time of survey was wrong and in fact there was no additional income.

7.27 In the instant case, it can be seen that the partner of the appellant firm admitted additional income voluntarily on being specifically asked about the evidence for purchases. It is not the case of the appellant that the partner was coerced or forced to admit the income. It can be seen from the reply to Q.No. 14 of statement dated 08.02.2018 and in Q. No. 5 of 12.02.2018, it was his admission that there was purchase inflation and, on this issue, he was admitting Rs.5,50,00,000/- as additional income.

7.28 Hence the contention of the partner made after one and half years that the statement was signed only to end the survey proceedings being unaware of what is recorded is without any merit.

7.29 The fact is when there is a clear admission, voluntarily made, by the appellant, that would constitute a good piece of evidence for the purpose of assessing the income.

7.30 There is no evidence on record that statement was obtained under coercion or threat of any kind. The appellant was completely aware of the statement he was giving and at no point of time filed any letter immediately after the search/survey stating that the statement was given under threat or coercion.

7.31 Hence once it is shown that the statement was voluntary then, the appellant cannot retract as held by the judgment of the Hon'ble Supreme Court in the case of Surjeet Singh Chhabra v. Union of India AIR 1997 SC 2560.
7.32 Further there is no material on record to suggest the statement was given under a mistaken belief either of facts or law. The statement under section 132(4) has greater evidentiary value than statement given under other provisions of the statute.

7.33 It has been held by the Hon'ble Supreme Court in the case Awadh Kishore Dass vs. Ram Gopal AIR 1979 SC 861 that evidentiary admission are not conclusive proof but shift the burden of the proof to

the person making them. Further, unless proved to be wrong, they are efficacious proof of facts admitted.

7.34 The submissions of the appellant as well as material available on record have been considered carefully. The crucial question is whether the addition can be made on the basis of statement recorded under section 131 and 132(4) which is now retracted by the appellant in as much as the income declared by the appellant during the course of search/survey as additional income has not been declared in the return of income.

7.35 It is settled law that admission by a person is a good piece of evidence and the same can be used against a person who makes it. The reason behind this is, a person making a statement stops the opposite party from making further investigation.

7.36 This principal is also embedded in the provisions of the Evidence Act. The statement recorded under section 132(4) is on a different footing. The Legislature in its wisdom has provided that such a statement may be used in evidence in any proceedings under the Income-tax Act, 1961. Therefore, great evidentiary value has been attached to such statement by the Legislature for the purpose of determining the income of the appellant post search.

7.37 In view of this the admission made in statement under section 132(4) has great evidentiary value and is binding on a person who makes it. Therefore, the assessment can he made based on such admission by using the same in evidence. If in the course of such search, the appellant makes some admission, he debars the authorised officer from making further investigation. The sanctity of such provision would be lost if the appellant is allowed to contend that no addition can he made based on such admission.

7.38 In the case of B. Kishore Kumar vs. Deputy Commissioner of Income-tax, Central Circle-I V (1), Chennai the Hon'ble High Court of Madras in [2014] 52 taxmann.com 449 (Madras) held that where appellant himself stated in sworn statement during search and seizure about his undisclosed income, same was to be levied tax on basis of admission even without scrutinizing documents.

7.39 The Hon 'ble Supreme Court of India has upheld the decision of the Hon 'ble Madras High Court and the SLP was dismissed as reported in [2015] 62 taxmann.com 215 (SC)/[2015] 234 Taxman 771 (SC).

7.40 The important issue to be observed is that because the appellant had made the aforesaid surrender, the revenue had

refrained from making any further enquiries into the matter. It was, therefore, not open to the appellant to retract from the earlier statement at the time of adjudication.

7.41 In the matter of Ranjas Nawal's case [2003] 131 Taxman 525 (Rajasthan) also, the Rajasthan High Court observed that the appellant admits that he is disclosing undisclosed income at his free will and without any threat and expresses his inability to submit any documentary evidence during search proceedings, the subsequent contention of the appellant that the income declared (without including the admitted income) is genuine is an afterthought and cannot be accepted.

7.42 In the matter of Hiralal Maganlal & Co.'s 96 ITD 113 (Mum) case during search proceedings in relation to block assessment, certain sheets indicating the details of stock of the appellant firm were seized The chief accountant of the firm admitted that the said stock represented unaccounted stock and offered the same as additional income. The partner as well as the chief accountant certified that the statements under section 132(4) were made voluntarily. The appellant did not retract from his statement for a period of 6 months though fully aware of the statement made by him.

7.43 The Bombay High Court did not accept the contention of the appellant that the aforesaid statements were forcibly recorded with an observation that the appellant has not produced any contemporaneous record or evidence, oral or documentary, to substantiate the allegation that he was forced to make the statement in question involuntarily.

7.44 It has been further observed that the declaration clearly fell under section 115 of the Evidence Act and hence it was not open to the appellant to retract from the same after the departmental authorities had accepted the same and altered their position by closing the search. It further observed that declarations falling under section 115 of the Evidence Act do not require any corroboration and upheld the order of the Assessing Officer in rejecting the retraction and treating the impugned sum as undisclosed income.

7.45 From the principles of law laid down in the aforesaid judgments, it may be deducted that, admission is one important piece of evidence and is rebuttable. It is open to the appellant who made admission to establish that confession was involuntary and the same was extracted under duress and coercion. However, the burden of proving that the statement was obtained by coercion or intimidation lies upon the appellant. Where the appellant claims that he made the statement under the mistaken belief of fact or law, he should prove the same with evidence.

7.46 The retraction should be made at the earliest opportunity and the same should be established by producing any contemporaneous record or evidence, oral or documentary, to substantiate the allegation that he was forced to make the statement in question involuntarily.

7.47 There are no mitigating circumstances to show the admission/surrender made by the appellant was retracted at the earliest part of time with corroborative evidence has substance. The fact is that the appellant surrendered undisclosed income only when he was not able to evidence found during survey and by volunteering surrender of undisclosed income, he induced the survey party not to proceed with collection of other evidence and to accept the surrendered amount.

8. Conclusion:

8.1 The discussion on various issues discussed above is summarised as below: Evidences of purchase inflation found during survey:

- *Details of purchases recorded in the computer of the firm containing date wise purchases made by the appellant from Malpe were found.*
- *The partner stated that the purchases under the column "MalpePur Actual" represents the actual purchases for which payments have been made by NEFT/RTGS.*
- *Purchases recorded under "Malpe Raised" were not genuine.*
- *The partner admitted that in respect of these purchases bearer cheques have been issued and amounts have been withdrawn and distributed to the partners as per the mutual understanding.*

9. Validity of statements relied upon:

- *The contention that the partner gave the statement declaring additional income without understanding the statement at the relevant point of time is not acceptable as the partner is in this line of business for a long time and have a clear grasp of the issues involved.*
- *The partners claim that what was stated was stated as admission for one year was misinterpreted and recorded for six years is also baseless as he has once again confirmed the same in his statement u/s 131 on 12.02.2018.*
- *Therefore, the contention of the appellant now made that they came to know of the additional income admitted only later is not true.*
- *This deposition made by the partner on 08.02.2018 is after thorough verification of the facts and its correctness. Hence it cannot be said that there is no justification in placing reliance on the statement recorded during survey or subsequently.*

- *The evidentiary value of the statement recorded u/s. 133A(3) (iii) is based on the digital evidences found and cloned which forms the basis.*

- *The recent judgement of Hon'ble Supreme Court in SLP(CRL)No.2302 of 2017 in the case of Shaft Mohammed Vs. The State of Himachal Pradesh has upheld the validity of the digital evidences and its admissibility under sec. 65B of the evidence Act.*

- *It is not the case of the appellant that the statement is recorded based on conjectures and surmises.*

10. Retraction of statement given under oath:

- *The statement u/s. 133(A)(3)and subsequently U/s 131was given and recorded in a sound state of mind.*
- *There is absolutely no basis on which the appellant could partly abide with his declaration by offering Rs. 5,50,00,000 for A.Y. 2016-17 and fully retract for the subsequent years.*

- *When there is a clear and categoric admission of the undisclosed income by the partner himself; in not one but two different statements, and the statement being confirmed by other two partners Sri Sadhu Salian and Sri Firoz Ahmed Tonse in their statement u/s 132(4) on 08.02.2018 there is no way the appellant can bring in the contention that the statement was given by the partner without proper understanding.*

- *The fact is when there is a clear admission, voluntarily made, by the appellant, that would constitute a good piece of evidence for assessing the income.*

- *It is pertinent to note that it is the partner who handles the business affairs clearly admitted that the purchase inflation is done.*

- *The important issue to be observed is that because the appellant had made the aforesaid surrender, the revenue had refrained from making any further enquiries into the matter. It was, therefore, not open to the appellant to retract from the earlier statement at the time of adjudication.*

- *The sanctity of such provision would be lost if the appellant is allowed to contend that no addition can be made based on such admission.*

- *The admission undisclosed income in the revised return of income for A.Y. 2016-17 also substantiates the statement of the appellant given during the course of survey and under oath u/s 131.*
- *Hence the retraction of the appellant now from the statement given is without any valid evidence.*

10.1 The issue relevant here is that the evidences point out the modus operandi of the appellant, confirmed by the partner himself during survey proceedings and the quantum being partly declared by him in the return of income for the A. Y. 2016-17 substantiates the finding of purchase inflation as a mode to divert money for the benefit of partners.

