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

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SHRI KESHAV DUBEY, JUDICIAL MEMBER

ITA Nos.431 to 435/Bang/2024
Assessment Years: 2013-14 to 2017-18

M/s. Mukka Proteins Limited (Formerly known as Mukka Sea Food Industries Ltd.), # 18-2-16/4, Mukka Corporate House, First Cross N.G. Road, Attavar Mangaluru 575 001 Karnataka **PAN NO : AAGCM8310E**	**Vs.**	DCIT Central Circle-1 Mangaluru
APPELLANT		**RESPONDENT**

Appellant by	:	Sri Narendra Sharma, A.R.
Respondent by	:	Ms. Neera Malhotra, D.R.

Date of Hearing	:	22.05.2024
Date of Pronouncement	:	03.07.2024

O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

All these appeals by assessee are for the assessment years 2013-14 to 2017-18 directed against the commo order of CIT(A) dated 29.2.2024. The grounds in all these appeals are common in nature except change in figures. Hence, these appeals are clubbed together, heard together and disposed of by this common order for the sake of convenience.

2. The grounds raised in ITA No.431/Bang/2024 are as follows:

1. *The orders of the authorities below in so far as they are against the appellant are opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.*

2. *The learned Commissioner of Income tax [Appeals] is not justified in upholding the assessment of the income of the appellant at Rs.5,34,23,070/- as against Rs.4,00,50,020/- returned the appellant in response to notice u/s.153A of the Act under the facts and in the circumstances of the appellant's case.*

3. *The learned CIT[A] is not justified in upholding the addition made of Rs.1,33,73,054/- as bogus purchases by placing reliance on the statement recorded u/s. 132[4] of the Act without appreciating that the appellant has since adduced evidence in course of the assessment proceedings from the suppliers, who have confirmed the sales made to the appellant and therefore, no addition on this score ought to have been made under the facts and in the circumstances of the appellant's case.*

4. *The learned CIT[A] erred in holding that the statement recorded u/s. 132[4] of the Act in course of search would constitute incriminating materials found in course of the search for making the impugned addition without appreciating that there were no materials found in course of search to consider any part of the purchases as bogus and therefore, the statement recorded u/s. 132[4] of the Act alone could not be considered as incriminating materials for making any addition on this score.*

5. *Without prejudice to the above, the learned CIT[A] erred in upholding the validity of the additions made based on the statement recorded in course of search without giving opportunity to cross-examine the said persons whose statements have been relied upon for making the addition.*

6. *Without prejudice to the above, the learned CIT[A] ought to have appreciated that there cannot be any bogus purchases when the appellant has made corresponding sales out of the purchases made and therefore, the addition made is liable to be deleted.*

7. *Without prejudice to the above, the learned CIT[A] ought to have appreciated that the entire purchases could not be disallowed and only the profit element embedded therein could be disallowed.*

8. *The learned CIT[A] further ought to have appreciated that sanction u/s.153D was accorded is without application of mind and such a mechanically granted approval vitiates the assessment order rendering it to be held illegal and void-ab-initio under the facts and in the circumstances of the appellant's case.*

9. *Without prejudice to the right to seek waiver with the Hon'ble CCIT/DG, the appellant denies itself liable to be charged to interest u/s. 234A, 234B and 234C of the Act, which under the facts and in the*

circumstances of the appellant's case and the same deserves to be cancelled.

9.1 Without prejudice to the above, the levy of interest u/s.234A, 234B and 234C of the Act is bad in law as the period, rate, quantum and method of calculation adopted on which interest is levied are all not discernable and are wrong under the facts and in the circumstances of the appellant's case.

10. For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and Justice rendered and the appellant may be awarded costs in prosecuting the appeal and also order for the refund of the institution fees as part of the costs.

2.1. The crux of above grounds is that the lower authorities erred in making addition in these assessment years on the basis of statement recorded u/s 132(4) of the Act in respect of bogus purchases. Since the facts are similar in all these assessment years, we consider the facts in assessment year 2013-14.

2.2 The appellant is engaged in the production of fish meal and extraction of fish oil. A search and seizure operation under Section 132 of the Income Tax Act, 1961 (in short "The Act") was carried out in the ease of the appellant on 8.2.2018. Subsequent to the notice under Section 1 53A of the Act, the appellant filed returns of income as under:

A.Y.	Amount (Rs.)	Date
2013-14	4,00,50,020/-	27.07.2019
2014-15	3,61,21,170/-	27.07.2019
2015-16	3,88,52,740/-	27.07.2019
2016-17	5,71,59,860/-	27.07.2019
2017-18	5,86,04,920/-	27.07.2019

2.3 The Assessing Officer completed the assessment u/s 153A r.w.s. 143(3) of the Act determining total income as under:

A.Y.	Amount (Rs.)
2013-14	5,34,23,070/-
2014-15	4,53,13,710/-
2015-16	6,10,53,840/-
2016-17	7,26,68,760/-
2017-18	7,63,82,510/-

2.4 A search u/s 132 of the Act was conducted on 8.2.2018 at the registered office of the assessee. A survey u/s 133A of the Act was conducted at the factory at Sasihitlu and godown at Baikampady, Mangalore

2.5 During the course of search on 08.02.2018, it was noticed that payments towards purchase of raw fish/fish meal were made to Sri Raghav Poojary, Sri Abdul Rasheed and some others for the alleged purchases. However, it was found that all these persons were actually the employees of Mukka Sea Food Industries Pvt. Ltd. and that no actual purchases have been made from them. The accountant Sri. Shareef admitted in his statement that no raw fish or fish meal was purchased from these parties and these entries were entirely bogus in nature. He added that these bogus entries were made purely under the directions of Sri. K Mohammed Haris, MD of M/S Mukka Seafood Industries Pvt. Ltd. Once the amounts were credited into the bank accounts of Sri. Raghav Poojary and Sri. Abdul Rasheed, the amounts were withdrawn by Sri. Ismail, brother of the Chairman Sri. Abdul Razak. He also stated that the withdrawn amounts were used by Sri Ismail and the purpose of utilizing such amounts were not known to him.

2.6 Further, during the course of the search, it was identified that similar payments were made to the truck drivers namely, Sri Sayeed Ebrahim, Sri Katakeri Ebrahim Sayeed etc. On further verification of the books of accounts, certain other entries were also detected where no supply was made but only payments were made.

2.7 This finding was put forth to Mr. Mohammed Shareef, Accountant and a statement was recorded from him again. The accountant identified the entries in the books and furnished a list of bogus payments made towards alleged purchase of fish/fish meal. The list of names against whom bogus purchases were recorded in the books are listed in page 4 of the assessment order. A list of 20 persons ant others, and the assessment year in which bogus purchases were recorded against these names are provided in the list. In the assessment year 2013-14, bogus purchases were booked in only 3 names namely Sri. Raghav Poojary, Sri. Abdul Rasheed and Sri. K Shareef.

2.8 In the statement recorded on 9.2.2018, Sri Mohammed Shareef, Accountant admitted that these entries were made under the direction of Sri K. Mohammed Haris and explained that once the amounts were credited to the bank accounts of the said employees/truck drivers. The amounts used to be withdrawn by Sri Ismail, brother of the CMD, Sri Abdul Razak.

2.9 Further during the course of search while recording the statement u/s 132(4) from Sri K. Mohammed Haris, the Director who handled the day-to-day affairs of the company, the statement recorded from Sri Mohammed Shareef, Accountant, during the course of search proceedings was shown to him which contained the list of bogus purchases made in the books of the assessee. Sri K. Mohammed Haris admitted that bogus purchase entries were made in the books to inflate the expenses and to reduce the profits and agreed to offer the same as additional income. The bogus purchases admitted to the relevant year was Rs.1,56,84,864/-.

2.10 However, in the return of income filed, the appellant has admitted only Rs.23,11,810/- as additional income on the issue of bogus purchases. In response to the show cause notice, the

appellant stated that they were able to obtain confirmation from Mr. Abdul Rasheed and Mr. Sayyed Ibrahim and they were also in the process of obtaining confirmations from other parties. Therefore, the income admitted during the search proceedings in respect of the said supplier was not taken into account while declaring additional income in the return filed.

2.11 The AO examined the appellant's contention but found not acceptable, for the reasons that the appellant had only filed the ledger extract of the parties as appearing in the books of the appellant, signed by the alleged suppliers. This cannot be considered as evidence for the sale or delivery of goods without supporting documentation relating to sale /purchase /delivery /transportation/taxes etc. Further, the accountant of the appellant on the date of search/survey had categorically confirmed that no raw materials were received in respect of the purchase bills in respect of the parties referred to above. The accountant has also stated that these bogus purchases were recorded at the instance of the director K. Mohammed Harris. The statement of the accountant was confirmed by the director who admitted that the company was inflating its purchases to reduce its income. Very important, the parties who had given confirmation were the full-time employees of the appellant and were under direct control of the Directors. Further. It was noted that Mr. Syed Ibrahim a truck driver working for the appellant

2.12 The ld. AO also pointed out that the purchases booked in the name of Syed Ibrahim for AY 2018-19 was accepted as bogus and offered to tax in that assessment year. In view of the position of these alleged suppliers being under direct control of the assessee, it was possible to get their signatures on the required papers and the amounts were credited to their accounts and withdrawn by one Sri. Ismail, relative of the director.

2.13. At the end, the ld. AO concluded saying that the admission made in statement under section 132(4) has great evidentiary value and is binding on the person who makes it. If in the course of such search, the appellant makes some admission, he restrains the authorised officer from making further investigation. The sanctity of such provision would be lost if the appellant is allowed to contend at a later stage that no addition can be made based on such admission.

2.14 The AO relied upon the judicial pronouncement in the case of B. Kishore Kumar vs. Deputy Commissioner of Income-tax, Central Circle-IV(l), Chennai the Hon'ble High Court of Madras in [2014] 52 taxmann.com 449 (Madras), which was upheld by the Hon'ble Supreme Court of India 62 taxmann.com 215 (SC)/234 Taxman 771.

2.15 During this proceeding, the appellant raised several arguments stating that the appellant procures raw materials from an unorganized market obtaining confirmations from suppliers was a tedious task. Moreover, the suppliers are oversensitive and pressurizing them for confirmation would have badly affected the supplies of the appellant. Taking into consideration the practical difficulties of obtaining confirmations, the appellant agreed to admit the purchases made from parties as additional income of the appellant. Hence, the ld. AO made impugned additions.

2.16 On appeal, ld. CIT(A) confirmed the order of the ld. AO. Against this assessee is in appeal before us by way of above grounds.

3. The ld. A.R. submitted that the addition in this assessment year based only on the basis of statement recorded u/s 132(4) of the Act without any corroborative material.

3.1 The ld. A.R. submitted that as evident from the assessment order, the assessment u/s 153A is initiated merely relying on the statement recorded during the search which is not backed by any incriminating material found during the search. It is settled law that the statement recorded u/s 132(4) does not constitute incriminating material by itself.

3.2 The Assessing Officer has not referred to any incriminating material found as a result of search while making the addition. The additions are solely based on the statement recorded u/s 132(4) which does not constitute as an incriminating material.

3.3 It may be noted that the statement wherein additional income is admitted too do not refer to any incriminating material found during the search.

3.4 He relied on the following judgements:

(i) In the case of PCIT Vs Best infrastructure (India) Pvt Ltd (ITA No. 13/2017) the question of law framed before Delhi High Court is as under:

"Did the ITAT fall into error in holding that the additions made under Section 68 of the Income Tax Act, 1961, on account of the statements made by the assessee's Directors in the course of search under Section 132 of the Act were not justified?"