10.2 In view of the discussion above it is evident that it is not the case of the appellant that the purchase inflation was not pointed out without evidence nor is the case that the statement was taken under coercion. The retraction of the statement without any reason cannot be treated as a valid retraction as several judicial decision referred to above have held. So also, several judicial decisions have held that admission by a person is a good piece of evidence and the same can be used against a person who makes it. The admission made in statement has great evidentiary value and is binding on a person who makes it.

10.3 Accordingly taking into account the statement of the partner, the evidence found during the course of survey and the undisclosed income of Rs. 5,50,00,000 admitted in the statement is assessed as the income of the appellant and added to the income under the head "Income from Business".

7.2 The ld. D.R. submitted that the AO, in the aforesaid order, relevant portion of which has been reproduced above given sufficient reasons backed by judicial pronouncements as would justify the additions made in the assessment order. It is also not correct to state that the additions have been made only on the basis of statement of one of the partners without any evidentiary proof. The fact is that during the course of the survey proceedings, details of purchases recorded in the computer of the assessee firm containing date wise purchases made by the assessee from Malpe were found. When confronted, the partner present during the course of the survey proceedings, clarified that the purchases under the column "MalpePur Actual" represented the actual purchases for which payments had been made by NEFT/RTGS and

that purchases recorded under "Malpe Raised" were not genuine and that in respect of these purchases, bearer cheques were issued and amounts so paid withdrawn and distributed to the partners as per the mutual understanding. No credible evidences were produced by the assessee to show that purchases recorded under "Malpe Raised" were indeed genuine and that the statement given by the partner of the firm during the course of survey proceedings were incorrect. He submitted that section 133A- of the Act states as under: -

> (3) *An income tax authority acting under this section may: —*
>
> *(i) & (ii)***
>
> *(iii) record the statement of any person which may be useful for, or relevant to, any proceeding under this Act."*

Section 133A(3)(iii) of the Act therefore empowers income-tax authority to record statement of a person including the assessee.

7.3 The ld. D.R. also brought to our notice the statement given by Ms. Amitha K.Y., W/o Sri Sujith Suvarna who is working as a Manager (HR) and also looking after the accounts section who has answered question nos.8 to 14 as follows:

Q.8	*I am showing you print out of the excel sheet "Purchase Raised Value" consisting of columns Date, Bill No., Supplier Name, Chq Name, Item, Weight, Rate, Purc. Value, Chq Value and Cheque No. Please go through the same, identify and explain the contents therein. Please also state as to why the Bill No. column is left blank.*
Ans	*I confirm that the said excel sheet has been found from my system and has been prepared by me. This is working of the total bogus purchases amounting to Rs.1,74,93,630/ - prepared by me during the month of January-2018. Whenever, there is need of cash to be taken out from the firm, any one of the partners of the firm, generally Mr. Uday Salian or Mr. F M Yakub or Mr. Ahmed or Mr. Firoze, instruct me to prepare bogus purchase bills for this purpose. I use the names of the boats referred to in 9.:NI L.7—of this statement and purchase bills are*

prepared by me, without actually making any purchases. For the purpose of encashing this money, bearer cheques are drawn in the name of the person appearing in ***`Column 1*** *of the excel sheet referred to in Q.No.7. In respect of the genuine purchases, generally all the payments are made through NEFT only through bulk NEFT transfers i.e., a single cheque is used to make payments to multiple persons. In respect of the bogus purchases booked by this firm, single bearer cheques are raised and handed over to any one of the partners. These bearer cheques are encashed by them. I am not aware as to specifically who encashes these bearer cheques. This excel sheet was prepared by me earlier for the purpose of working out the total bogus purchases to be accommodated during the month of January-2018 and hence the bill no. column is blank in this excel sheet.*

Q.9 I am sowing you a print out of the excel sheet 'Purchase Jan' with heading `MALPE PURCHASE'. Please go through the same, identify and explain the contents therein.

Ans. I confirm that this excel sheet has been found from my system and has been prepared by me. This is a similar excel `sheet to the one referred to in Q.No.8. However, this contains the day" wise details of cash purchases made from `Malpe' parties. I am further clarifying that these contains both genuine and the bogus purchases made by the firm during the month of January-2018. As evident from the presence of Bill No., these are the purchases entered in the books of the firm for the month of January-2018.

Q.10 I am reminding you once again that you are giving this statement under oath. Please confirm.

Ans. Yes. I understand that this statement is being recorded under oath and I confirm that I have understood the consequences of giving a false statement under Oath. I am stating the truth only.

Q.11. I am showing you the print outs of two excel statements taken from 'Daily Cash' maintained on your system. Please go through the same, identify and explain the contents therein?

Ans. I have gone through these two printouts and confirm that the same has been prepared by me and maintained on my system. These two statements are the advance workings of the bogus purchases to be accommodated for 10-Feb-18 and 11-Feb-18. As can be seen from these statements the Bill No. column has

been left blank, which shows that these bills have not yet been generated. However, I have entered the cheque No., which is the continuation cheque no. available and the same will be issued as a bearer cheque only, when once the bogus purchase bills are generated. This is done as per the directions of the partners only as stated earlier by me.

Q.12 I am showing you print out of the 2nd sheet of excel sheet `Purchase Raised Value' containing day wise totals of various dates during January and February. Please go through the same, identify and explain the contents therein.

Ans. I have gone through the excel sheet and confirm that the same has been prepared by me and maintained on my system. These are actually day wise details of bogus purchase bills raised during the month of January-2018 and February-2018 upto 09/02/2018. However, the bogus purchase bills have been raised only upto 06/02/2018 and the total bogus purchase bills raised during the month of February-2018 is Rs.23,53,560/-. This is a consolidated day wise entry of the bogus purchases referred to,in my answer to Q.No.8 above.

Q.13 The total bogus purchases booked as per your answer to Q.No.8
Above is Rs. 1,74,93,630/-. However, the total during the month of January-2018 as per this sheet comes to Rs.1,74,48,200/-. Please explain the difference of Rs.45,430/-.

Ans. I have gone through the statement. By mistake, in the day wise total list, on 26-Jan, the total is entered as Rs.3,81,700/-, as against the actual of Rs.4,27,130/-. If this is adopted then the total of Rs.1,74,93,630/- is correct.

Q.14Please state as to where the other similar excel sheets generated for working out the bogus purchases booked for the other months are kept?

Ans These excel sheets are specifically prepared for the purpose of intimation to the partners during their monthly meetings. When once the meeting is over, the hard copy as well as the soft copy, being the excel sheet, is destroyed / deleted from the system. Since, the general monthly meeting of the partners for the month of January-2018 has not yet been completed, the same is still available.

Q.15 Do you have anything else to say?
Ans. No. I do not have anything else to say.

7.4 Thus, the ld. D.R. submitted that the assessee has in a systematic manner made insertion of the bogus purchases in the books of accounts and the same has been accepted by the assessee in assessment year 2018-19 by settling the dispute through VSV Scheme and also accept in its return of income in AY 2016-17.

8. We have heard the rival submissions and perused the materials available on record. In this case, there was a survey proceedings u/s 133A of the Act in the case of assessee on 8.2.2018. During the course of survey proceedings, statement was recorded from partner Uday Kumar Salian u/s 131 of the Act who has admitted additional income as recorded in para 5.1 of this order on account of inflated purchases in these assessment years. On 22.7.2019, the assessee filed a letter stating that statement of partner was misinterpreted in as much as the additional income of Rs.5.5 Crores was admitted for one assessment year but it was recorded as per each assessment year in the statement, which was not the admission of the assessee. It was also alleged that print outs of the various papers have been taken out for which the partner's signature has got fixed and the partner in order to complete the long drawn survey proceedings, he had put the signature without reading it. However, the AO has not agreed with the retraction statement of the assessee and he concluded that there was insertion of bogus purchase into the account of the assessee and came to conclusion that the income of the assessee was understated on the reasons:

Evidences of purchase inflation found during survey:

- Details of purchases recorded in the computer of the firm containing date wise purchases made by the assessee from Malpe were found.
- The partner stated that the purchases under the column "MalpePur Actual" represents the actual purchases for which payments have been made by NEFT/RTGS.

- Purchases recorded under "Malpe Raised" were not genuine.
- The partner admitted that in respect of these purchases' bearer cheques have been issued and amounts have been withdrawn and distributed to the partners as per the mutual understanding.

Validity of statements relied upon:

- The contention that the partner gave the statement declaring additional income without understanding the statement at the relevant paint of time is not acceptable as the partner is in this line of business for a long time and have a clear grasp of the issues involved.
- The partners claim that what was stated was stated as admission for one year was misinterpreted and recorded for six years is also baseless as he has once again confirmed the same in his statement u/s 131 on 12.02.2018.
- Therefore, the contention of the assessee now made that they came to know of the additional income admitted only later is not true.
- This deposition made by the partner on 08.02.2018 is after thorough verification of the facts and its correctness. Hence it cannot be said that there is no justification in placing reliance on the statement recorded during survey or subsequently.
- The evidentiary value of the statement recorded u/s. 133A(3)(iii) is based on the digital evidences found and cloned which forms the basis.
- The recent judgement of Hon'ble Supreme Court in SLP(CRL)No.2302 of 2017 in the case of **Shaft Mohammed Vs. The State of Himachal Pradesh** has upheld the validity of the digital evidences and its admissibility under sec. 65B of the evidence Act.
- It is not the case of the assessee that the statement is recorded based on conjectures and surmises.