(a) In the case, the learned CIT-(A) held that evidence does not mean only documentary evidence and the statement under section 132(4) of the Act is important evidence collected as a result of search and seizure operation and thus, the addition of share capital was based on evidence gathered during the search. However, the Tribunal held that no incriminating material for each of the assessment year other than the year of search, to justify the assumption of jurisdiction under section 153A of the Act. The Hon'ble High Court, after considering the arguments of both parties on the issue whether statement under section 132(4) of the Act constitute incriminating material, held as under:

*"38. Fifthly, **statements recorded under Section 132(4) of the Act do not by themselves constitute incriminating material as has been explained by this Court in Commissioner of Income Tax Vs. Harjeev Aggarwal (supra)**. Lastly, as already pointed out hereinbefore, the facts in the present case are different from the facts in Smt. Dayawanti Gupta Vs. CIT (supra) where the admission by the Assessees themselves on critical aspects, of failure to maintained accounts and admission that the seized documents reflected transactions of unaccounted sales and purchases, is non-existent in the present case. In the said case, there was a factual finding to the effect that the assessee were habitual offenders, indulging in clandestine operations whereas there is nothing in the present case, whatsoever, to suggest that any statement made by Mr. Anu Aggarwal or Mr. Harjeet Singh contained any such admission.*
*39. For all the aforementioned reasons, the Court is of the view that the ITAT was fully justified in concluding that the **assumption of jurisdiction under Section 153A of the Act qua the Assessee herein was not justified in law**."*
[Emphasis in bold and underline supplied]

(ii) In the case of CIT Vs Harjeev Aggarwal (2016) 290 CTR 263 (Delhi), the Hon'ble High Court observed as under:

"19 In view of the settled legal position, the first and foremost issue to be addressed is whether a statement recorded under Section 132(4) of the Act would by itself be sufficient to assess the income, as disclosed by the Assessee in its statement, under the Provisions of Chapter XIV –B of the Act.
*20. **In our view, a plain reading of Section 158BB(1) of the Act does not contemplate computing of undisclosed income solely on the basis of a statement recorded during the search.** The works evidence found as a result of search" would not taken within its sweep statements recorded during search and seizure operations. However, the statements recorded would certainly constitute information and if such information is relatable to the evidence or material found during search, the same could certainly be used in evidence in any proceedings under the Act as expressly mandated by virtue of the explanation to Section 132(4) of the Act. **However, such statements on a standalone basis without reference to any other material discovered during search and seizure operations would not empower the Assessing Officer to make a block assessment merely because any admission was made by the Assessee during search operation."***
[Emphasis in bold and underline supplied]

(b) The Hon'ble High Court in the above case further noted that the statement recorded under section 132(4) of the Act may be used for making the assessment but only to the extent it is relatable to the incriminating evidence/material unearthed or found during the course of search.

(iii) In Moon Beverages Ltd. Vs ACIT, Central Circle- 15, New Delhi (ITA No.7374/Del/2017 dated 07.06.2018) Delhi bench held as under:

"45. Since in the instant case addition of Rs.11,85,00,000/- was made on the basis of statements recorded u/s 132(4) and post-search enquiry and no incriminating material was found/seized during the course of search, therefore, following the decisions cited (supra), we hold that no addition could have been made u/s 153A since the assessment was not abated in the instant case. In view of the above, we hold that the ld. CIT(A) was not justified in upholding the action of the Assessing Officer in assuming jurisdiction u/s 153A of the I.T. Act. Accordingly, the addition made by the Assessing Officer and upheld by the ld. CIT(A) in the 153A assessment proceedings being void ab-initio are deleted."

(iv) In M/s. Brahmaputra Finlease (P) Ltd. Vs DCIT (ITA No. 3332/Del/2017 dated 29.12.2017) Delhi Tribunal held as under:

"4.19 We find that in the case of best infrastructure (India) private limited (supra), despite the admission of accommodation entry in ***statements under section 132(4) of the Act, the court held that the statement do not constitute as incriminating material****. In the instant case, neither is there any statement of any accommodation entry operator claiming that any entry was not provided nor any director has admitted that assessee obtained accommodation entry. Thus, the case of the assessee is on better footing then the case of Best Infrastructure (I) P. Ltd (supra). In such facts and circumstances, respectfully following the decision of the Hon'ble Delhi High Court in the case of best infrastructure (India) private limited (supra),* ***we do not have any hesitation to hold that the statement under section 132(4) of Sh. Sampat Sharma cannot be treated as incriminating material found during the course of search.****"*

[Emphasis in bold and underline supplied]

(v) In PCIT Vs Suman Agrwal (ITA NO. 167 OF 2022) Honourable Delhi High court held as under:

8. We have perused the statement dated 3rd August, 2015 and the contents of the letter dated 31st July, 2015, both authored by Sh. Madho Gopal Agarwal. There is no reference to M/s KGN Industries Limited in either of the said documents. No other material found during search pertaining to M/s KGN Industries Ltd. has been placed on record. The Revenue has not placed on record any incriminating material which was found as a result of the search conducted on the assesee herein. It is also the contention of the assessee that there was no surrender by her unlike Sh. Madho Gopal Agarwal and she, therefore, specifically disputed that any notice under section 153A of the Act could have been initiated against her. The said facts are not disputed by the counsel for the Revenue.

9. On the date of search, admittedly, the assessment with respect to the AY under consideration 2011-12 admittedly stood completed. ***Since no assessment was pending for the relevant AY 2011-12 on the date of search and no incriminating material was found during the course of search, the issue is covered in favour of the assessee by the judgment of this Court in the case of Kabul Chawla (supra) and Pr. CIT v. Meeta Gutgutia [2017] 82 taxmann.com 287/248 Taxman 384/395 ITR 526/295 CTR 466****.*

[Emphasis in bold and underline supplied]

(vi) Honourable Delhi High Court in the case of Pr. CIT v. Anand Kumar Jain [2021] 432 ITR 384 held as under:

"This statement certainly has the evidentiary value and relevance as contemplated under the explanation to section 132(4) of the Act. ***However, this statement cannot, on a standalone basis, without reference to any other material discovered during search and seizure operations, empower the AO to frame the block assessment."***

[Emphasis in bold and underline supplied]

(vii) Honourable Mumbai Bench of ITAT in Arihant Universal Realty (P.) Ltd. v. DCIT(ITA NO. 4342/2017 dated 05.04.2022) held as under:

6.1 ***We find it would be necessary to address the preliminary issue of whether the addition could be framed u/s 153A of the Act in respect of a concluded proceeding without the existence of any incriminating materials found in the course of search****. The scheme of the act provides for abatement of pending proceedings as on the date of search. It is not in dispute that the assessment for the Asst Year 2009-10 was originally completed u/s 143(1) of the Act and hence it falls under concluded proceeding, as on the date of search.* ***We hold that the legislature does not differentiate whether the assessments originally were framed u/s 143(1) or 143(3) or 147 of the Act. Hence unless there is any incriminating material found during the course of search relatable to such concluded year, the statute does not confer any power on the ld AO to disturb the findings given thereon and income determined thereon, as finality had already been reached thereon, and such proceeding was not pending on the date of search to get itself abated****. It is not in dispute that both the ld AO and the ld CITA had admittedly not made any reference to any seized material found during the course of search in their orders relatable to the completed assessment year with regard to the items that were subject matter of disallowances/addition.* ***In this regard, we hold that the disallowances/additions that were made by the ld. AO in section 153A assessment were already forming part of the regular books of accounts and were duly recorded in the regular books of the assessee and cannot be construed as incriminating in nature. Every assessee would be having its regular books of accounts (where books are maintained) and would be filing his regular returns of income and assessments framed accordingly. If such person is subjected to***

search and the very same regular books of accounts were found at the time of search and if the ld AO tries to take a different view on the already recorded transactions in the said regular books of accounts in the search assessment u/s 153A of the Act which is contrary to the view taken by him in the original scrutiny assessments u/s 143(3) or intimation u/s 143(1) of the Act, then it would only result in giving another innings to the ld AO to review his own earlier decision on the very same set of facts and figures. This would make the entire scheme of the Act meaningless and the ld AO would be conferred with unfettered powers to review the earlier decisions taken either by him or by his predecessor on the very same issue , which in our considered opinion, cannot be the intention of the statute. That's why the legislature had duly drawn a distinction between the completed and abated assessments.

[Emphasis in bold and underline supplied]

3.5 ADDITIONS ARE NOT SUSTAINABLE WHEN THE CONFIRMATIONS FROM PARTIES ARE RECEIVED:

3.5.1 The learned assessing officer has held that the purchases made from following parties as bogus purchases:

Name	Amount
Sayeed Ebrahim	61,97,117
Abdul Rasheed	71,75,937
Total	1,33,73,054

3.5.2 In this connection it may be noted that during the search proceedings we were asked to substantiate the purchases of fish made from various parties. However, on the date of search we could not readily produce the necessary confirmations from the parties for the purchases made by us. It may be noted that the purchases are used by us for the production of fish meal and fish oil. He reiterated that fishermen are oversensitive. There would be panic among the suppliers if a discreet enquiry is made by the department which would affect our business adversely. Taking this into consideration we agreed to declare additional income during the search proceedings.

3.6 It was submitted by the ld. A.R. that having regard to the nature of trade, it was apprehended that **it could not be able to**

ensure that each of the suppliers to confirm because sometimes they are not within assessee's control. Some of the suppliers are small fishermen who might not have maintained regular books of accounts. Obtaining confirmations from the parties with whom it don't have any dealings now would be a herculean task. As always, it was intended to cooperate with the Department so that it could concentrate on its business. Hence, to conclude the search/survey proceedings without much delay, it was agreed to declare the purchases made from certain parties as its income. Meanwhile it was in the process of obtaining confirmations from suppliers. It could obtain confirmations from Mr. Abdul Rasheed and Mr. Sayyad Ebrahim. Confirmations received from parties were produced before us. Hence, the income admitted during the search proceedings in respect of said suppliers was not taken into account while declaring additional income in the Return of Income filed in response to Notice u/s 153A. Further he submitted that the additional income offered in 153A returns is only to co-operate with the department and same should not be inferred as concealment of income. The ld. A.R. placed reliance on the judgement of Kerala High Court in the case of CIT Vs Interseas ITA.No. 77 of 2009 dt 6.11.2009 where in it was held as under:

"In some cases even though the suppliers have confirmed that they have supplied goods to the assessee, they have stated that they do not maintain the accounts to confirm the turnover of supply to the assessee during the previous year."

"We find force in the contention of the assessee that having regard to the nature of trade, the assessee would not be able to get the suppliers confirm the supplies to the assessee because they are not within the control of the assessee. After making supplies and after collecting cash payments the suppliers are absolutely free to disown the transaction and assessee obviously cannot be blamed for the same."

"However, Government has chosen to liberalise the operation of Section 40A(3) to augment trade. After granting this facility, we are of the view that the department cannot insist the assessees to get the suppliers confirm to the department about the supplies made to the assessee and the payments received by them. In our view, the assessee should be taken to have discharged their burden by furnishing the copies

of purchase bills or vouchers issued containing the names and addresses of the suppliers with date, value, quantity etc. Besides this, the department cannot demand the assessee to get the supplier confirm to the department about the supplies, which the suppliers are free to deny. In a case where the suppliers deny that the supplies have not been made to the assessee, the remedy open to the department is to proceed for conducting a survey and enquiry against the activities of the supplier, establish with materials the details of business carried on by him including the supplies made to the assessee and proceed to make assessment on suppliers. No doubt, if assessee's claim of purchase from a particular person is found to be bogus, then it is certainly open to the department to disallow the expenditure in respect of such purchase. However, in this case it is the finding of the Tribunal that the assessee in fact purchased the quantity accounted by them and the same is seen exported and the assessee has accounted the export proceeds. So much so, in our view, the Tribunal rightly held that the department cannot call upon the assessee to prove what is beyond their capacity i.e. to get the suppliers confirm the supplies made to the assessee in terms of the claim of the assessee. In our view, there is no logic in the department disbelieving the assessee with regard to the purchases, but at the same time believe the denial of the supply and receipt of consideration by the suppliers. Besides the denial of full or part supply by the suppliers, we do not find any case of bogus purchases accounted by the assessee as found by any of the lower authorities."

3.7 In the instant case though assessee had received the supplies from the persons in respect to whom additional income is offered, it has admitted additional income to co-operate with the department. Only where the parties have confirmed, the additional income is not offered to tax. It is also humbly submitted that the peculiar nature of our business may kindly be taken into account. He stated that the payments are made to suppliers through banking channels only.

3.8 Ld. A.R. submitted that confirmation from parties has been duly submitted. In addition to the same the copies of ITR V and computation of income of above mentioned parties were filed before authorities. As could be noticed there from the said party has been offering income from business of trading in Raw Fish in their ITR. It may be appreciated that as evident from computation of income the suppliers were supplying raw fish to others as well. The turnover declared by them in the ITR is higher than the supplies made to the appellant company.

3.9 The ld. AO had ample powers u/s 131 and 133(6) to conduct independent enquiry and verify the claims made by the appellant. However, learned AO has not exercised any such powers and proceeded with the assessment merely relying on the statements recorded during the search.

3.10 ASSESSMENT IS VOID WHEN COPIES OF STATEMENTS / OPPORTUNITY OF CROSS EXAMINATION NOT PROVIDED:

3.10.1 He stated that the learned AO has referred to statement of Mr. Mohammed Shareef and Mr. K. Mohammed Haris but neither the copies of statement recorded were furnished to the appellant nor an opportunity of cross examination was granted to the appellant. Additions made without providing copies of statement and granting opportunity of cross examination is against the principles of natural justice and the consequent proceedings is void ab initio.

3.10.2 In Kishanchand Chellaram v. CIT (1980) 125 ITR 713 (SC) the Court held that the department is bound to provide an opportunity to the assessee to cross examine the piece of evidence on which it places reliance to draw an adverse inference to make any addition or disallowance.

3.10.3 The Hon'ble Apex Court in case of Andaman Timber Industries v. CCE [2015] 62 taxmann.com 3 observed as under in context to cross-examination: -

"6. According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority, though the statements of those witnesses were made the basis of the impugned order, is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected."

3.10.4 In Shri Deepak Valji Karia Vs ITO (ITA NO. 259/MUM/2021 dated 10.03.2022) the Mumbai Tribunal held as under:

"Facts and circumstances being identical respectfully following the decision of the Hon'ble Supreme Court, we hold that the assessment order passed u/s. 143(3) of the Act by the Assessing Officer is bad in law and has to be quashed as the Assessing Officer has failed to provide the copies of statements on which he relied

on for making assessments and also for not providing cross examination of those persons"

3.10.5 The Supreme Court in Kalra Glue factory vs. Sales Tax Tribunal (1987) 65 CTR (SC) 233 set aside the order of the tribunal for failure to afford the facility of cross-examination to the assessee. The observations made by the Apex Court are relevant for the purpose of present discussion and is being reproduced as under:

"We allow this appeal solely on the ground that the statement of Banke Lai, which was not tested by cross-examination, was used in order to reach the conclusion that the transaction was an inter-State sale."

3.10.6 He submitted that the above judgment though was rendered under the sales tax law, yet the observations reproduced above clearly highlights importance of cross-examination.

3.10.7 The Apex Court in C. Vasantlal & Co. vs. CIT (1962) 45 ITR 206 (SC) observed as follows:

"The Income-tax Officer is not bound by any technical rules of the law of evidence. It is open to him to collect materials to facilitate assessment even by private enquiry. But if he desires to use the material so collected, the assessee must be informed of the material and must be given an adequate opportunity of explaining it'. Accordingly, denial of opportunity to cross-examine has been held to be clearly illegal and unsustainable apart from being violative of natural justice."

3.10.8 In CIT Vs Ashwani Gupta [2010] 191 TAXMAN 51 (DELHI), The High Court of Delhi held that once there is a violation of the principles of natural justice in as much as seized material is not provided to an assessee nor is cross-examination of the person on whose statement the Assessing Officer relies upon, granted, then, such deficiencies would amount to a denial of opportunity and, consequently, would be fatal to the assessment proceedings. Based on the above finding, the Hon'ble Court upheld the order of the tribunal wherein the tribunal confirmed the order passed by the Commissioner of Income-tax (Appeals) which held the entire

addition made by the Assessing Officer to be invalid and had deleted the same.

3.10.9 In CIT Vs Rajesh Kumar [2008] 172 TAXMAN 74 (DELHI) the High Court of Delhi held as under:-

"The Tribunal had, on those facts, rightly come to the conclusion that since the revenue had relied upon the statement of 'M', it should have been made available to the assessee with an opportunity of cross-examining him. That was not done by the Assessing Officer. It clearly showed that the principles of natural justice had been violated. [Para 11]

There was no infirmity in the view taken by the Tribunal on the facts of the case. It was quite clear that material collected by the revenue behind the back of the assessee was used against him without disclosing that material to him or giving any opportunity to him to cross-examine the person whose statement had been used by the revenue against the interests of the assessee [Para 12]"

3.10.10 In the above case, based on the aforementioned findings, the appeal of the revenue was dismissed and upheld the order of the tribunal wherein the tribunal deleted the additions since the material collected by revenue behind the back of assessee was used against him without disclosing such material or giving any opportunity to him to cross-examine the person whose statement had been used by revenue against his interests and thereby principles of natural justice had been violated.

3.10.11 Reliance is also placed on the following decisions:

- State of Kerala v. K. T. Shaduli Yusuff [(1977) 39 STC 478 SC)]
- Mehta Parikh & Co. v. CIT [(1956) 30 ITR 181 (SC)]
- Vasanji Ghela & Co, v. CST — [(1977) 40 STC 544 (Bom)]
- CIT v. Ashish International [ITA No. 4299 of 2009, Order Dated 22.02.201, Bombay High court]

3.11 ADDITION MERELY BASED ON STATEMENT IS INVALID:

3.11.1 As evident from the assessment order the entire addition is dependent on the statement recorded under section 132(4) and not material is brought on record to substantiate the additions. It

may be noted that the additions cannot be sustained merely based on statements recorded which is not backed by credible evidence.

3.11.2 He stated that, honourable Bangalore bench of ITAT in Shri. K. Somasekhar, Hospet vs DCIT (ITA no. 988/Bang/2015 dated 28.08.2019 held as under:

"Under these facts, in our considered opinion, these various judgments cited by ld. AR of assessee are squarely applicable and respectfully following the same, we hold that the addition made by the AO and confirmed by ld. CIT(A) merely on the basis of statement without establishing that the entry on the seized paper is indicating any undisclosed income of the assessee is not sustainable and hence, we delete the same"

3.11.3 In Sh. Jagdish Kumar,Vs D.C.I.T., CC-1, (ITA No. 56 & 57/Asr/2022 dated 02.03.2023) the honourable Amrithsar Tribunal held as under:

We have found that ***merely reliance is only placed upon statement of the assesse taken at the time of locker operation without confronting the incriminating material or any other corroborative evidence either at the time of recording statement u/s 132(4) or in the assessment proceedings. Such statement has no evidentiary value u/s 292C of the act as being not supported with any incriminating material/evidence****. Further, The CBDT circular is binding on the revenue authorities as also followed by the CIT(A) in one of the Assessment year as above.*

3.11.4 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 O. 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 and 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.***

3.11.5 He relied on the judgement of Hon'ble Apex Court in Pullangode Rubber Produce Co., Ltd V. State of Kerala (1973) 91 ITR 18 (SC) wherein 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.

3.11.6 He relied on the judgement of Hon'ble Supreme Court 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 was made when the appellant could not readily produce confirmations about purchases at the time of search.

3.11.7 He relied on the judgement of Mumbai Tribunal in the case of DCIT vs M/s NIBR Bullion Pvt. Ltd. (ITA No. 6320/Mum/2011 dated 05.12.2022) wherein held as under:

"The AO vide replied dated 16/05/2011 reiterated that the addition has been made on the basis of the declaration made by the Ajay C. Arora u/s 132(4) of the Act and subsequently confirmed. However, ***the AO was not able to point any seized document that could be correlated to the disclosure statement. Thus, in the light of the facts of the case, various decisions and CBDT instructions referred above, we see no infirmity in the impugned order granting partial relief to the assessee****. Hence, the impugned order is upheld and appeal of the Revenue is dismissed."*

3.11.8 He relied on the judgement in the case of ACIT vs Janak Raj Chauhan [2006] 102 TTJ 316 ASR wherein it was held as under:

"Additions on the basis of statement made u/s 132(4), nothing on records to show that there exist positive evidence found during search in support of such an statement. Addition not justified till there exists any conclusive evidence on records in support of statement."

3.11.9 Further, he submitted that it is settled law that the assessment cannot be made merely on the basis of statement which is not backed by credible evidence. Reliance is placed on

- Instruction No. 286 /2/2003 (Inv.) It Dt. 10/3/2002
- Vinod Solanki vs. UOI [2009] (233) ELT 157 (SC)
- Jagmohan Singh Arora vs. DCIT [2006] 101 TTJ 682 (689) (Mum)
- Rajesh Jain vs. Dy. CIT [2006] 100 TTJ 929 (Del.)
- Asst. CIT vs. Jorawar Singh M. Rathod [2005] 94 TTJ 867 (Ahd)
- Aishwarya Rai vs. Dy. CIT [2007] 104 ITD 166 (TM) (Mum)
- S.P. Goyal vs. DCIT [2002] 82 ITD 85 (Mumbai)(TM)
- CBI v V.C. Shukla [1998] SCC 410
- M.M. Financers (P) Ltd. vs. DCIT [2007] 107 TTJ (Chennai) 200

- CIT v. Ashok Kumar Jain [369 ITR 145 (Raj.)]
- Shree Ganesh Trading Co. v. CIT [257 CTR (Jharkhand) 159]
- ACIT v. Ghatge Patil Industries Limited and vice-versa [ITA No. 1281 to 1284/Pun/2016]
- Avishkar Infrastructure Pvt. Ltd. v. DCIT [ITA No.7165/MUM/2011] dated 17.06.2015.

3.12 Additions to bogus purchase are invalid when sales have been accepted by the department:

3.12.1 He stated that the learned AO has not disputed the sales declared by the appellant. The sales offered in the Return of Income are accepted by the learned AO in toto. He stated that unless there is purchase there cannot be sale of goods. That too when assessee is maintaining quantitative details of stock and the same have been audited by the qualified Chartered Accountant, the learned AO ought not to have held that the purchases as bogus without verifying the corresponding sale. Unless sale is disproved the purchases cannot be held as bogus. He submitted that Hon'ble Bombay High Court in PCIT Vs Nitin Ramdeoji Lohia (ITA Nos. 673 and 750 OF 2018 dated 21.10.2022) held as under:

"We are in agreement with the view expressed by the CIT (Appeals) that, if the purchases are bogus, it would be impossible for the assessee to complete the business transaction and that if the purchase is bogus, the corresponding sale also must be bogus or else the transaction would be impossible to complete and as a necessary corollary, unless the corresponding sale is held to be bogus, the purchase also cannot be held to be bogus, rather it would be a case of purchase from bogus entities/parties. That view has been upheld by the Tribunal in principal while dismissing the appeal of the Revenue. In view of the above, we are of the opinion that the questions of law proposed as (a), (b), and (c) in the appeal cannot be said to be substantial questions of law."

3.13 ADDITIONS IN RESPECT OF BOGUS PURCHASES TO BE RESTRICTED TO GP:

3.13.1 Without prejudice he submitted that even assuming but not admitting the appellant has booked bogus purchases the addition ought to have restricted to the gross profit declared by the appellant and the AO could not have made additions of entire purchases. In

Shri Bhavesh Punmaji Devasi vs ITO (ITA No. 1693/M/2022 dated 31.05.2023) the Mumbai bench of Tribunal held as under:

"12. In the identical facts and circumstances of the case where though the purchases found to be bogus by the Revenue Authorities but sales by the assessee have been accepted as genuine as against these bogus purchases, we are of the considered view that when sales have been accepted being genuine the entire purchases cannot be treated as non genuine to make addition of the entire bogus purchases amount. Hon'ble High Court of Bombay in the case of JK Surface Coatings Pvt. Ltd. (supra) upheld the view taken by the Tribunal that in such circumstances gross profit should be in the range of 5% to 12.5% as reasonable estimation of profit element embedded in the bogus purchases"

3.13.2 He relied on the judgement of Hon'ble High Court of Bombay in the case of JK Surface Coatings Pvt. Ltd. (ITA No.1850 of 2017 dated 28.10.2021) wherein held as under:

"4. Having considered the memo of Appeal and the Orders passed by AO / CIT(A) and the Order of ITAT, the only issue that comes up for consideration is with respect to the extent of ad-hoc disallowance to be sustained with respect to bogus purchases. The AO has observed 100% of the purchase value to be added to the income of Assessee, the CIT(A) has said it should be 15% and ITAT has said it should be 10%. First of all, this would be an issue which requires evidence to be led to determine what would be the actual profit margin in the business that Assessee was carrying on and the matter of calculations by the concerned authority. According to the Tribunal, in all such similar cases, it is ranged between 5% to 12.5% as reasonable estimation of profit element embedded in the bogus purchase when material consumption factor do not show abnormal deviation.