8.1 The issue relevant here is that the evidences point out the modus operandi of the assessee, confirmed by the partner himself during survey proceedings and the quantum being partly declared by him in the return of income for the A.Y. 2016-17 substantiates the finding of purchase inflation as a mode to divert money for the benefit of partners.

8.2 According to ld. D.R., it is evident that it is not the case of the assessee that the purchase inflation was not pointed out without evidence nor is the case that the statement was taken under coercion. The retraction of the statement without any reason cannot be treated as a valid retraction as several judicial decision referred to above have held. So also, several judicial decisions have held that admission by a person is a good piece of evidence and the same can be used against a person who makes it. The admission made in statement has great evidentiary value and is binding on a person who makes it.

8.3 Similarly, A.O. made additions in other assessment years as discussed in para 5.1 of this order towards inflated purchases. The contention of the ld. A.R. before us is that there was no evidence found during the course of survey proceedings with regard to bogus purchases inserted by the assessee in each of the assessment years and even if it is presumed that there is inflated purchase, there cannot be same amount in each assessment year. Further, it was noted that the AO never rejected the books of accounts by assessee and it is not possible to the AO to estimate the income of the assessee without rejecting the books of accounts. It is also on record that assessee has produced books of accounts before AO for all these assessment years in response to the notice issued u/s 143(2) & 143(1) of the Act and this has been noted by him in para 4 of the assessment order that assessee's Chartered Accountant appeared and furnished the details and submitted the documents called for

and thereafter he proceeded to make addition to the declared income on the basis of statement recorded u/s 131 of the Act from Mr. Uday Kumar Salian, though he retracted the same subsequently and he has not considered the explanations of all the partners filed vide retraction letter dated 14.2.2018. Further, it was noted that the AO has taken uniform bogus purchase of Rs.5.5 Crores in all these assessment years from 2012-13 to 2016-17 and Rs.10.5 Crores in assessment year 2017-18 and he has not recorded anywhere that he is not satisfied about correctness and completeness of accounts of the assessee and also not rejected the books of accounts maintained by the assessee, which was duly audited by qualified Chartered Accountants u/s 44AB of the Act. The ld. AO before making any addition towards bogus purchase, he ought to have rejected the books of accounts and recorded the same. However, he has taken the profit declared in the books of accounts and also made additions on the basis of the surrender of income made by one of the partner in his statement recorded u/s 131 of the Act on 1.8.2018 and u/s 131(1A) of the Act on 8.2.2018. In our opinion, as rightly contended by the ld. A.R., ld. AO cannot go with both methods for the purpose of making additions. Either the ld. AO go with the surrender on the admission of the assessee or may go to estimate the income of the assessee after rejecting the same. In the present case, ld. AO has not rejected the books of accounts u/s 145(3) of the Act. He accepted the books of accounts, then make additions on the basis of surrender of income by partner of the assessee firm during the course of search. The ld. A.R. pleaded before us that books of accounts have been produced before ld. AO and the surrender of income made by partner has been retracted vide retraction letter filed before the authorities on 14.2.2018 as against the surrender of income vide statement recorded on 8.2.2018 u/s 131(1A) of the Act. As pointed out by the ld. A.R., CBDT vide its various circulars have emphasized time to time that the Income tax authorities should not try to extract the

admission of the assessee and should bring some concrete material on record for the purpose of estimating the undisclosed income of the assessee. In these circumstances, particularly when the books of accounts are not rejected by ld. AO and the statement of one partner has been retracted by all the partners, it weighs more and the assessee has been declaring turnover, gross profit and net profit read as follows, which is progressively having increased from year to year under consideration. There is no reason to hold that the assessee has inserted the bogus purchase without rejecting the books of accounts of the assessee.

FY	2017-18	2016-17	2015-16	2014-15	2013-14	2012-13
Turnover	3,84,46,57,493	3,67,64,40,084	3,29,88,92,109	3,68,05,48,941	1,79,79,56,596	83,75,14,526
Gross profit	87,35,70,168	88,51,14,145	58,43,90,889	66,22,54,952	26,52,12,067	13,65,93,393
GP%	22.72	24.08	17.71	17.99	14.75	16.31
Net profit %	13.71	13.93	8.16	8.87	5.24	5.89

8.4 Being so, the action of the ld. AO was clearly sans documentary proof, which cannot be upheld and to hold that purchases shown by the assessee are bogus, such adhoc addition is liable to be deleted. Admittedly, in this case, the AO placed reliance on the statement recorded from assessee's partner u/s 131 of the Act. According to ld. AO, there were no evidence brought on record by the AO with regard to bogus purchase other than the statement recorded during the course of survey proceedings.

8.5 As per section 31 of Indian Evidence Act, 1878, admissions are not conclusively proved as against admitted proof. In the absence of rebuttable conclusion, admission bind the maker when these are not rebutted or retracted. An admission is an extremely important piece of evidence but it cannot be said that it is a conclusive and the maker can show that it was incorrect. In our opinion admission made by the assessee will constitute a relevant piece of evidence but if the assessee contends that in making the admission, he had proceeded on a mistaken understanding or on misconception of facts or untrue facts, such admission cannot be relied upon without considering the

aforesaid contention. In our opinion, the voluntary admission are not conclusive proof of the facts admitted and may be explained or shown to be wrong but they do raise an estoppel and shift the burden of proof to the person making the admission. It is to be noted that, unless shown or explained to be wrong, they are an efficacious proof of the facts admitted. Thus, the burden to prove "admission" as incorrect is on the maker and in case of failure of the maker to prove that the earlier stated facts were wrong, these earlier statements are suffice to conclude the matter. If retraction or proved sufficiently, the earlier stated facts lose their effect and relevance as binding evidence and the authorities cannot conclude the matter on the basis of the earlier statements alone. However, bald retraction of earlier admission will not be enough after retraction. Such statements cannot automatically become nullified. If the assessee proves that the statement recorded was involuntary and it was made under coercion, the statement has no legal validity.

8.6 Further, there was a CBDT circular file no.286/98/2013-IT (Inv.II) dated 18.12.2014 which states as under:

> *"Instances/complaints of undue influence/coercion have come to notice of the CBDT that some assessees 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 IT Act, 1961 and/or recording a disclosure of undisclosed income under undue pressure/coercion shall be viewed by the Board adversely."

From the above Circular, it is amply clear that the CBDT has emphasized on its officers to focus on gathering evidences during search/survey operations and strictly directed to avoid obtaining admission of undisclosed income under coercion/under influence. Keeping in view the guidelines issued by the CBDT from time to time regarding statements obtained during search and survey operations, it is undisputedly clear that the lower authorities have not collected any other evidence to prove that the impugned income was earned by the assessee.

……

……

8.7 At this stage, it is pertinent to refer to the judgment of the Supreme Court in the case of Vinod Solanki (2009) (233) ELT 157 observed as under :

> *"22. It is a trite law that evidences brought on record by way of confession which stood retracted must be substantially corroborated by other independent and cogent evidences, which would lend adequate assurance to the Court that it may seek to rely thereupon. We are not oblivious of some decisions of this Court wherein reliance has been placed for supporting such contention but we must also notice that in some of the cases retracted confession has been used as a piece of corroborative evidence and not as the evidence on the basis whereof alone a judgment of conviction and sentence has been recorded. [see Pon Adithan vs. Dy. Director, Narcotics Control Bureau (1999) 6 SCC 1]* .....

8.8 In case of Romesh Chandra Mehta vs. State of West Bengal (1969) 2 SCR 461 although Hon'ble Court held that any statement made under ss. 107 and 108 of the Customs Act by a person against whom an enquiry is made by a customs officer is not a statement made by a person accused of an offence, but as indicated hereinbefore, he being an officer concerned or the person in authority, s. 24 of the Indian Evidence Act would be attracted.

8.9 It has been similarly held by the Hon'ble Supreme Court in the case of K.T.M.S. Mohd. & Anr. vs. Union of India (1992) (197 ITR 196) as under:

"We think it is not necessary to recapitulate and recite all the decisions on this legal aspect. But suffice it to say that the core of all the decisions of this Court is to the effect that the voluntary nature of any statement made either before the customs authorities or the officers of Enforcement Directorate under the relevant provisions of the respective Acts is a sine qua non to act on it for any purpose and, if the statement appears to have been obtained by any inducement, threat, coercion or by any improper means, that statement must be rejected brevi manu. At the same time, it is to be noted that, merely because a statement is retracted, it cannot be recorded as involuntary or unlawfully obtained. It is only for the maker of the statement who alleges inducement, threat, promise, etc. to establish that such improper means have been adopted. However, even if the maker of the statement fails to establish his allegations of inducement, threat, etc., against the officer who recorded the statement, the authority, while acting on the inculpatory statement of the maker, is not completely relieved of his obligation at least subjectively to apply its mind to the subsequent retraction to hold that the inculpatory statement was not extorted. It thus boils down to this that the authority or any Court intending to act upon the inculpatory statement as a voluntary one should apply its mind to the retraction and reject the same in writing. It is only on this principle of law that this Court, in several decisions, has ruled that, even in passing a detention order on the basis of an inculpatory statement of a detenu who has violated the provisions of the Foreign Exchange Regulation Act or the Customs Act, etc., the detaining authority should consider the subsequent retraction and record its opinion before accepting the inculpatory statement lest the order be vitiated. Reference may be made to a decision of the Full Bench of the Madras High Court in Roshan Beevi vs. Jt. Secretary to the Government of Tamil Nadu, Public Deptt. etc. (1983) Mad LW (Crl.) 289 : (1984) 15 ELT 289 : AIR 1984 NOC 103, to which one of us (S. Ratnavel Pandian, J.) was a party."