5. Whether the purchases were bogus or whether the parties from whom such purchases were allegedly made were bogus was essentially a question of fact. When the Tribunal has concluded that the assessee did make the purchase, as a natural corollary ***not the entire amount covered by such purchase but the profit element embedded therein would be subject to tax.***

3.13.3 He relied on the judgement in the case of PCIT vs M/s Mohommad Haji Adam & Co (ITA No. 1004 of 2016 dated 11.02.2019), wherein the Hon'ble Bombay High court held as under:

" 8 In the present case, as noted above, the assessee was a trader of fabrics. The A.O. found three entities who were indulging in bogus billing activities. A.O. found that the purchases made by the assessee from these entities were bogus. This being a finding of fact, we have proceeded on such basis. Despite this, the question arises whether the Revenue is correct in contending that the entire purchase amount

should be added by way of assessee's additional income or the assessee is correct in contending that such logic cannot be applied. The finding of the CIT(A) and the Tribunal would suggest that the department had not disputed the assessee's sales. There was no discrepancy between the purchases shown by the assessee and the sales declared. ***That being the position, the Tribunal was correct in coming to the conclusion that the purchases cannot be rejected without disturbing the sales*** *in case of a trader. The Tribunal, therefore, correctly restricted the additions limited to the extent of bringing the G.P. rate on purchases at the same rate of other genuine purchases."*

3.13.4 He relied on the judgement in the case of M/s. Pavapuri Metals & Tubes Vs ITO (ITA NO. 1148/MUM/2019 dated 29.09.2020) wherein Hon'ble Mumbai Tribunal wherein held as under:

*"It is not in dispute that sales have been accepted as genuine from out of these purchases****. When the sales have been accepted as genuine the entire purchases cannot be treated as non-genuine.*** *The Hon'ble Gujarat High Court in the case of Bholanath Polyfab Pvt. Ltd [355 ITR 290] held that when the assessee made purchases and sold the finished goods as a natural corollary not the entire amount covered under such purchases would be subject to tax but only the profit element embedded therein. Similar view has been taken by the Hon'ble Gujarat High Court in the case of CIT v. Simit P. Seth [38 taxman.com 385]. Simply because the parties were not produced the entire purchases cannot be added as held by the Bombay High Court in the case of CIT v. Nikunj Eximp [216 Taxman.com 171]. We agree with the view of the lower authorities that there should be an estimation of profit element from these purchases and should be estimated reasonably as the assessee could not conclusively prove that the purchases made are from the parties as claimed, especially in the absence of any confirmations from them. Taking the totality of facts and circumstances, keeping in view the nature of business of the assessee i.e. trader in iron and steel, it would be justified if the profit element embedded in those purchases are estimated at 4%. Accordingly, we direct the Assessing Officer to estimate the profit element from the non-genuine purchases at 4% and restrict the disallowance of purchases to 4% and compute the income accordingly."*

3.13.5 He relied on the decision in the case of M/s Accra Pac(India) Pvt. Ltd Vs DCIT (ITA No. 514/Ahd/2018 dated 07.11.2022) wherein the Ahmedabad Tribunal held as under:

"However, we also note that it ***would not be justifiable to disallow the entire purchases when the corresponding sale of finished product (in which such which the purchases so made were utilised for making the final finished product) have been subject to tax.*** *Accordingly, in light of the judicial precedents cited above, a certain percentage of such alleged bogus purchases may be disallowed, keeping into consideration the profit offered to tax by the assessee."*

3.14 He also relied on the judgement of Hon'ble Supreme Court in the case of PCIT Vs. Abhisara Buildwell Pvt. Ltd. in ITA No.454 ITR 212 wherein it was held that no addition can be made in respect of assessment framed u/s 153A of the Act without any seized material.

3.15 The ld. A.R. for the assessee further relied on the following judgements:

a) CIT Vs. S. Jayalakshmi Ammal (390 ITR 189)
b) CIT Vs. Sunil Aggrawal (379 ITR 367)
c) CIT Vs. Harjeev Aggrawal (290 ITR 263)
d) Judgement of Hon'ble Supreme Court in the case of PCIT Vs. Anand Kumar Jain (HUF) (2021) (SCC) Online Del 3174

3.16 The ld. A.R. further relied on the order of this Tribunal in the case of M/s. Yashaswi Fish Meal and Oil Company in ITA Nos.62 to 66/Bang/2023 dated 1.9.2023.

3.17 Hence, the ld. A.R. requested us that the additions may kindly be deleted appreciating the facts of the case.

4. The ld. D.R. submitted that a sister concern firm of the appellant, where a survey was conducted on the same day on 08/02/2018, when search and seizure action u/s 132 was carried out on the appellant. At page 3 of the assessment order the statement of the accountant, Mr. Mohammed Shareef, is extracted where in the accountant has stated that -

> *" I admit and confirm that as per records available in this office that payments have been made for having purchased raw fish/fish meal to some of the employees of M/s Mukka Sea Food Industries Pvt. Ltd. viz Sri Raghav Poojary and Sri Abdul Rasheed.* ***Actually no raw fish/fish meal was purchased by them and these entries are bogus and it is being entered purely under the directions of Sri K. Mohammad Haris, MD of M/s Mukka seafood Industries Pvt. Ltd. Once the amounts are credited into the bank accounts of Sri Raghav Poojary and Sri Abdul Rasheed, the amounts will be withdrawn by Sri Ismail, brother of Chairman Sri Abdul Razak. The withdrawn amounts will be used by Ismail, brother of the Chairman Sri Abdul Razak. The withdrawn amounts will be used by Ismail and the purpose of utilizing the amounts is not known to me."***
>
> ***(Emphasis supplied)***

4.1 She drew our attention to the statement of Sri K. Mohammed Haris, Director of M/s Mukka Sea Food Industries Pvt. Ltd., recorded on 09/02/2018 and in reply to question no. Q. No. 23 & 24 Sri K. Mohammed Haris has accepted Rs.13,28,08,508 as bogus purchases made for A.Y. 2013-14 TO A.Y.2018-19 in the case of the appellant. She relied on the following:

4.2 INCREMINATING EVIDENCE

(1) She drew our attention to para 4.2 to para 7.2 (Internal pages 10 TO 38 of impugned CIT(A) order dated 29.02.2024.

(2) She also drew our attention to the Statement of the accountant, Mr. Mohammed Shareef recorded on 08/02/2018, during the course of survey u/s 133A on M/s Haris Marine Products, wherein he provided NAME-WISE, AMOUNT-WISE & ASSESSMENT YEAR-WISE DETAILS OF "BOGUS PURCHASE ENTRIES" MADE WITHOUT ANY PURCHASE". The specific nature of each entry itself proves that the Statement of the accountant, Mr. Mohammed Shareef recorded on 08/02/2018 is correct.

(3) She also drew our attention to the subsequent admission by Sri K. Mohammed Haris, Director of M/s Mukka Sea Food Industries Pvt. Ltd., and a working Director of the company, in the statement recorder u/s 132(4) of the Act accepted entries made against the names of 20 individuals in the books of accounts, for 6 assessment years, from A.Y. 2013-14 to 2018-19, as "Bogus" and agreed to declare Rs.13,28,08508 as bogus purchases.

(4) Total purchases made Vs. bogus purchase entries in books of accounts for AY 2013-14 to AY 2017-18 by the assessee

A.Y.	Total purchases of Raw Fish as per P&L a/c in the P.B. filed by the assessee	Bogus purchases of raw fish as per statement of Sri Mohammed Haris on 09/02/2018
2013-14	Rs.115,62,88,691	Rs.1,56,848,64
2014-15	Rs.109,51,16,877	Rs.91,92,537
2015-16	Rs.155,10,98,113	Rs.2,70,77,770
2016-17	Rs.141,64,19,966	Rs.3,28,37,070
2017-18	Rs.269,78,91,647	Rs.1,63,62,825

(A) Further, she submitted that:

(i) Statement of Accountant Mr. Mohammed Shareef recorded on 8.2.2018 is not filed by the assessee in the paper books filed by the assessee in the paper books filed for AY 2013-14 to AY 2017-18. This statement is crucial significance as it has all details regarding "Bogus Purhases".

(ii) Sri K. Mohammed Haris, Director of M/s Mukka Sea Food Industries Pvt. Ltd., is a working Director of the company.

(iii) The details of "BOGUS PURCHASES" tabulated in Q No. 24 relate A.Y.2013-14 TO A.Y.2018-19 and the list includes 20 specific names and "Bogus Purchases" entered in their names for each Assessment year.

(iv) The amounts entered towards "Bogus purchases" tabulated in Q No. 24 relate A.Y.2013-14 TO A.Y.2018-19 are specific amounts. These are not round figures.

(v) Sri K. Mohammed Haris, Director of M/s Mukka Sea Food Industries Pvt. Ltd., a working Director of the company, in the statement recorded u/s 132(4) of the

Act will not label entries for 20 individuals in the books of accounts, for 6 assessment years, from AY 2013-14 to AY 2018-19, as "Bogus" and agree to declare Rs.13,28,08,508 as bogus purchases. Therefore, the subsequent production of "DUBIOUS EVIDENCES" during the course of assessment proceedings is to be rejected.

Further, she analyzed the statements as below:

(B) **In the case of Sayyad Ebrahim:-** Bogus entry – Evidence to be rejected for the AY 2013-14 on the following reasons:

i. Name in the books of a/c of appellant is Sayyad Ebrahim

ii. ITR filed is of Katakari Ebrahim Sayeed for A.Y.2013-14, at pages 155 of P.B for A.Y. 2013-14. The name and spelling are both different. To cover-up this bogus evidence, the appellant at Pg.No. 90 of the P.B. says Sayyad Ebrahim and Katakari Ebrahim Sayeed are same.

iii. Confirmation of account at Page 117 of paper book is from Sayyad Ebrahim and NOT from Katakari Ebrahim Sayeed.

iv. Further, Sayyad Ebrahim is an employee of the appellant company. Whereas, in the ITR filed, and in the Statement of Income there is no disclosure of income from salary.

v. Further, as per ITR, this individual is born on 02/10/1950. So he was 62 years old in FY 2012-13, relevant for AY 2013-14, which again makes this evidence as dubious.

vi. No evidence furnished that Sayyad Ebrahim and not_from Katakari Ebrahim Sayeed are one and the same person.

(C) In the case of Abdul Rasheed & Raghava Poojari – Bogus entry – Evidence to be rejected. Abdul Rasheed and Raghava Poojary are employees of the appellant company. Whereas, in the ITR filed and in the Statement of Income, there is no income from salary was shown.

(a) No evidence furnished that Abdul Rasheed and Raghava Poojary, employees of the appellant company and Abdul Rasheed and Raghava Poojary, in the ITR filed are one and the same person.

(b) Notwithstanding the above, no evidence furnished that the income declared in ITR is from sale of fish business and that the fish was sold to the appellant.

(D) Case of Abdul Khadar – Bogus entry – Evidence to be rejected on the following reasons:

(a) Name in the books of a/c of appellant is Abdul Khader.

(b) Confirmation of account at Page 117 of paper book for A.Y.2016-17 is from Abdul Khadar **NOT** from Abdul Khader.

(c) ITR filed is of Alekala Abdul Khader A.Y.2016-17, at pages 169 of P.B for A.Y.2016-17, The name and spelling are both different.

(d) Further, Abdul Khader is an employee of the appellant company. Whereas, in the ITR filed, and in the Statement of Income at Page 171 of P.B for A.Y.2016-17, there is no income from salary has been shown.

4.3 Regarding ground of appeal No.5 in ITA 431-435/B/2024(A.Y.2013-14 TO A.Y.2017-18) she submitted that no names specified for cross examination opportunity, and ground to be dismissed on the following reasons:

(1) The appellant has not specified any name & did not give details of whose statement was recorded during search on the basis of which addition was made, for which no opportunity of cross-examination was given.

(2) The grounds of appeal being vague is to be rejected.

(3) Notwithstanding above, Sri K. Mohammed Haris, Director of M/s Mukka Sea Food Industries Pvt. Ltd. was confronted on 09/02/2018 u/s 132(4) of the Act with the Statement of the accountant, Mr. Mohammed Shareef recorded on 08/02/2018, which Sri K. Mohammed Haris, Director accepted to be true in his statement recorded on 09/02/2018 u/s 132(4) of the Act.

4.4 Regarding grounds of appeals Nos.6 & 7 in ITA Nos.431-435/B/2024(A.Y.2013-14 TO A.Y.2017-18) she submitted that no purchase made– So no profit element to be determined

4.5 Further, she submitted that in the statement of the accountant, Mr. Mohammed Shareef recorded on 08/02/2018, during the course of survey u/s 133A on M/s Haris Marine Products, the accountant, Mr. Mohammed Shareef, clearly stated that

".....Actually no raw fish/fish meal was purchased by them and these entries are bogus and it is being entered purely under the directions of Sri K. Mohammad Haris, MD of M/s Mukka seafood Industries Pvt. Ltd. ....."

(Emphasis supplied)

(1) Sri K. Mohammed Haris, Director of M/s Mukka Sea Food Industries Pvt. Ltd. , a working Director of the company, in the statement recorded u/s 132(4) of the Act, in reply to Q.No.24 agreed that these are bogus entries in books.

(2) So, when 'NO PURCHASE" was made, obviously there was "NO SALE". So, there is no question of any profit element.

4.6 Regarding ground of appeals No.8 in ITA Nos. 431-434/B/2024(A.Y.2013-14 to A.Y.2016-17) & ground of appeals No.9 in ITA Nos.435/B/2024 (A.Y.2017-18) she submitted that Sanction u/s 153 D not adjudicated by Ld. CIT(A)

4.7 Regarding ground of appeals No.9 in ITA Nos.431-435/B/2024(A.Y.2013-14 to A.Y.2017-18) & ground of appeals No.10 in ITA Nos.435/B/2024 (A.Y.2017-18) with regard to Waiver of interest she submitted that these grounds not relevant to proceeding before Hon'ble ITAT, so no comments.

4.8 Regarding ground of appeals No.8 in ITA No.435/B/2024 (A.Y.2017-18) with regard to Capital subsidy she submitted that this ground was not adjudicated by ld. CIT(A).

Finally, she relied on following judgements:

(i) Judgement of Hon'ble Supreme Court of India in the case of Video Master Vs. JCIT reported in (2015) 378 ITR 374 (SC), wherein held as under:

> *"A search and seizure operation was carried on at premises of the assessee' firm and others where in partner of the assessee disclosed certain undisclosed income. Accordingly, an addition was made to the income of the assessee. The Tribunal held that statement made by partner could be used as evidence and accordingly upheld the assessment order. The High Court dismissed appeal of the assessee.*
>
> *Held that it is not possible to say that this is a case of no evidence at all inasmuch as evidence in the form of the statement made by the assessee himself and other corroborative material are there on record."*

(ii) Judgement of Hon'ble High Court of Kerala in the case of CIT, Kozhikode Vs. O. Abdul Razak reported in (2013) 350 ITR 71 (Kerala) where held as follows:

> *"IT: As self-serving retraction, without anything more cannot dispel statement made under oath under section 132(4)".*

(iii) Judgement of Hon'ble High Court of Jharkhand in the case of Mahabir Prasad Rungta Vs. CIT, Ranchi reported in (2014) 266 CTR 175 (Kharkhan) (9.1.2014) wherein held as under:

> *"IT: Where assessee has not adduced any rebuttal evidence to show that entries made in diary/loose sheets recovered during search are not income in hands of assessee, addition is to be upheld."*

(iv) Judgement of Hon'ble Supreme Court of India in the case of Roshanlal Sanchiti Vs. PCIT reported in (2023) 150 taxmann.com 228 (SC), wherein held that *retraction of statement recorded u/s 132(4) of the Act has to be made within reasonable time or immediately after statement of assessee is recorded and hence where retraction of statement recorded u/s 132(4) and later confirmed in statement recorded u/s 131 had been made by assessee after almost 8 months same was to be disregarded."*

4.9 She also relied on the judgement of Hon'ble Delhi High Court in the case of CIT Vs. Chetan Das Lachman Das wherein held as follows:

> *"13. Coming to the order of the Tribunal, we are of the view that the reasons given by it to distinguish the judgment of the Supreme Court cited (supra) are not sound. Firstly, there was seized material in the present case to show that the assessee has been indulging in off-record transactions. The observation of the Tribunal that no evidence was found to show that the actual turnover of the assessee was more than the declared turnover is hair splitting. The Tribunal lost sight of the fact that all was not well with the books of account maintained by the assessee and it has been keeping away its income from the books. That should have been sufficient for the Tribunal to examine the estimate made by the Assessing Officer, having regard to the principles laid down in the judgment of the Supreme Court (supra). The Tribunal also failed to note the difference between Section 158BB appearing in the Chapter-XIVB and the assessment made by virtue of the provisions of Section 153A of the Act. Secondly, the Tribunal expects the purchasers from the assessee to come forward and declare that they have paid more than what was appearing in the*

sale bills issued to them and has commented upon the lack of any inquiry from the purchasers on this line. Suffice to say that this throws an impossible burden on the Assessing Officer, having regard to the observations of the Supreme Court that the assessee cannot be permitted to take advantage of his own illegal acts, that it was his duty to place all facts truthfully before the assessing authority, that if he fails to do his duty She cannot be allowed to say that assessing authority failed to establish suppression of income, that the facts are within his personal knowledge and therefore it was the burden of the assessee to prove that there was no suppression. Thirdly, the Tribunal has stated that there was no corroborative material to substantiate the contents of the loose papers found during the search. We are not impressed by this reason at all. The papers are not denied or disputed by the assessee. The CIT (Appeals) has found that the partners of the assessee firm had admitted to the practice of suppressing the profits. The papers themselves show two different rates, one higher and the other lower and on comparison with the sale bills it has been found that the sale bills show the lower rate and these findings have not been denied by the assessee. The Tribunal, therefore, erred in looking for some other corroboration to substantiate the contents of the loose papers, overlooking that the loose papers needed no further corroboration and the sale bills compared with the seized papers themselves corroborated the suppression of income. Fourthly, the Tribunal has relied on the observations of the CIT (Appeals) that no serious consideration can be given to the loose papers and has held that this shows that there is "nothing more in Revenue s kitty apart from those said loose papers pertaining to November, 2005 (financial year 2005-06) to support suppression of sales receipts on the part of the assessee firm". The Tribunal, with respect, has misread the observations of the CIT (Appeals) and has relied on a single observation without reading the order of the CIT (Appeals) as a whole. Moreover, in such cases, it is expected of the Tribunal to also independently examine the decision of the CIT (Appeals) which is impugned before it. In such cases it would be more appropriate to find out or ascertain whether there is any positive material which is in support of the assessee's case or anything upon which the assessee can rely in order to discharge the burden placed upon him in the light of the judgment of the Supreme Court in H M Esufali H. M. Abdulali (supra). Mere negative findings should not be made use of to throw out the case of the department. Lastly, the reliance placed by the Tribunal on the judgment of this Court in CIT v. Anand Kumar Deepak Kumar, (2007) 294 ITR 497 does not seem appropriate. There it was held that there was no presumption that unaccounted sales in the pre-search period would continue in the post search period also. This judgment has no application to the present case because the search took place on 13.12.2005 which falls in the year relevant to the assessment year 2006-07. The assessments under Section 153A of the Act have been completed up to and including the assessment year 2006-07. Even if there can be no presumption that after 13.12.2005 there could have been unaccounted sale of Hing or compound Hing, it is hardly material since only a period of 31/2 months were left aft e date of search till the end of the previous year i.e. 31.3.2006."

5. We have heard the rival submissions and perused the materials available on record. In this case, there was a search and seizure action u/s 132 of the Act on 8.2.2018. The ld. AO made addition in these assessment years as follows:

AY	Addition towards bogus purchase	Assessment made under section
2013-14	1,33,73,054/-	143(3) r.w.s. 153A
2014-15	91,92,537/-	-do-
2015-16	2,22,01,100/-	-do-
2016-17	1,55,08,903/-	-do-
2017-18	1,24,14,325/-	-do-

5.1 Now the contention of the ld. A.R. is that the entire addition is based on statement recorded u/s 132(4) of the Act during the course of search action carried out u/s 132 of the Act and this addition is not based on any seized material brought on record. Admittedly, in this case there was no seized material corresponding to addition made by the ld. AO and confirmed by ld. CIT(A). Question No.4 in statement recorded u/s 132(4) of the Act in all these assessment years Mr. Raghav Poojary, employee of the assessee confirmed the bogus purchase vide question No.15, which was reproduced in para 4 in ld. D.R's submissions herein above. In question Nos.23 & 24, Mr. K. Mohammed Haris, Director of the assessee company on statement recorded u/s 132(4) fo the Act on 9.2.2018 admitted the bogus purchase. Further, Md. Shareef, Accountant of the assessee given the list of bogus purchases with the name and address. On the basis of above, the ld. AO came to conclusion that there was bogus purchase made by assessee for these assessment years. However, vide reply dated 9.12.2019, assessee stated that the assessee has offered the additional income in respect of bogus purchases, which were not confirmed by the suppliers. The assessee has also brought on record copy of confirmation letter filed before the lower authorities by filing

separate paper books in all these assessment years, which is kept on record. However, ld. D.R. strongly opposed the arguments of the assessee's counsel by relying various judgements cited (supra). Contrary to this, the ld. A.R. relied on the judgement of Hon'ble Delhi High Court in the case of Harjeev Agrawal 241 Taxman 199(Delhi) wherein held as under:

> *"20. In our view, a plain reading of Section 158BB(1) of the Act does not contemplate computing of undisclosed income solely on the basis of a statement recorded during the search. The words "evidence found as a result of search" would not take within its sweep statements recorded during search and seizure operations. However, the statements recorded would certainly constitute information and if such information is relatable to the evidence or material found during search, the same could certainly be used in evidence in any proceedings under the Act as expressly mandated by virtue of the explanation to Section 132(4) of the Act. However, such statements on a standalone basis without reference to any other material discovered during search and seizure operations would not empower the AO to make a block assessment merely because any admission was made by the Assessee during search operation.*
>
> *21. A plain reading of Section 132 (4) of the Act indicates that the authorized officer is empowered to examine on oath any person who is found in possession or control of any books of accounts, documents, money, bullion, jewellery or any other valuable article or thing. The explanation to Section 132 (4), which was inserted by the Direct Tax Laws (Amendment) Act, 1987 w.e.f. 1st April, 1989, further clarifies that a person may be examined not only in respect of the books of accounts or other documents found as a result of search but also in respect of all matters relevant for the purposes of any investigation connected with any proceeding under the Act. However, as stated earlier, a statement on oath can only be recorded of a person who is found in possession of books of accounts, documents, assets, etc. Plainly, the intention of the Parliament is to permit such examination only where the books of accounts, documents and assets possessed by a person are relevant for the purposes of the investigation being undertaken. Now, if the provisions of Section 132(4) of the Act are read in the context of Section 158BB(1) read with Section 158B(b) of the Act, it is at once clear that a statement recorded under Section 132(4) of the Act can be used in evidence for making a block assessment only if the said statement is made in the context of other evidence or material discovered during the search. A statement of a person, which is not relatable to any incriminating document or material found during search and seizure operation cannot, by itself, trigger a block assessment. The undisclosed income of an Assessee has to be computed on the basis of evidence and material found during search. The*

statement recorded under Section 132(4) of the Act may also be used for making the assessment, but only to the extent it is relatable to the incriminating evidence/material unearthed or found during search. In other words, there must be a nexus between the statement recorded and the evidence/material found during search in order to for an assessment to be based on the statement recorded.