8.10. The ratio that emerges from the aforesaid decisions is that once a statement is retracted, the contents stated in the retracted statement must be substantially corroborated by other independent and cogent evidence. It has been consistently held by various courts that a sworn statement cannot be relied upon for making any addition and must be corroborated by independent evidence for the purposes of making assessments.

8.11 In view of the above, in our opinion, the lower authority erred in holding that the assessee has inserted bogus purchase into his accounts without bringing on any evidence to hold that entire transactions are not genuine and they relied upon only the

statement of one of the partner Shri Uday Kumar Salian recorded on 8.2.2018, which was later retracted by all partners vide letter dated 14.2.2018 within short date of 6 days. This has been filed by assessee with department on 15.2.2018, which is not at all considered by the AO, the said letter is reproduced as under:

37

Yashaswi
Marine Ingredients

Date: 14.02.2018

To
The Additional Director of Income Tax
Pandeshwar
Mangaluru

Dear Sir,

Reg: PAN: AAAFY6841M

In connection with the survey proceedings u/s 133A in our premises, we wish to submit as under:

1. We are assessed to tax under PAN: AAAFY6841M.

2. We have been filing our Returns of Income regularly.

3. On 08.02.2018 following proceedings were carried out at our premises and residences of our partners:

Place	Proceedings
Office of M/s Yashaswi Fish Meal and Oil Company	Survey u/s 133A of Income Tax Act
Residence of Mr. Sadhu Salian	Search u/s 132
Residence of Mr. Firoze Ahmed Thonse Sheikh	Search u/s 132

4. We have been regularly paying our tax liability regularly. We have been filing our returns of income regularly and also the profit declared is also higher. This may be verified from our income tax returns. The profit declared by us is highest among other fish meal manufacturers in costal Karnataka.

5. During the survey proceedings various documents have been verified and also some of the documents were taken from our office. We were only given a carbon copy of

15 FEB 2018

Yashaswi Fish Meal & Oil Company
9-184B, Post Pithrody, Udyavara, Udupi - 574118, Karnataka, India
T: +91 820 2533720 E: info@fishmealoil.com

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Approved by Export Inspection Council of India

For YASHASWI FISH MEAL & OIL COMPANY

Partner

(58)

Yashaswi
Marine Ingredients
Enriching Growth

the list of documents taken. We do not have copies of the documents taken away by the department. The seized documents contain the purchase book, we are receiving pressure from our suppliers for settling their dues. To settle their payments we require reconciling the purchase book. We request to furnish copy to us as early as possible.

6. We are surprised by the action taken by the department and the pressure during the search proceedings was enormous. During the proceedings various questions were asked and the reply given was being typed in the computer by the official. At the end of the proceedings post midnight of 08.02.2018, Mr. Udayakumar Salian was asked to sign various sheets and also the print out of the statement typed by the official. He was instructed to date signatures as 08.02.2018. Further, our partners Mr. Ahmed Saheb and Mr. F.M Yakub were asked to sign some statements. Similar excercise was also made at the residence of Mr. Sadhu Salian and Mr. Firoze Ahmed T S at their residence. We were not allowed to go through the contents of records signed by us. We had asked for copies of the same. It was also not entertained.

7. We were once again called to income tax office on 12.02.2018 and asked sign on few papers with dates as insisted by the officials. We were informed that we are bound to sign the papers though we were not allowed to go through the same and the failure would result in arrest of partners including the ladies. Similar threat was made even on the date of the survey/search. Though we had asked for the copies once again same was not furnished. We once again request you to kindly grant the copies of all the statements signed by us.

8. During survey proceedings certain allegations were made stating that we have inflated our purchases. We have given detailed explanations during the survey proceedings in this regard. As submitted during the survey proceedings there was dispute between us and erstwhile partner Mohammed Mujeeb Sikhander. He had retired from the firm in April 2016. Said retired partner had removed various data from our records and we were unable to produce some of the records called for. Due to the mental stress during the search proceedings we were waiting for the closure of the proceedings eagerly. Moreover, our employees were also being pressurised. In order to purchase peace we agreed to declare sum of Rs. 5.50 crores for the financial year 2015-16 to cover the discrepancy from the financial year 2011-12 to 2015-16, if any occurred due to the havoc created by the retired partner and also to cover up minor reduction in profit percentage pointed out by the officers during survey.

Yashaswi Fish Meal & Oil Company
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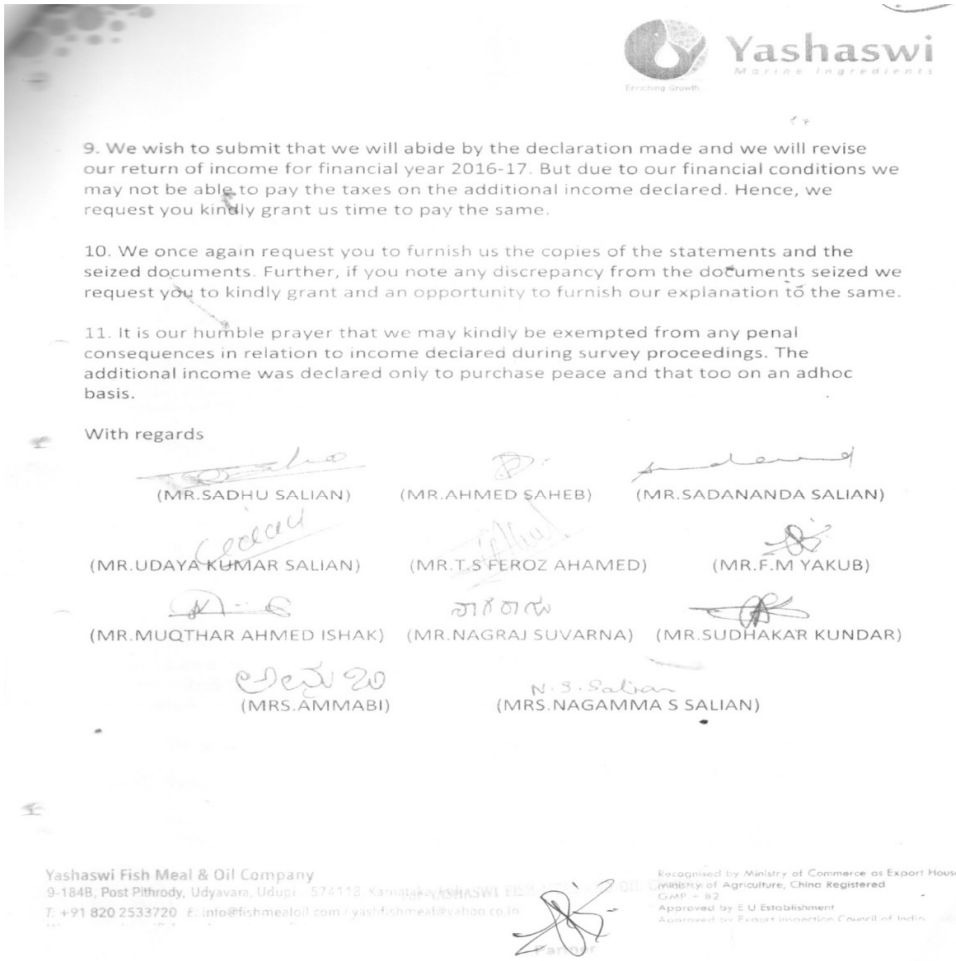
Partner



Yashaswi
Marine Ingredients

9. We wish to submit that we will abide by the declaration made and we will revise our return of income for financial year 2016-17. But due to our financial conditions we may not be able to pay the taxes on the additional income declared. Hence, we request you kindly grant us time to pay the same.

10. We once again request you to furnish us the copies of the statements and the seized documents. Further, if you note any discrepancy from the documents seized we request you to kindly grant and an opportunity to furnish our explanation to the same.

11. It is our humble prayer that we may kindly be exempted from any penal consequences in relation to income declared during survey proceedings. The additional income was declared only to purchase peace and that too on an adhoc basis.

With regards

(MR.SADHU SALIAN) (MR.AHMED SAHEB) (MR.SADANANDA SALIAN)

(MR.UDAYA KUMAR SALIAN) (MR.T.S FEROZ AHAMED) (MR.F.M YAKUB)

(MR.MUQTHAR AHMED ISHAK) (MR.NAGRAJ SUVARNA) (MR.SUDHAKAR KUNDAR)

(MRS.AMMABI) (MRS.NAGAMMA S SALIAN)

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8.12 It is noted that the ld. AO/CIT(A), never mentioned about this retraction statement in their order and this action of lower authorities cannot be appreciated. It is the duty of ld. AO to consider the letter in true perspective and to comment on it which he failed to do so.

8.13 It is also submitted by ld. A.R. before us that the statement recorded from Ms. Amitha who is an employee of the assessee, who has confirmed bogus purchase from 1.4.2017 to 31.1.2018 at Rs.4,28,47,574/- for the financial year 2017-18 relevant to assessment year 2018-19 and not for the all-assessment years involved herein. For clarity, we reproduce the question no.12 and

answer to question no.12 recorded from Uday Kumar Salian on 8.12.2018 as under:

12. **I am showing you a print out taken from the computer operated by your employee, Miss Amitha(attached as Annexure 1). Kindly go through, confirm and explain the contents of the same.**

Ans. I confirm that the document marked as **Annexure 1** has been taken from the computer in our office operated by my staff, Miss Amitha. Sir, these pages contains the details regarding the purchases made by M/s Yashaswi Fish Meal & Oil from Malpe for the period from 01.04.2017 to 31.01.2018. It contains date wise purchases made by our partnership concern from the fisherman, commission agent at Malpe. The figures under the column " Malpe Pur Actual" represents our actual purchases made from various parties of Malpe and the payments against all these purchases have been made through NEFT/RTGS. As regards the figures mentioned in the column " Malpe

For YASHASWI FISH MEAL AND OIL COMPANY

Partner

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[illegible]. I would like to admit that though purchase bills have been raised in these cases, but the same are not genuine. Against these bills, bearer cheques have been issued and the amounts have been withdrawn from the bank by us. The amounts withdrawn from the banks have been used for making payments to the partners, who in mutual understanding have agreed to take Rs. 50,00,000/- in cash per annum, in addition to the remuneration, interest on capital and part of the profit earned during the year. **As regards the figures mentioned under the column " Total", the same represents the purchases booked by our partnership concern in it's books of accounts.**

Since, I have already admitted that we have booked bogus purchase bills in our partnership concern i.e. M/s Yashaswi Fish Meals & Oil, I am voluntarily offering herewith the total of the third column i.e. " Malpe Raised" amounting to Rs. 4,28,47,574/- as the additional income in the hands of our partnership concern i.e. M/s Yashaswi Fish Meals & Oil for the F.Y. 2017- 18.

13. **Please specify the identity of the person who used to carry the bearer cheque to the bank for with drawl of cash and also specify the bank from which the amounts have been withdrawn?**

Ans. Sir, we used to hand over the bearer cheques to one of our employee by name, Sri Amit, who is working with us at the weighing bridge. Other that this person the cheques are not handed over to any other employee. On many occasions, the bearer cheques were also taken by my other partners i.e. Mr. Firoz and Mr. Sadanand Salian. Today Sri Amit has already left and hence, I am not in a position to produce him before you.

14. **You have stated in your answer to question no. 12, that there is a mutual understanding between all the partners of M/s Yashaswi Fish Meal & Oil that in each year they will be taking Rs. 50,00,000/- each in cash from the firm in addition to the remuneration, interest on capital and share of profit of the year. Please specify the year in which this mutual understanding among the partners was made and also specify the method through which Rs. 50,00,000/- paid to the partners was generated from the business.**

Ans. Sir, I want to state that the mutual understanding of withdrawing/taking Rs. 50,00,000/- in cash from the firm in addition to the remuneration, interest on capital

For YASHASWI FISH MEAL AND OIL COMPANY

Partner

8.14 Being so, it cannot be considered that Ms. Amitha given any statement related to bogus purchases relating to all assessment years. This being the position, framing assessment by AO without considering the retraction of statement filed by the assessee, in our opinion, the addition cannot be sustained.

8.15 Further, in the case of CIT Vs. Vijay M. Mistry construction Ltd. 355 ITR 498 (Guj.) the Hon'ble Gujarat High Court has held as under:

"Held, dismissing the appeal, that the conclusion arrived at by the Tribunal was based on concurrent findings of fact recorded by the Commissioner (Appeals) as well as the Tribunal. It was not the case of the Revenue that the Tribunal had taken into account any irrelevant material or that any relevant material had not been taken into consideration. In the absence of any material to the contrary being pointed out on behalf of the Revenue, the order of the Tribunal could not be found fault with."

8.16 Further in the case of CIT Vs. Bholanath Poly Fab (P) Ltd. 355 ITR 290 the Hon'ble Gujarat High Court has held as under:

"Held, dismissing the appeal, that whether the purchases themselves were bogus or whether the parties from whom such purchases were allegedly made were bogus was essentially a question of fact. The Tribunal having examined the evidence on record came to the conclusion that the assessee did purchase the cloth and sell the finished fabrics. Therefore, as a natural corollary, not the entire amount covered under such purchases, but the profit element embedded therein would be subject to tax."

8.17 In the case of Sanjay Oilcake Industries vs. CIT reported in (2009) 316 ITR 274 (Guj), the Hon'ble Gujarat High Court held as under (page 281):

"7.2 . A similar question came up before this Court in the case of Sanjay Oilcake Industries vs. Commissioner of Income Tax reported in [2009] 316 ITR 274 (Guj) and this Court while deciding the said issue has held as under:

"Thus, it is apparent that both the Commissioner (Appeals) and the Tribunal have concurrently accepted the finding of the Assessing Officer that the apparent sellers who had issued sale bills were not traceable. That goods were received from the parties other than the persons who had issued bills for such goods. Though the purchases are shown to have been made by making payment thereof by account payee cheques, the cheques have been deposited in bank accounts ostensibly in the name of the apparent sellers, thereafter the entire amounts have been withdrawn by

bearer cheques and there is no trace or identity of the person withdrawing the amount from the bank accounts. In the light of the aforesaid nature of evidence it is not possible to record a different conclusion, different from the one recorded by the Commissioner (Appeals) and the Tribunal concurrently holding that the apparent sellers were not genuine, or were acting as conduit between the assessee-firm and the actual sellers of the raw materials. Both the Commissioner (Appeals) and the Tribunal have, therefore, come to the conclusion that in such circumstances, the likelihood of the purchase price being inflated cannot be ruled out and there is no material to dislodge such finding. The issue is not whether the purchase price reflected in the books of account matches the purchase price stated to have been paid to other persons. The issue is whether the purchase price paid by the assessee is reflected as receipts by the recipients. The assessee has, by set of evidence available on record, made it possible for the recipients not being traceable for the purpose of inquiry as to whether the payments made by the assessee have been actually received by the apparent sellers. Hence, the estimate made by the two appellate authorities does not warrant interference. Even otherwise, whether the estimate should be at a particular sum or at a different sum, can never be an issue of law.

In the aforesaid set of facts and circumstances of the case, the impugned order of the Tribunal is an order which is made in accordance with law and does not require any interference. The questions referred at the instance of the assessee as well as the Revenue are, therefore, answered in the affirmative, i.e., in favour of the Revenue and against the assessee in relation to the questions at the instance of the assessee, and in favour of the assessee and against the Revenue in relation to the questions at the instance of the Revenue."

8.18 In the case of Vijay Trading Co. vs. ITO reported in (2016) 388 ITR 377 (Guj), the Hon'ble Gujarat High Court has held as under:

"Held, that it was not the entire amount covered by such purchase, but the profit element embedded therein which would be subject to tax. It would be appropriate to restrict the disallowance made in this regard to 25 per cent of the cost of such purchases in each year."

8.19 In the case of CIT Vs. President Industries, reported in 258 ITR 654, the Hon'ble Gujarat High Court held as under:

"In the course of survey conducted in the premises of assessee, excise records were found which disclosed godown sales not disclosed in the books of account of the assessee. The Assessing Officer made addition of undisclosed income of the entire sale proceeds thereof. The Commissioner affirmed the addition but the Appellate Tribunal found that there was no material to indicate that the assessee made investments outside the books of account to make the alleged sales and held that the entire sale proceeds could not have been added as undisclosed income of the assessee but the addition could be only of the profits embedded in the sales. The Tribunal having declined to state a case, the Department applied to the High Court for an order *calling for a reference :*

Held, *dismissing the application for reference, that the amount of sales could not represent the income of the assessee who had not disclosed the sales. The sales only represented the price received by the seller of the Goods; only the realisation of the excess over the cost incurred could form part of the profit included in the consideration for the sales. Since there was no finding to the effect that investment by way of incurring the cost in acquiring the goods which were sold had been made by the assessee and that that investment was also not disclosed, only the excess over the cost incurred could be treated as profit."*

8.20 In the case of CIT Vs. Satyanarayan P. Rathi (2013) 351 ITR 150 (Guj), the Hon'ble Gujarat High Court has held as under:

"The assessee was in the business of trading in iron and steel. During the reassessment proceedings for the year 2003-04, it was found that purchases worth Rs.61.40 lakhs were not supported by sufficient evidence. Purchase of such goods from various suppliers was verified, but it was found that such parties had not supplied the goods as named by the assessee. The Assessing Officer made an addition of the entire amount of purchase of Rs.61.40 lakhs. The Commissioner (Appeals) found that though the purchases were not made from the parties from whom the assessee claimed, there was complete quantitative tally of the materials purchased and sold. He was of the view that such materials were purchased from the open market incurring cash payment and bills were procured from various sources. He added only the profit element and not the entire amount of the purchases, for the limited addition to 30 percent of the total amount and reduced the amount to Rs.18.42 lakhs. The Tribunal allowed further relief to the assessee and retained the addition to the level of twelve and half per cent in pursuance of the various purchases. On appeal:

Held, dismissing the appeal, that the assessee was a trader and the Tribunal having retained twelve and half per cent of the purchase towards its possible profit, there was no reason to interfere in the order of the Tribunal."