*22. In **CIT v. Sri Ramdas Motor Transport Ltd.: (1999) 238 ITR 177 (AP)**, a Division Bench of Andhra Pradesh High Court, reading the provision of Section 132(4) of the Act in the context of discovering undisclosed income, explained that in cases where no unaccounted documents or incriminating material is found, the powers under Section 132(4) of the Act cannot be invoked. The relevant passage from the aforesaid judgment is quoted below:*

> *"A plain reading of sub-section (4) shows that the authorised officer during the course of raid is empowered to examine any person if he is found to be in possession or control of any undisclosed books of account, documents, money or other valuable articles or things, elicit information from such person with regard to such account books or money which are in his possession and can record a statement to that effect. Under this provision, such statements can be used in evidence in any subsequent proceeding initiated against such per son under the Act. Thus, the question of examining any person by the authorised officer arises only when he found such person to be in possession of any undisclosed money or books of account. But, in this case, it is admitted by the Revenue that on the dates of search, the Department was not able to find any unaccounted money, unaccounted bullion nor any other valuable articles or things, nor any unaccounted documents nor any such incriminating material either from the premises of the company or from the residential houses of the managing director and other directors. In such a case, when the managing director or any other persons were found to be not in possession of any incriminating material, the question of examining them by the authorised officer during the course of search and recording any statement from them by invoking the powers under section 132(4) of the Act, does not arise. Therefore, the statement of the managing director of the assessee, recorded patently under section 132(4) of the Act, does not have any evidentiary value. This provision embedded in sub- section (4) is obviously based on the well established rule of evidence that mere confessional statement without there being any documentary proof shall not be used in evidence against the person who made such statement. The finding of the Tribunal was based on the above well settled principle."*

23. It is also necessary to mention that the aforesaid interpretation of Section 132(4) of the Act must be read with the explanation to Section 132(4) of the Act which expressly provides that the scope of examination under Section 132(4) of the Act is not limited only to the books of accounts or other assets or material found during the search. However, in the context of Section 158BB(1) of the Act which expressly restricts the computation of undisclosed income to the evidence found during search, the statement recorded under Section 132(4) of the Act can form a basis for a block assessment only if such statement relates to any incriminating evidence of undisclosed income unearthed during search and cannot be the sole basis for making a block assessment.

24. If the Revenue's contention that the block assessment can be framed only on the basis of a statement recorded under Section 132(4) is accepted, it would result in ignoring an important check on the power of the AO and would expose assessees to arbitrary assessments based only on the statements, which we are conscious are sometimes extracted by exerting undue influence or by coercion. Sometimes statements are recorded by officers in circumstances which can most charitably be described as oppressive and in most such cases, are subsequently retracted. Therefore, it is necessary to ensure that such statements, which are retracted subsequently, do not form the sole basis for computing undisclosed income of an assessee.

25. In ***Commissioner of Income Tax v. Naresh Kumar Aggarwal: (2014) 3699 ITR 171 (T & AP),*** *a Division Bench of Telangana and Andhra Pradesh High Court held that a statement recorded under Section 132(4) of the Act which is retracted cannot constitute a basis for an order under Section 158BC of the Act. The relevant extract from the said judgement is quoted below:*

> *"17. 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 the Code of Criminal Procedure 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."*

> *"18. It is not without reason that 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."*
>
> *"19. 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."*

5.2 Thus, the contention of the ld. A.R. is that the assessee's books of accounts are duly audited and ld. AO has not rejected the books of accounts and not found any defects in the same. Even after accepting the books of accounts, the ld. AO solely relying on the statement recorded u/s 132(4) of the Act from Md. Haris, Director of assessee company and the statement of various employees recorded during the course of search action, admittedly, the ld. AO not recorded anywhere that he is not satisfied about the correctness and completeness of books of accounts and also it was not rejected which was duly audited by the qualified Chartered Accountants u/s 44AB of the Act. In our opinion, 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 as well as additional income offered by the assessee, thereafter he made further additions on the basis of statement recorded u/s 132(4) or 131 of the Act from various persons. In our opinion, as rightly contended by the ld. A.R., the ld. AO cannot go with both methods for the purpose of making assessments. Either the ld. AO has to go with the surrender of income by the assessee or may go to estimate the income of the assessee after rejecting the books of accounts. In the present case, the ld. AO has not rejected the books of accounts

u/s 145(3) of the Act. He accepted the books of accounts, then made additions on the basis of declaration made during the course of search action. Admittedly in this case, the assessee has offered the additional income in respect of which not confirmed by the suppliers with regard to bogus purchase. However, whatever purchase confirmed by the parties, he has not offered it as an additional income in his return filed consequent to the search action u/s 153A of the Act. In our opinion, the assessee before the ld. AO clearly brought on record the fact as to why he has not offered the additional income vide its letter dated 10.4.2018 before the ld.AO i.e. within 14 months of the search action which took place on 8.2.2018.

5.3 At this stage, it is appropriate to take support of the 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.

……

……

5.4 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]…….*

5.5 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.

5.6 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."

5.7. 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.

5.8 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 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 is 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.

5.9 Further, in the present case though the assessee retracted the earlier statement recorded u/s 132(4) of the Act on 9.12.2019, however, the lower authority has not considered retraction letter filed by the assessee. Being so, the statement recorded u/s 132(4) of the Act cannot be considered as a gospel truth.

5.10 Further, the parties from whom the assessee made purchases who have confirmed the same and their return of income has been filed and there was no rejection of their claim by the department. The details of confirmations and returns of income filed by them are kept on record as follows:

AY 2013-14:

Sl.No. in paper book	Particulars	Pages from	To	Filed/available before AO/CIT(A)
10	Copy of the reply dated 09/12/2019 filed before the learned Deputy Commissioner of Income-tax, Central Circle - 1, Mangalore along with the confirmation of accounts received from the following parties:	113	115	AO & CIT[A]
10[a]	Sri Abdul Rasheed	116	116	
10[b]	Sri Sayyed Ebrahim	117	117	
11	Copy of the Written submissions dated 27/09/2023 along with the following annexures filed before the learned CIT[A]-2, Panaji.	118	150	CIT[A]
11[a]	Confirmation of accounts received from Sri Abdul Rasheed	151	151	AO & CIT[A]
11[b]	Confirmation of accounts received from Sri Sayyed Ebrahim	152	152	AO & CIT[A]
11[c]	Copy of the acknowledgement for having filed the return of income along with the computation of total income for the assessment year 2013-14 in the case of Sri Abdul Rasheed Mangalore.	153	154	AO & CIT[A]
11[d]	Copy of the acknowledgement for having filed the return of income along with the computation of total income for the assessment year 2013-14 in the case of Sri Sayyed Ebrahim	155	156	AO & CIT[A]

AY 2014-15:

Sl.No. in paper book	Particulars	Pages from	To	Filed/available before AO/CIT(A)
8	Copy of the reply dated 09/12/2019 filed before the learned Deputy Commissioner of Income-tax, Central Circle - 1, Mangalore along with the confirmation of accounts received from the following parties:	102	104	AO & CIT[A]
8[a]	Abdul Rasheed	105	106	
8[b]	Sayyed Ebrahim	107	108	

9	Copy of the Written submissions dated 27/09/2023 along with the following annexures filed before the learned CIT[A]-2, Panaji.	109	141	CIT[A]
9[a]	Confirmation of accounts received from Sri Abdul Rasheed	142	143	AO & CIT[A]
9[b]	Confirmation of accounts received from Sri Sayyed Ebrahim	144	145	AO & CIT[A]
9[c]	Copy of the acknowledgement for having filed the return of income along with the computation of total income for the assessment year 2014-15 in the case of Sri Abdul Rasheed Mangalore.	146	148	AO & CIT[A]
9[d]	Copy of the acknowledgement for having filed the return of income along with the computation of total income for the assessment year 2014-15 in the case of Sri Sayyed Ebrahim	149	151	AO & CIT[A]

AY 2015-16:

Sl.No. in paper book	Particulars	Pages from	To	Filed/available before AO/CIT(A)
8	Copy of the reply dated 09/12/2019 filed before the learned Deputy Commissioner of Income-tax, Central Circle - 1, Mangalore along with the confirmation of accounts received from the following parties:	102	104	AO & CIT[A]
8[a]	Abdul Rasheed	105	106	
8[b]	Raghava Poojary	107	107	
8[c]	Sayyed Ebrahim	108	109	
9	Copy of the Written submissions dated 27/09/2023 along with the following annexures filed before the learned CIT[A]-2, Panaji.	110	143	CIT[A]
9[a]	Confirmation of accounts received from Sri Abdul Rasheed	144	145	AO & CIT[A]
9[b]	Confirmation of accounts received from Sri Raghava Poojary	146	146	AO & CIT[A]
9[c]	Confirmation of accounts received from Sri Sayyed Ebrahim	147	148	AO & CIT[A]
9 [d]	Copy of the acknowledgement for having filed the return of income along with the computation of total income and Trading and Profit and Loss account for the assessment year 2015-16 in the case of Sri Abdul Rasheed Mangalore.	149	152	AO & CIT[A]
9[e]	Copy of the acknowledgement for having filed the return of income along with the computation of total income for the assessment year 2015-16 in the case of Sri Raghava Poojary.	153	154	AO & CIT[A]
9[f]	Copy of the acknowledgement for having filed the return of income along with the computation of total income and Trading and Profit and Loss account for the assessment year 2015-16 in the case of Sri Sayyed Ebrahim	155	157	AO & CIT[A]

AY 2016-17:

8	Copy of the reply dated 09/12/2019 filed before the learned Deputy Commissioner of Income-tax, Central Circle - 1, Mangalore along with the confirmation of accounts received from the following parties:	110	112	AO & CIT[A]
8[a]	Abdul Rasheed	113	114	
8[b]	Raghava Poojary	115	115	
8[c]	Sayyed Ebrahim	116	116	
8[d]	Abdul Khadar	117	117	

9	Copy of the Written submissions dated 27/09/2023 along with the following annexures filed before the learned CIT[A]-2, Panaji.	118	153	CIT[A]
9[a]	Confirmation of accounts received from Sri Abdul Rasheed	154	155	AO & CIT[A]
9[b]	Confirmation of accounts received from Sri Raghava Poojary	156	156	AO & CIT[A]
9[c]	Confirmation of accounts received from Sri Sayyed Ebrahim	157	157	AO & CIT[A]
9[d]	Confirmation of accounts received from Sri Abdul Khadar	158	158	AO & CIT[A]
9[e]	Copy of the acknowledgement for having filed the return of income along with the computation of total income and Trading and Profit and Loss account for the assessment year 2016-17 in the case of Sri Abdul Rasheed Mangalore.	159	161	AO & CIT[A]
9[f]	Copy of the acknowledgement for having filed the return of income along with the computation of total income for the assessment year 2016-17 in the case of Sri Raghava Poojary.	162	164	AO & CIT[A]
9[g]	Copy of the acknowledgement for having filed the return of income along with the computation of total income and Trading and Profit and Loss account for the assessment year 2016-17 in the case of Sri Sayyed Ebrahim	165	168	AO & CIT[A]
9[h]	Copy of the acknowledgement for having filed the return of income along with the computation of total income and Trading and Profit and Loss account for the assessment year 2016-17 in the case of Sri Abdul Khader	169	171	AO & CIT[A]
9[i]	Ledger Extract of Sri Sayyed Ali	172	172	AO & CIT[A]

AY 20017-18:

10	Copy of the reply dated 09/12/2019 filed before the learned Deputy Commissioner of Income-tax, Central Circle - 1, Mangalore along with the confirmation of accounts received from the following parties:	115	117	AO & CIT[A]
10[a]	Abdul Rasheed	118	119	
10[b]	Raghava Poojary	120	120	
10[c]	Sayyed Ebrahim	121	124	
11	Copy of the Written submissions dated 27/09/2023 along with the following annexures filed before the learned CIT[A]-2, Panaji.	125	160	CIT[A]
11[a]	Confirmation of accounts received from Sri Abdul Rasheed	161	162	AO & CIT[A]
11[b]	Confirmation of accounts received from Sri Raghava Poojary	163	163	AO & CIT[A]
11[c]	Confirmation of accounts received from Sri Sayyed Ebrahim	164	167	AO & CIT[A]
11[d]	Copy of the acknowledgement for having filed the return of income along with the computation of total for the assessment year 2017-18 in the case of Sri Abdul Rasheed Mangalore.	168	170	AO & CIT[A]
11[e]	Copy of the acknowledgement for having filed the return of income along with the computation of total income for the assessment year 2017-18 in the case of Sri Sayyed Ebrahim	171	173	AO & CIT[A]
11[f]	Copy of the acknowledgement for having filed the return of income along with the computation of total income and Trading and Profit and Loss account for the assessment year 2017-18 in the case of Sri Abdul Khader	174	176	AO & CIT[A]

This being the position, how it could be treated as a bogus purchase in the hands of the assessee? In our opinion, the answer to this question is **NO.**

5.11 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."