8.21 In the case of CIT Vs. Simit P. Sheth the Gujarat High Court reported in (2013) 356 ITR 451 (Guj) wherein the Hon'ble Gujarat High Court has held as under:

"The assessee was engaged in the business of trading in steel on wholesale basis. During the course of the reassessment proceedings for the year 2006-07, the Assessing Officer noticed that some of the suppliers of steel to the assessee had made their statements on oath to the effect that they had not supplied the steel to the assessee but had only provided sale bills. In turn, they were receiving small commission. The Assessing Officer concluded that the total purchase of Rs.41,04,903 cumulatively made from the three parties were bogus. He thus treated such purchases as bogus purchases and added the entire amount of Rs.41,04,903 to the gross profit of the assessee. He also rejected the books of account and estimated the assessee's business profits at Rs.5 lakhs. The Commissioner (Appeals) held that the assessee had made purchases from other parties in the open market. Therefore, he retained 30 per cent of the purchases cost as the probable profit of the assessee. He reduced the additions from Rs.41,04,903 to Rs.12,31,471 and deleted the balance

of Rs.28,73,432. While doing so, he deleted the addition of Rs.5 lakhs as made by the Assessing Officer on the ground that the addition on account of bogus purchases had already been made. The Tribunal was of the opinion that twelve and half per cent of the disputed purchases should be retained in the hands of the assessee as business profits. On appeal to the High Court:

Held, dismissing the appeal, that the Commissioner (Appeals) believed that the purchases were not bogus but were made from the parties other than those mentioned in the books of account. That being the position, not the entire purchase price but only the profit element embedded in such purchases could be added to the income of the assessee. In essence, the Tribunal only estimated the possible profit out of purchases made through non-genuine parties. The estimation of rate of profit return must necessarily vary with the nature of business and no uniform yardstick could be adopted."

8.22 Further, **Hon'ble Supreme Court in the case of CIT Vs. Odeon Builders Pvt. Ltd. reported in (2019) 418 ITR 315 (SC)** held as under:

2. We have perused the review petition and find that the tax effect in this case is above Rs.1 crore, that is, Rs.6,59,27,298/-. Ordinarily, therefore, we would have recalled our order dated 17th September, 2018, since the order was passed only on the basis that the tax effect in this case is less than Rs.1 crore.

3. However, on going through the judgments of the CIT, ITAT and the High Court, we find that on merits a disallowance of Rs.19,39,60,866/- was based solely on third party information, which was not subjected to any further scrutiny. Thus, the CIT (Appeals) allowed the appeal of the assessee stating:

> *"Thus, the entire disallowance in this case is based on third party information gathered by the Investigation Wing of the Department, which have not been independently subjected to further verification by the AO who has not provided the copy of such statements to the appellant, thus denying opportunity of cross examination to the appellant, who has prima facie discharged the initial burden of substantiating the purchases through various documentation including purchase bills, transportation bills, confirmed copy of accounts and the fact of payment through cheques, & VAT Registration of the sellers & their Income Tax Return. In view of the above discussion in totality, the purchases made by the appellant from M/s Padmesh Realtors Pvt. Ltd. is found to be acceptable and the consequent disallowance resulting in addition to income made for Rs.19,39,60,866/-, is directed to be deleted."*

4. The ITAT by its judgment dated 16th May, 2014 relied on the self-same reasoning and dismissed the appeal of the revenue. Likewise, the High Court by the

impugned judgment dated 5th July, 2017, affirmed the judgments of the CIT and ITAT as concurrent factual findings, which have not been shown to be perverse and, therefore, dismissed the appeal stating that no substantial question of law arises from the impugned order of the ITAT."

8.23 Further, the Hon'ble Karnataka High Court in the case of Shri Ganesh Shipping Company Vs. ACIT in ITA No.366 of 2015 dated 6.2.2021 held as under:

"5. We have considered the submissions made on both sides and have perused the record. From perusal of the order passed by the authorities, it is evident that the authorities have accepted the books of accounts produced by the assessee. The Assessing Officer, in its order, has admitted that the payment of speed money is a trade practice which is followed by the assessee and similar business concerns functioning for speedy completion of their work. However, the disallowance of 20% of the expenses is made solely on the ground that the assessee had produced the self-made cash vouchers which showed that the payment was made by cash to each gang leader and the identity of the gang leader is not verifiable and the recipients are not assessee's employees. Thy aforesaid finding has been affirmed by the Commissioner of Income Tax (Appeals) as well as by the Tribunal. However, it is pertinent to note that the books of accounts have not been touted by any of the authorities under the Act. A Bench of this Court vide judgment dated 24.03.2015 passed in ITA No.22/2015, has held that admittedly the normal practice in the line of business of the assessee is to pay certain extra amounts to port labourers as speed money for promptly and speedily carrying out the labour work of handling cargo beyond working hours and has placed reliance on the decision rendered by this Court in ***KONKAN MARINE AGENCIES,*** *supra. It is pertinent to note that in* ***CLIFFORD D'SOZA,*** *supra, payment was made to the sub-contractors in cash as well as by Cheques. In the absence of any challenge to the entries made in the books of accounts by the authorities, in our opinion, the finding recorded by the Assessing Officer as well as the Tribunal that it denied the claim of the assessee for expenditure to the extent of 10% on account of payment of speed money, is perverse as the same is duly supported by the documentary evidence. Insofar as the submission made by the learned counsel for the revenue that in paragraph 4 of the order of the Commissioner the assessee himself had restricted the payment of speed money to 10% is concerned, it is pertinent to note that the restriction was made by the assessee in respect of Assessment Year 2004-05 and from the grounds of memorandum of appeal before the Tribunal; we find that the assessee had challenged the aforesaid finding which is evident from paragraphs 1 and 2, therefore, the aforesaid submission is of no assistance to the revenue."*

8.24 The only argument of ld. D.R. is that assessee has accepted the bogus purchase in the assessment year 2018-19 and settled the issue by VSV Scheme 2020 and also accepted the bogus

purchase in the assessment year 2016-17, the addition to be sustained. In our opinion, the acceptance by assessee in one assessment year cannot lead to conclusion that in all these assessment years, the assessee has inserted bogus purchases in a similar way. It cannot be said that the principle of estoppel to be applied. In our opinion, the case of assessee is to be examined in the light of evidence brought on record and in the present case, there was no evidence brought on record with regard to bogus purchase or creation of any undisclosed assets by the assessee in all these assessment years.

8.25 In our opinion, addition could be made only when it is shown by the evidence brought on record that the books of accounts are not reliable as there are material errors and omissions existed therein. In order to support this proposition, we place reliance on the judgment of Hon'ble Supreme Court in the case of Umacharan Shaw and Brothers Vs. CIT (37 ITR 271)(SC), wherein it was held that *"there was no material on which the ITO could come to the conclusion that the firm was not genuine. There were many surmise and conjectures and if the conclusion is the result of suspicion, which cannot take place of proof in this matter."*

8.26. Further, reliance was placed on the judgement of Hon'ble Supreme Court in the case of Dhakeswari Cotton Mills Ltd. Vs. CIT (26 ITR 775)(SC), wherein held that *"assessment made u/s 23(3) of the Act could not be merely a few guess work without making reference to any evidence or material on record. There must be something more than bear suspicion to support the assessment. The estimate of gross rate of profit on sales by the ITO and the Tribunal same to be based on surmise and conjectures*

and, thus, it was a fit case for exercising jurisdiction under Article 136 of the Constitution of India."

8.27 Further, reliance was placed on the order of Third Member in the case of J.R. Solvent Industries Pvt. Ltd. Vs. ACIT (68 ITD 65 (TM)(Chd.) in which it was held that "the Tribunal did not consider as to whether the outputs were more the inputs, if the purchases from M/s. R.K.R.K. were considered as bogus. The assessee had moved a miscellaneous application, which was rejected inter-alia on the ground that no specific plea with regard to assessee did purchases, rice bran from M/s. R.K.R.K. or some other person or as did go into the process of manufacturing the oil. It was held that the cost of such purchases may be worked out on the basis of average purchase price in the entire year and substituting the same in the place of purchase price shown by the assessee in respect of the aforesaid firm. In the present case, the case of the assessee is that when the sales have been not doubted, the conclusion that the purchases were made cannot be rejected.

8.28 For this purpose, reliance was placed on the judgement in the case of CIT Vs. Ved Prakash Choudhary (305 ITR 245). In that case, the assessee had stated that there was no transfer of money between him and Sri Ravi Talwar & Madhu Talwar. Mr. Ravi Talwar & Mr. Madhu Talwar denied the receipt of any money from the assessee. In the face of the denial, there ought to have corroborated evidence to show that there was in fact such a transfer of money. The ld. CIT(A) and the Tribunal came to the conclusion that there was no such material on record. The ld. AO had relied on some other transactions for deriving the presumption in respect of transfer of money, but the Tribunal rightly held that there were independent transactions and had

nothing to do with the MOU. On the basis of aforesaid, it was held that no substantial question of law arises.

8.29 The case of ld. Counsel was that there should be some tangible material on record to show that the purchases were not made and in absence thereof, the purchase shown by the assessee in the accounts could not have been held to be bogus. For this purpose, he placed reliance on the judgement of Madras High Court in the case of CIT Vs. Vighnesh Kumar Jewellers (222 CTR 79) (Mad.) in which it was held that merely because some quantity of jewellery manufactured out of imported gold, meant for the purpose of export had been kept in the jewellery shop that by itself cannot be a ground to hold that the jewellery found in the shop premises was made out of smuggled gold. Such a finding should be supported by concrete evidence, which is totally absent in this case.

8.30 On the basis of these decisions, we hold that there should be concrete evidence for considering the purchase entries in the books of accounts as bogus. In the present case, sales and purchase shown by the assessee leading to profit and that the profit declared by assessee is progressively increasing from year to year and it cannot be said that purchases were bogus without having any material to suggest that it is a bogus.

8.31 Further, similar issue came for consideration before the Hon'ble Supreme Court in the case of CIT Vs. S. Khadar Khan & Sons (352 ITR 480) (SC). In that case, a survey was conducted in the premises of the assessee-firm. One of the partners in his statement offered an additional income of Rs. 20 lakhs for the assessment year 2001-02 and Rs. 30 lakhs for the assessment year 2002-03 but the statement was retracted by the assessee

stating that the partner from whom the statement was recorded during the survey operation under section 133A of the Act was new to the management and had agreed to an adhoc addition. The Assessing Officer based on the admissions made by the assessee recomputed the assessment. The order was set aside by the Commissioner (Appeals) and this order was upheld by the Tribunal. On appeal to the High Court, the High Court held that in view of the scope and ambit of the materials collected during the course of survey, the action under section 133A would not have any evidentiary value and that 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. On appeal to the Supreme Court; the Hon'ble Supreme Court dismissed the appeal in view of the concurrent findings of fact.

8.32 Further, in the case of CIT Vs. Tilak Raj Kumar (369 ITR 180) (T&AP), it was held as under:

> *"The three assessees made separate voluntary disclosures of their income in response to the Voluntary Disclosure of Income Scheme, 1997, and they were also issued certificates. Most of the items mentioned in the disclosures were jewellery of gold and diamonds. For one reason or the other, the family thought of selling the jewellery. In the process, the diamonds were separated from gold and while the gold was sold at Hyderabad, the diamonds were sold at Surat. The resultant sale proceeds were shown as capital gains in the respective returns for the assessment year 1998-99. The Assessing Officer was satisfied as regards the proceeds from the sale of gold but doubted the genuineness of the sale of diamonds at Surat. After conducting a detailed enquiry, he disbelieved that and treated the amount shown as sale proceeds of diamonds in all the three assessments, as unexplained cash credits, in the respective orders of assessment passed by him. The Commissioner (Appeals) dismissed the appeals filed by the assessees but the Tribunal held in favour of the asses-sees. On appeals :*
>
> Held, *dismissing the appeals, that the purchaser was a dealer in diamonds. Even assuming that on certain occasions, the assessee did not proceed to Surat, it could not be a factor to disbelieve the transaction. When the assessees had not only disclosed the wealth in terms of the Scheme but also had shown sale proceeds as capital gains, it was farfetched, if not unreasonable, on the part of the Assessing Officer to doubt their honesty in this behalf. For all practical purposes, the Assessing Officer subjected the*

assessees to a verification equivalent to the one made by the police officials vis-a-vis a person, who committed the crime. Though it is a prerogative of the State to levy tax, referable to its sovereign power, it cannot be extended to the level of regulating the conduct of a citizen to such minute extents. Therefore, the sale transaction of diamonds worth Rs. 51,92,750 as claimed by the assessees was a genuine transaction and it could not be added as unexplained cash credits under section 68 of the Income-tax Act, 1961."

8.33 Further, Cochin Bench of Tribunal in the case of ITO Vs.M/s. Toms Enterprises in ITA No.442/Coch/2018 dated 7.2.2019, held as under:

8. *We have heard the rival submissions and perused the record. In this case, the books of account of the assessee were required to get audited u/s. 44AB of the Act. It is an admitted fact that books of account of the assessee had not been rejected by the Assessing Officer. However, the Assessing Officer relied on the statement of Shri Tomy C. Vadayil, managing partner of the assessee recorded u/s. 131(1) of the Act on 25/09/2014 for the purpose of framing the assessment wherein he has stated as follows:*

"Question:- 8 - Explain the procedure of sale of goods in your firm. For e.g. I am showing a sale bill TPA 536 dated 03/01/2014 of Toms Pipes Pvt. Ltd. Please explain the sale of goods to Toms enterprises?

Ans: - We buy goods from the company by fixing our price (up to 160% of the cost price). From the price we give different types of discounts (Trade discount, monthly quantity discount, annual quantity discount, quarterly quantity discount). In addition to that we also give cash discounts.

Question:- 9- In addition to the above what are your major expenses?

Ans: - Other major expenses are distribution expenses,

advertisement, Sales promotion, Salary incentive.

Question:- 10 After deducting the above expenses will you give the approximation of gross profit and net profit?

Ans: - We plan and prepare price list in order to get approximately 15% gross profit and 4% net profit. However, if we are not able to achieve the required turn over, then we will lose our control on net profit because of fixed cost that will increase the over head expenditure."

8.1 As seen from the above, the managing partner stated that the assessee is getting GP at 15% and net profit at 4%. Contrary to this, the assessee has shown gross profit at 10.55%. It was also explained by the Ld. AR the reason for declaring GP at lower rate in the assessment year instead of 15% as stated in the sworn statement and this was due to offering higher discount to the customers to sustain in the market. This was the case of offering lower rate of profit on sale. The Assessing Officer rejected the

contention of the assessee and he estimated the income of the assessee on the basis of GP at 15% by placing reliance on the sworn statement recorded u/s. 131 of the Act. After careful consideration of the circumstances and facts of the this case, we are of the opinion that the statement recorded u/s. 131 of the Act was valid statement and it could be used for the purpose of assessment provided they are supported by corroborative documents.

8.2 Under section 131 of the Act, the income tax authority is empowered to examine on oath. Section 131 of the Act confers power to the income tax authority to record the statement in the course of proceedings before them. The power invested u/s. 131(1) is only to make enquiries and investigation and not basically meant to voluntary disclosure or surrender of concealed income. As per section 31 of the Indian Evidence Act, 1878, admissions are not conclusively proved as against admitted proof. In the absence of rebuttable conclusion, admission bind the maker when these are not rebuttable or retracted. It was held by the Supreme Court in the case of Pullengode Rubber Produce vs. State of Kerala (91 ITR 18) that an admission is an extremely important piece of evidence but it cannot be said that it is conclusive and the maker can show that it was incorrect. In the case of Satinder Kumar (HUF) vs. CIT (106 ITR 64), the High Court of Himachal Pradesh held that the admission made by an assessee constitute a relevant piece of evidence but if the assessee contends that in making the admission, he had proceeded on a mistaken understanding or on misconception of facts or untrue facts, such admission cannot be relied upon without considering the aforesaid contention. In the case of Avadh Kishore Das vs. Ram Gopal AIR 1979 (SC) 861, it was held that evidentiary admissions are not conclusive proof of the facts admitted and may be explained or shown to be wrong but they do raise an estoppel and shift the burden of proof to the person making the admission. The Supreme Court further held that unless shown or explained to be wrong, they are an efficacious proof of the facts admitted. Thus, the burden to prove "admission" as incorrect is on the maker and in case of failure of the maker to prove that the earlier stated facts were wrong, these earlier statements are suffice to conclude the matter. If retraction is proved sufficiently, the earlier stated facts loose their effect and relevance as a binding evidence and the authorities cannot conclude the matter on the basis of the earlier statements alone. However, bald retraction of earlier admissions will not be enough even after retraction. Such statements cannot automatically become nullified. If the assessee proves that the statement recorded u/s. 131 was involuntary and it was made under coercion or during their admission, the statement recorded u/s. 131 has no legal validity.

8.3There was a circular issued by CBDT issued circular in F. No. 286/98/2013- IT(Inv.II) dated 18th December 2014 stating as follows:

> *"Instances/complaints of undue influence/coercion have come to notice of the CBDT that some assessees 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 IT Act, 1961 and/or recording a disclosure of undisclosed income under undue pressure/coercion shall be viewed by the Board adversely."

From the above Circular, it is amply clear that the CBDT has emphasized on its officers to focus on gathering evidences during search/survey operations and strictly directed to avoid obtaining admission of undisclosed income under coercion/under influence. Keeping in view the guidelines issued by the CBDT from time to time regarding statements obtained during search and survey operations, it is undisputedly clear that the lower authorities have not collected any other evidence to prove that the impugned income was earned by the assessee.

8.4 Without commenting on the authenticity of the statement by the managing partner of the assessee Shri Tomy C. Vadayil, we are of the opinion that there is no corroborative evidence to support the claim made by the Assessing Officer. Even otherwise, uncorroborative statements collected by the Assessing Officer cannot be an evidence for sustenance of addition made by the Assessing Officer.

8.5 At this stage, it is pertinent to refer to the judgment of the Supreme Court in the case of Vinod Solanki (2009) (233) ELT 157 observed as under :

"22. It is a trite law that evidences brought on record by way of confession which stood retracted must be substantially corroborated by other independent and cogent evidences, which would lend adequate assurance to the Court that it may seek to rely thereupon. We are not oblivious of some decisions of this Court wherein reliance has been placed for supporting such contention but we must also notice that in some of the cases

retracted confession has been used as a piece of corroborative evidence and not as the evidence on the basis whereof alone a judgment of conviction and sentence has been recorded. [see Pon Adithan vs. Dy.
Director, Narcotics Control Bureau (1999) 6 SCC 1].....