5.12 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."

5.13 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."

5.14 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."*

5.15 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."

5.16 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."

5.17 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."

5.18 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."*

5.19 In our opinion, addition could be made only when it is reflected 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."*

5.20. 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."

5.21 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.

5.22 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.

5.23 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.

5.24 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 bogus.

5.25 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 ad hoc 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.

5.26 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."

5.27 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.

8.3 There 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."

5.28 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."

5.29 Further, the ld. AO cannot solely rely on the statement recorded u/s 132(4) of the Act as recently held by Hon'ble Delhi High Court in the case of PCIT Vs. Pavitra Realcon Pvt. Ltd.

reported in ITA No.579/2018 dated 29.5.2024, wherein held as under:

"17. We have heard the learned counsels appearing on behalf of the parties and perused the record.

18. The primary grievance which arises in the present appeals pertains to whether the ITAT was right in deleting additions made under Section 68 of the Act by holding that no assessment could have been made on mere presumption of existence of incriminating material.

19. Undisputedly, during the period of search, no incriminating material appears to have been found. However, the Revenue proceeded to issue notice under Section 143(2) of the Act on the pretext of the statements of the Directors of the respondent-assessee companies recorded under Section 132(4) of the Act and material seized from the search conducted on Jain group of companies. The assessment order was also passed under Section 143(3) read with Section 153C of the Act making additions under Section 68 of the Act.

20. However, it is an undisputed fact that the statement recorded under Section 132(4) of the Act has better evidentiary value but it is also a settled position of law that addition cannot be sustained merely on the basis of the statement. There has to be some material corroborating the content of the statements.

21. In the case of ***Kailashben Manharlal Chokshi v. CIT***[1]*, the Gujarat High Court held that the additions could not be made only on the basis of admissions made by the assessee, in the absence of any corroborative material. The relevant paragraph no. 26 of the said decision has been reproduced hereinbelow: -*

> *26. In view of what has been stated hereinabove we are of the view that this explanation seems to be more convincing, has not been considered by the authorities below and additions were made and/or confirmed merely on the basis of statement recorded under section 132(4) of the Act. Despite the fact that the said statement was later on retracted no evidence has been led by the Revenue authority.* ***We are, therefore, of the view that merely on the basis of admission the assessee could not have been subjected to such additions unless and until, some corroborative evidence is found in support of such admission.*** *We are also of the view that from the statement recorded at such odd hours cannot be considered to be a voluntary state ment, if it is subsequently retracted and necessary evidence is led contrary to such admission. Hence, there is no reason not to disbelieve the retrac tion made by the Assessing Officer and explanation duly supported by the evidence. We are, therefore, of the view that the Tribunal was not justified in making addition of Rs. 6 lakhs on*

the basis of statement recorded by the Assessing Officer under section 132(4) of the Act. The Tribunal has com mitted an error in ignoring the retraction made by the assessee.

[Emphasis supplied]

22. Further, the position with respect to whether a statement recorded under Section 132(4) of the Act could be a standalone basis for making assessment was clarified by this Court in the case of ***CIT v. Harjeev Aggarwal***[2]*, wherein, it was held that merely because an admission has been made by the assessee during the search operation, the same could not be used to make additions in the absence of any evidence to corroborate the same. The relevant paragraph of the said decision is extracted herein below: -*

"20. *In our view, a plain reading of section 158BB(1) of the Act does not contemplate computing of undisclosed income solely on the basis of a statement recorded during the search.* ***The words "evidence found as a result of search" would not take within its sweep statements recorded during search and seizure operations.*** *However, the statements recorded would certainly constitute information and if such information is relatable to the evidence or material found during search, the same could certainly be used in evidence in any proceedings under the Act as expressly mandated by virtue of the Explanation to section 132(4) of the Act.* ***However, such statements on a stand alone basis without reference to any other material discovered during search and seizure operations would not empower the Assessing Officer to make a block assessment merely because any admission was made by the assessee during search operation.***

[Emphasis supplied]

23. In our opinion, the Act does not contemplate computing of undisclosed income solely on the basis of statements made during a search. However, these statements do constitute information, and if they relate to the evidence or material found during the search, they can be used in proceedings under the Act, as specified under Section 132(4) of the Act. Nonetheless, such statements alone, without any other material discovered during the search which would corroborate said statements, do not grant the AO the authority to make an assessment.

24. Coming to the findings of the ITAT with respect to incriminating material in the case of M/s Pavitra Realcon Pvt. Ltd and M/s Delicate Real Estate Pvt. Ltd, it is seen that the ITAT has explicitly held in paragraph no. 18 that no addition has been made on the basis of any incriminating material found during the course of search. Further, the ITAT relied on the

decision of the Supreme Court in the case of ***CIT v. Sinhgad Technical Education Society***[1] *and held as follows: -*

> *"18. Further, while writing the order it has come to our notice that the Hon'ble Apex Court in the case of Sinhgad Technical Education Society has held that section 153C can be invoked only when incriminating materials assessment year-wise are recorded in satisfaction note which is missing here. Therefore, the proceedings drawn u/s 143(3) as against 153C are invalid for want of any incriminating material found for the impugned assessment year.*
>
> *19. In view of the above, the additional grounds raised by the assessee in the case of M/s Pavitra Realcon Pvt. Ltd. And M/s Delicate Real Estate Pvt. Ltd. are accepted. Since the assessee succeeds on this legal ground, we refrain ourselves from adjudicating the issue on merit as far as these two cases are concerned."*

25. Also, the Supreme Court in the case of ***CIT v. Abhisar Buildwell (P) Ltd.***[4]*, has clarified that in case no incriminating material is found during the search conducted under Section 132 of the Act, the AO will have no jurisdiction to make an assessment. The relevant paragraph is reproduced herein below: -*

> *"36.4. In case no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments. Meaning thereby, in respect of completed/unabated assessments, no addition can be made by the AO in absence of any incriminating material found during the course of search under Section 132 or requisition under Section 132-A of the 1961 Act. However, the completed/unabated assessments can be re-opened by the AO in exercise of powers under Sections 147/148 of the Act, subject to fulfilment of the conditions as envisaged/mentioned under Sections 147/148 of the Act and those powers are saved."*
>
> *[Emphasis supplied]*

26. This Court in the case of ***CIT v. Kabul Chawla***[5]*, has explicitly noted that the information/material which has been relied upon for assessment has to relate with the assessee. The relevant portion of the said decision is extracted herein below: -*

> *(iv) Although section 153A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available*

with the Assessing Officer which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously, an assessment has to be made under this section only on the basis of the seized material."

[Emphasis supplied]

27. Recently, this Court, in the case of ***Saksham Commodities Limited v. Income Tax Officer, Ward 22(1), Delhi & Anr***[6]*, while relying upon the decision of the Supreme Court in Abhisar Buildwell (supra) and this Court's decision in the case of* ***CIT v. RRJ Securities Ltd.***[7]*, upheld the position of law that the AO would not be justified to assess income in case no incriminating material is found during the search. The relevant paragraph is reproduced herein below: -*

"54. In any case, Abhisar Buildwell, in our considered opinion, is a decision which conclusively lays to rest any doubt that could have been possibly harboured. The Supreme Court in unequivocal terms held that absent incriminating material, the AO would not be justified in seeking to assess or reassess completed assessments. Though the aforesaid observations were rendered in the context of completed assessments, the same position would prevail when it comes to assessments which abate pursuant to the issuance of a notice under Section 153C. *Here too, the AO would have to firstly identify the AYs' to which the material gathered in the course of the search may relate and consequently it would only be those assessments which would face the spectre of abatement. The additions here too would have to be based on material that may have been unearthed in the course of the search or on the basis of material requisitioned. The statute thus creates a persistent and enduring connect between the material discovered and the assessment that may be ultimately made. The provision while speaking of AYs' falling within the block of six AYs' or for that matter all years forming part of the block of ten AYs', appears to have been put in place to cover all possible contingencies. The aforesaid provisions clearly appear to have been incorporated and made applicable both with respect to Section 153A as well as Section 153C ex abundanti cautela. Which however takes us back to what had been observed earlier, namely, the existence of the power being merely enabling as opposed to a statutory compulsion or an inevitable consequence which was advocated*

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56. We also bear in mind the pertinent observations made in RRJ Securities when the Court held that merely because an

article or thing may have been recovered in the course of a search would not mean that concluded assessments have to "necessarily" be reopened under Section 153C and that those assessments are not liable to be revised unless the material obtained have a bearing on the determination of the total income. ***This aspect was again emphasised in para 38 of RRJ Securities with the Court laying stress on the existence of material that may be reflective of undisclosed income being of vital importance. All the aforenoted judgments thus reinforce the requirement of incriminating material having an ineradicable link to the estimation of income for a particular AY."***

[Emphasis supplied]

28. So far as the submission made by the learned counsel for the Revenue that the AO acted on a bona fide belief that the date of search has to be taken as the date of initiation of proceedings under Section 153C of the Act is concerned, it is apposite to refer to our decision in the case of ***CIT v. Ojjus Medicare (P) Ltd.***[8] *This Court, in the said case, reiterated the already settled law that the date of initiation of assessment proceedings under Section 153C would be calculated from the date of handing over of the books of accounts, documents or assets seized to the jurisdictional AO of the non-searched person. The relevant paragraphs of the said decision are extracted herein below: -*

"K. SUMMARY OF CONCLUSIONS

119. *We thus record our conclusions as follows:*

A. Prior to the insertion of Sections 153A, 153B and 153C, an assessment in respect of search cases was regulated by Chapter XIVB of the Act, comprising of Sections 158B to 158BI and which embodied the concept of a block assessment. A block assessment in search cases undertaken in terms of the provisions placed in Chapter XIVB was ordained to be undertaken simultaneously and parallelly to a regular assessment.

Contrary to the scheme underlying Chapter XIVB, Sections 153A, 153B and 153C contemplate a merger of regular assessments with those that may be triggered by a search. On a search being undertaken in terms of Section 153A, the jurisdictional AO is enabled to initiate an assessment or reassessment, as the case may be, in respect of the six AYs' immediately preceding the AY relevant to the year of search as also in respect of the "relevant assessment year", an expression which stands defined by Explanation 1 to Section 153A. Of equal significance is the introduction of the concept of abatement of all pending assessments as a consequence of which curtains come down on regular assessments.

B. *Both Sections 153A and 153C embody non-obstante clauses and are in express terms ordained to override Sections 139, 147 to 149, 151 and 153 of the Act. By virtue of the 2017 Amending Act, significant amendments came to be introduced in Section 153A. These included, inter alia, the search assessment block being enlarged to ten AYs' consequent to the addition of the stipulation of "relevant assessment year" and which was defined to mean those years which would fall beyond the six year block period but not later than ten AYs'. The block period for search assessment thus came to be enlarged to stretch up to ten AYs'. The 2017 Amending Act also put in place certain prerequisite conditions which would have to inevitably be shown to be satisfied before the search assessment could stretch to the "relevant assessment year". The preconditions include the prescription of income having escaped assessment and represented in the form of an asset amounting to or "likely to amount to" INR 50 lakhs or more in the "relevant assessment year" or in aggregate in the "relevant assessment years".*

C. *Section 153C, on the other hand, pertains to the non-searched entity and in respect of whom any material, books of accounts or documents may have been seized and were found to belong to or pertain to a person other than the searched person. As in the case of Section 153A, Section 153C was also to apply to all searches that may have been undertaken between the period 01 June 2003 to 31 March 2021. In terms of that provision, the AO stands similarly empowered to undertake and initiate an assessment in respect of a non-searched entity for the six AYs' as well as for "the relevant assessment year". The AYs', which would consequently be thrown open for assessment or reassessment under Section 153C follows lines pari materia with Section 153A.*

D. ***The First Proviso to Section 153C introduces a legal fiction on the basis of which the commencement date for computation of the six year or the ten year block is deemed to be the date of receipt of books of accounts by the jurisdictional AO. The identification of the starting block for the purposes of computation of the six and the ten year period is governed by the First Proviso to Section 153C, which significantly shifts the reference point spoken of in Section 153A(1), while defining the point from which the period of the "relevant assessment year" is to be calculated, to the date of receipt of the books of accounts, documents or assets seized by the jurisdictional AO of the non-searched person. The shift of the relevant date in the case of a non-searched person being regulated by the First Proviso of Section 153C(1) is an issue which is no longer res integra and stands authoritatively settled by virtue of the decisions of this Court in SSP Aviation***

and RRJ Securities as well as the decision of the Supreme Court in Jasjit Singh. The aforesaid legal position also stood reiterated by the Supreme Court in Vikram Sujitkumar Bhatia. The submission of the respondents, therefore, that the block periods would have to be reckoned with reference to the date of search can neither be countenanced nor accepted.

E. *The reckoning of the six AYs' would require one to firstly identify the FY in which the search was undertaken and which would lead to the ascertainment of the AY relevant to the previous year of search. The block of six AYs' would consequently be those which immediately precede the AY relevant to the year of search. In the case of a search assessment undertaken in terms of Section 153C, the solitary distinction would be that the previous year of search would stand substituted by the date or the year in which the books of accounts or documents and assets seized are handed over to the jurisdictional AO as opposed to the year of search which constitutes the basis for an assessment under Section 153A.*

F. *While the identification and computation of the six AYs' hinges upon the phrase "immediately preceding the assessment year relevant to the previous year" of search, the ten year period would have to be reckoned from the 31st day of March of the AY relevant to the year of search. This, since undisputedly, Explanation 1 of Section 153A requires us to reckon it "from the end of the assessment year". This distinction would have to necessarily be acknowledged in light of the statute having consciously adopted the phraseology "immediately preceding" when it be in relation to the six year period and employing the expression "from the end of the assessment year" while speaking of the ten year block."*

[Emphasis supplied]

29. It is thus seen that in order to determine block of six AYs, one must first identify the FY in which the search occurred, leading to the identification of the AY relevant to the previous year of the search. The block of six AYs will then be those immediately preceding the AY relevant to the search year. For a search assessment under Section 153C of the Act, the only difference is that the previous year of the search is replaced by the date or year in which the seized books of accounts, documents, and assets are handed over to the jurisdictional AO, rather than the year of the search, which is the basis for an assessment under Section 153A of the Act. Therefore, the relevant AY in the present case would come under the block of six AYs immediately preceding the AY in which the satisfaction note was recorded by the AO of the respondent-assessee companies.

30. Further, in the case of M/s Design Infracon Pvt. Ltd., the ITAT held that there is violation of principles of natural justice as neither the statement of owner of Jain group of companies was provided to the said company, nor the opportunity of cross-examination was given. The ITAT in paragraph no. 23 has held as under: -

> *"23.Now, coming to Design Infracon (P) Ltd., we find from the material available on record that there is brazen violation of principles of natural justice inasmuch as neither the statement of Mr. Jain recorded at the time of search nor his cross-examination was provided to the assessee by both the lower authorities despite specific and repeated requests made by the assessee in this regard. The Hon'ble Supreme Court in the case of M/s Andaman Timber Indusgies vs. CCE reported in 281 CTR 241 has held that not giving opportunity of cross-examination makes the entire proceedings invalid and nullity. The Co-ordinate Bench of the Tribunal in the case of Best City Infrastructure Ltd. (supra) has also held that not providing opportunity of cross-examination makes the addition invalid. It has come to our notice that the Hon'ble Delhi High Court recently has upheld the said decision as reported in 397 ITR 82."*

31. On this aspect, it is beneficial to refer to the decision of the Supreme Court in the case of ***Andaman Timber Industries v. CCE***[9]*, wherein, it was held that not providing the opportunity of cross- examination to the assessee amounts to gross violation of the principles of natural justice and the same will render the order passed null and void. The relevant paragraph of the said decision is extracted herein below: -*

> ***"6. According to us, not allowing the assessee to cross-examine the witnesses by the adjudicating authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected.*** *It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the adjudicating authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the adjudicating authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the adjudicating authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-*

examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their exfactory prices remain static. It was not for the Tribunal to have guesswork as to for what purposes the appellant wanted to crossexamine those dealers and what extraction the appellant wanted from them."

[Emphasis supplied]

32. Additionally, the Supreme Court in the case of ***State of Kerala v. K.T. Shaduli Grocery Dealer***[2]*, held that tax authorities being quasi- judicial authorities are bound by the principles of natural justice. The relevant paragraph is extracted herein below: -*

"2. ***Now, the law is well settled that tax authorities entrusted with the power to make assessment of tax discharge quasi-judicial functions and they are bound to observe principles of natural justice in reaching their conclusions.*** *It is true, as pointed out by this Court in Dhakeswari Cotton Mills Ltd. v. CIT [AIR 1955 SC 154 : (1955) 1 SCR 941 : (1955) 27 ITR 126] that a taxing officer "is not fettered by technical rules of evidence and pleadings, and that he is entitled to act on material which may not be accepted as evidence in a court of law", but that does not absolve him from the obligation to comply with the fundamental rules of justice which have come to be known in the jurisprudence of administrative law as principles of natural justice. It is, however, necessary to remember that the rules of natural justice are not a constant: they are not absolute and rigid rules having universal application. It was pointed out by this Court in Suresh Koshy George v. University of Kerala [AIR 1969 SC 198 : (1969) 1 SCR 317*

: (1969) 1 SCJ 543] that "the rules of natural justice are not embodied rules" and in the same case this Court approved the following observations from the judgment of Tucker, L.J. in Russel v. Duke of Norfolk [(1949) 1 All ER 109] :"There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case."

[Emphasis supplied]

33. Further, the argument of learned counsel for the Revenue that this mistake is curable under Section 292B of the Act lacks merit as the plain language of the said Section makes it abundantly clear that this provision condones the invalidity which may arise merely by mistake, defect or omission in notice. The said Section reads as under: -

> *292-B. Return of income, etc., not to be invalid on certain grounds.—No return of income, assessment, notice, summons or other proceeding, furnished or made or issued or taken or purported to have been furnished or made or issued or taken in pursuance of any of the provisions of this Act shall be invalid or shall be deemed to be invalid merely by reason of any mistake, defect or omission in such return of income, assessment, notice, summons or other proceeding if such return of income, assessment, notice, summons or other proceeding is in substance and effect in conformity with or according to the intent and purpose of this Act.*

34. Reliance can also be placed upon the decision in the case of ***CIT v. Micron Steels P. Ltd.****[11], whereby, it was held that the jurisdictional defects cannot be cured under Section 292B of the Act and they render the entire proceedings null and void.*

35. In the present case, it is seen that the Revenue has failed to allude to any steps which were taken to determine that the seized material belonged to the respondent-assessee group. Notably, the satisfaction note has also been prepared in a mechanical format and it does not provide any details about the incriminating material. Therefore, a failure on the part of the Revenue to manifest as to how the material gathered from the search of Jain group of companies belonged to the respondent-assessee group and the same is incriminating, vitiates the entire assessment proceedings.

36. Accordingly, we find no reason to intermeddle with the order of the ITAT which has rightly set aside the assessment order and deleted the additions made therein.

37. In view of the aforesaid and on the basis of the findings of fact arrived at before the authority, these appeals do not raise any substantial question of law and consequently, they stand dismissed. Pending applications, if any, are also disposed of."

5.30 In the light of the above decisions, statements recorded u/s 132(4) of the I.T. Act, 1961 cannot constitute as incriminating material.

5.31 It is also noted that in the case of M/s. Yashaswi Fish Meal and Oil Company, the Tribunal in ITA Nos.62 to 66/Bang/2023 for the assessment years 2012-13 to 2015-16 and 2017-18 the coordinate bench of the Tribunal vide order dated 1.9.2023 deleted similar addition made by ld. AO towards bogus purchase.

5.32 In view of the above, we are of the opinion that the ld. AO without rejecting the books of accounts only on the basis of statement recorded u/s 132(4) of the Act though it was retracted letter as such addition cannot be sustained towards bogus purchase and the same is to be deleted in all the assessment years.

5.33 Even otherwise, learned AO has not disputed the sales declared by the appellant. The sales offered in the Return of Income are accepted by the learned AO in toto. Hence, unless there is purchase there cannot be sale of goods. That too when assessee is maintaining quantitative details of stock and the same have been audited by the qualified Chartered Accountant the learned AO ought not to have held that the purchases as bogus without verifying the corresponding sale. Unless sale is disproved the purchases cannot be held as bogus. He submitted that Hon'ble Bombay High Court in PCIT Vs Nitin Ramdeoji Lohia (ITA Nos. 673 and 750 OF 2018 dated 21.10.2022) held as under:

"We are in agreement with the view expressed by the CIT (Appeals) that, if the purchases are bogus, it would be impossible for the assessee to complete the business transaction and that if the purchase is bogus, the corresponding sale also must be bogus or else the transaction would be impossible to complete and as a necessary corollary, unless the corresponding sale is held to be bogus, the purchase also cannot be held to be bogus, rather it would be a case of purchase from bogus entities/parties. That view has been upheld by the Tribunal in principal while dismissing the appeal of the Revenue. In view of the above, we are of the opinion that the questions of law proposed as (a), (b), and (c) in the appeal cannot be said to be substantial questions of law."

5.34 In view of the above discussion, we delete the additions made towards bogus purchase in these five assessment years in ITA Nos.431 to 435/Bang/2024 for the assessment years 2013-14 to

2017-18. These ground Nos.2 to 7 in appeals in ITA Nos.431 to 435/Bang/2024 are allowed.

6. In ITA No.435/Bang/2024 in assessment year 2017-18, there is one more amount with regard to treating the receipt of subsidy of Rs.53,63,272/- as income of the assessee. The assessee has received subsidy of Rs.57,25,709/-. Out of this assessee offered an amount of Rs.3,62,437/- as other operating income. However, not offered the balance amount of Rs.53,63,272/- as income. Before us, ld. A.R. submitted that this is a capital receipt not to be liable for taxation.

7. The ld. D.R. submitted that the assessee has not furnished any evidence to show that the said subsidy is not covered under definition "income" referred in section 2(24)(xviii) of the Act.

8. We have heard the rival submissions and perused the materials available on record. It is appropriate to remit this issue to the file of ld. AO with a direction to assessee to produce necessary details of subsidy by providing sanction letter from the competent authority so as to demonstrate that it is capital subsidy. Ordered accordingly.

9. With regard to ground No.8 in ITA No.431, 432, 433 & 434/Bang/2024 for the AY 2015-16 that sanction u/s 153D of the Act was accorded without application of mind and such a mechanical granted approval invalidate the assessment, the ld. A.R. not put any serious argument on this issue, as such this ground is not considered for adjudication.

10. The last ground with regard to levy of interest u/s 234A, B & C in all the assessee's appeals, which is consequential and mandatory in nature to be computed accordingly.

11. In the result, appeals of the assessee in ITA Nos.431 to 434/Bang/2024 are allowed and ITA No.435/Bang/2024 is partly allowed for statistical purposes.

Order pronounced in the open court on 3rd July, 2024

Sd/-	**Sd/-**
(Keshav Dubey)	**(Chandra Poojari)**
Judicial Member	**Accountant Member**

Bangalore,
Dated 3rd July, 2024.
VG/SPS

Copy to:

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

By order

Asst. Registrar,
ITAT, Bangalore.