8.6 Yet again in Romesh Chandra Mehta vs. State of West Bengal (1969) 2 SCR 461 although this Court held that any statement made under ss. 107 and 108 of the Customs Act by a person against whom an enquiry is made by a customs officer is not a statement made by a person accused of an offence, but as indicated hereinbefore, he being an officer concerned or the person in authority, s. 24 of the Indian Evidence Act would be attracted.

8.7 It has been similarly held by the Hon'ble Supreme Court in the case of K.T.M.S. Mohd. & Anr. vs. Union of India (1992) (197 ITR 196) as under:

"We think it is not necessary to recapitulate and recite all the decisions on this legal aspect. But suffice it to say that the core of all the decisions of this Court is to the effect that the voluntary nature of any statement made either before the customs authorities or the officers of Enforcement Directorate under the relevant provisions of the respective Acts is a sine qua non to act on it for any purpose and, if the statement appears to have been obtained by any inducement, threat, coercion or by any improper means, that statement must be rejected brevi manu. At the same time, it is to be noted that, merely because a statement is retracted, it cannot be recorded as involuntary or unlawfully obtained. It is only for the maker of the statement who alleges inducement, threat, promise, etc. to establish that such improper means have been adopted. However, even if the maker of the statement fails to establish his allegations of inducement, threat, etc., against the officer who recorded the statement, the authority, while acting on the inculpatory statement of the maker, is not completely relieved of his obligation at least subjectively to apply its mind to the subsequent retraction to hold that the inculpatory statement was not extorted. It thus boils down to this that the authority or any Court intending to act upon the inculpatory statement as a voluntary one should apply its mind to the retraction and reject the same in writing. It is only on this principle of law that this Court, in several decisions, has ruled that, even in passing a detention order on the basis of an inculpatory statement of a detenu who has violated the provisions of the Foreign Exchange Regulation Act or the Customs Act, etc., the detaining authority should consider the subsequent retraction and record its opinion before accepting the inculpatory statement lest the order be vitiated. Reference may be made to a decision of the Full Bench of the Madras High Court in Roshan Beevi vs. Jt. Secretary to the Government of Tamil

Nadu, Public Deptt. etc. (1983) Mad LW (Crl.) 289 : (1984) 15 ELT 289 : AIR 1984 NOC 103, to which one of us (S. Ratnavel Pandian, J.) was a party."

8.8 The ratio that emerges from the aforesaid decisions is that once a statement is retracted, the contents stated in the retracted statement must be substantially corroborated by other independent and cogent evidence. It has been consistently held by various courts that a sworn statement cannot be relied upon for making any addition and must be corroborated by independent evidence for the purposes of making assessments.

8.9 We are of the view that the statement recorded u/s. 131 cannot be independently used for making any addition in the hands of the assesse and the said statement cannot, in our view, be the sole basis for making any addition and must be independently corroborated by evidences. Thus, on a careful reading of the decisions of the Hon'ble Supreme Court referred before us, we are of the view that the legal position that emerges is that a sworn statement, though binds the assessee, it cannot be the sole basis for making the assessment. It is open to the assessee to show the circumstances in which confessional statements were recorded and once the assessee proves that confessional statements were recorded under threat and coercion and retracts from the same, the confessional statements cannot be the sole basis for making assessments or for making any addition in the hands of the assessee.

9. Further, in the case of CIT vs. S. Khader Khan Son (300 ITR 157), the Madras High Court held as follows:

"The principles relating to section 133A of the Income Tax Act, 1961, are as follows: (i) an admission is extremely an important piece of evidence but it cannot be said that it is conclusive and it is open to the person who made the admission to show that it is incorrect and that the assessee should be given a proper opportunity to show that the books of accounts do not correctly disclose the correct state of facts; (ii) in contradistinction to the power under section 133A, section 132(4) enables the authorized 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 Income-tax Act. On the other hand, whatever statement is recorded under section 133A of the Income-tax Act it is not given any evidentiary value obviously for the reason that the officer is not authorised to administer oath and to take any sworn statement which alone has evidentiary value as contemplated under law; (iii) The expression "such other materials or information as are available with the Assessing Officer" contained in Section 158BB of the Income-tax Act, 1961, would include the materials gathered during the survey operation under Section 133A; (iv) The material or information found in the course of survey

proceeding could not be a basis for making any addition in the block assessment; (v) Finally, the word "may" used in Section 133A (3)(iii) of the Act, viz., "record the statement of any person which may be useful for, or relevant to, any proceeding under this Act, as already extracted above, makes it clear that the materials collected and the statement recorded during the survey under Section 133A are not conclusive piece of evidence by itself.

A survey was conducted in the premises of the assessee-firm. One of the partners in his sworn statement offered an additional income of Rs.20 lakhs for the assessment year 2001-02 and Rs.30 lakhs for the assessment year 2002-03. However, the said statement was retracted by the assessee-firm in its letter dated August 3, 2001, stating that the partner from whom a statement was recorded during the survey operation under section 133A, was new to the management and he could not answer the enquiries made and as such he agreed to an ad hoc addition. The Assessing Officer based on the admissions made by the assessee, which were directly relatable to the defects noticed during the action under section 133A of the Act, recomputed the assessment. The order was set aside by the Commissioner of Income-tax (Appeals) and this order was upheld by the Tribunal. On appeal to the High Court:

> *"Held, dismissing the appeal, that in view of the scope and ambit of the materials collected during the course of survey action under section 133A shall not have any evidentiary value. 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."*

10. On further appeal by the Department in Civil Appeal No. 13224 of 2008 and 6747 of 2012 dated 20/09/2012, the Supreme Court held as follows:

> *"Heard Counsels on both sides. Leave granted. Civil Appeal filed by the Department pertains to 2001-02. In view of the concurrent findings of the fact, this Civil Appeal is dismissed."*

Hence, the ratio laid down by the Madras High Court was confirmed by the Supreme Court.

11. From the foregoing discussion, the following principles can be culled out:

> *(i) An admission is extremely an important piece of evidence but it cannot be said that it is conclusive and it is open to the person who made the admission to show that it is incorrect and that the assessee should be given*

a proper opportunity to show that the books of accounts do not correctly disclose the correct state of facts, vide decision of the Apex Court in Pullangode Rubber Produce Co. Ltd. v. State of Kerala [(1973) 91 I.T.R. 18];

(ii)In contradistinction to the power under section 133A, section 132(4) of the Income-tax Act 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 Income-tax Act. On the other hand, whatever statement is recorded under section 133A of the Income-tax Act it is not given any evidentiary value obviously for the reason that the officer is not authorised to administer oath and to take any sworn statement which alone has evidentiary value as contemplated under law, vide Paul Mathews and Sons v. Commissioner of Income-tax [(2003) 263 I.T.R. 101];

(iii) The word "may" used in Section 133A (3)(iii) of the Act, viz., "record the statement of any person which may be useful for, or relevant to, any proceeding under this Act, makes it clear that the materials collected and the statement recorded during the survey under Section 133A are not conclusive piece of evidence by itself.

(iv) Finally, the statement recorded by the Assessing Officer on 25/09/2014 u/s. 131 cannot be the basis to sustain the addition since it is not supported by corroborative material.

12. In our opinion, the Assessing Officer has made the addition only on the basis of sworn statement of the managing partner. Accordingly, we dismiss the ground taken by the Revenue. The appeal of the Revenue is dismissed."

8.34 Further, in the case of CIT Vs. Dr. N. Thippa Setty (322 ITR 525) (Karn.), the jurisdictional High Court has held as under:

"Held, dismissing the appeals, that it was clear that the statements made by the assessee under section 132(4) of the Act were retracted not once but twice and that the Department had accepted the retraction. No cogent and valid reasons had been assigned by the Assessing Officer for reopening the assessment. There were no good or sufficient reasons for reopening of the assessment under section 148 of the Act against the assessee."

8.35 In view of the foregoing discussion, we are of the opinion that once the statement recorded u/s 131 or 131(1A) or 133A of the Act or 133A of the Act is retracted by assessee, the ld. AO without rejecting the books of accounts cannot make any additions towards bogus purchases. In these circumstances, we are not in a position to uphold the argument of ld. D.R.

Accordingly, the addition made on the premise of bogus purchase in all these assessment years is deleted and we allow the ground taken by the assessee in all these appeals.

8.36 With regard to addition of Rs.1.5 Crores on account of personal expenses of partners in the AY 2017-18, on this issue also the contention of the ld. AO is that this money is generated by inflating the expenditure in the books of accounts and for this purpose, he relied on the statement recorded during the course of survey. Since we have already held that there was no corroborative material to support this addition and the statement has already been retracted, this addition based on no supporting evidence cannot be made.

9. In the result, all the appeals of the assessee are partly allowed.

Order pronounced in the open court on 1st Sept, 2023

Sd/-	**Sd/-**
(Beena Pillai)	**(Chandra Poojari)**
Judicial Member	**Accountant Member**

Bangalore,
Dated 1st Sept, 2023.
VG/SPS
Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(Judicial)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar,
ITAT, Bangalore.