आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL,
JAIPUR BENCHES,"A" JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं डा0 मीठा लाल मीना, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & DR MITHA LAL MEENA, AM

आयकर अपील सं./ITA No. 378/JP/2024
निर्धारण वर्ष/Assessment Year : 2017-18

The ACIT Central Circle Kota	बनाम Vs.	Nisha Jain E-15, Ballabh Bari Kota
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ABLPJ 8118L		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

राजस्व की ओर से/Revenue by: Shri A.S. Nehra, Addl. CIT-DR
निर्धारिती की ओर से/Assessee by : Shri Mahendra Gargieya Adv
Shri Hemang Gargieya, Adv.

सुनवाई की तारीख/Date of Hearing : 22/05/2024
उदघोषणा की तारीख/Date of Pronouncement: 05/08/2024

आदेश/ORDER

PER: SANDEEP GOSAIN, JM

This appeal filed by the Revenue is directed against order of the ld. CIT(A), Udaipur-2 dated 29-01-2024 for the assessment year 2017-18 raising therein following grounds of appeal.

> ''1. Whether on facts and in circumstances of the case the CIT (A) is justified in not appreciating the incriminating documents found and impounded during the survey having all the incriminating information of incriminating transactions recorded therein and supported by the explanation and acceptance of Shri Naresh Jain in his statement recorded on oath u/s 131 during survey, as to be unaccounted transactions

and those were the basis taken for making additions of Rs.72,00,000/- deposited in cash in SBN in one instance.

2. Whether on facts and in circumstances of the case the CIT (A) is justified in deleting the addition of Rs 35,550/- appreciating the reply of the assessee which was only an after thought arrangement and not appreciating the overall facts and record of the case which should be taken all together ab initio from survey.

2.1 It may be noted that the present appeal is preferred by the Revenue against the order of CIT(A) dt. 29.01.2024. Since the ld. CIT(A) has already stated the relevant facts hence, the same are not being repeated here. During the course of hearing the parties were directed to file detailed written submissions in support of their oral arguments, if so desired. However, the ld.DR supported the order of the AO. To this effect, the ld. AR of the assessee has filed the following written submissions countering the grounds of appeal raised by the Revenue.

'' Submission:

1. At the outset we strongly place reliance upon our detailed submissions made before AO as also before the CIT(A).

2. We also place strong reliance upon the order of the CIT(A) to the extent (Pg.36, Para. 5.6) his findings and observations are given in the favour of the assessee.

3. In the Grounds of Appeal No.1 taken by the Revenue, their allegation that:

"Whether on facts and circumstances of the CIT(A) is justified in not appreciating the incriminating documents found and impounded during the survey having all the incriminating information of incriminating transaction recorded therein and supported by the explanation and acceptance of Shri Naresh Jain, in his statement recorded on oath u/s 131 during survey, as to be unaccounted transactions and those were the basis taken for making additions of Rs. 72,00,000/- deposited in case in SBN in one instance."

In this regard it is submitted that firstly, self-contradictory and apart from being based on misconception of law and facts. It was nothing incriminating found during survey neither any incriminating document nor any incriminating

information, as was rightly held by the CIT(A). Hence, we respectfully submit that the Revenue's grounds lack merit for the following reasons:

4. AO cannot blindly rely upon a statement alone:

4.1 During survey the physical cash in hand on 02.02.2017 was found at Rs. 2,08,000/- whereas as per tally printout it was alleged that the cash in hand as per books of accounts of M/s Quick Advertising Co was Rs. 90,67,052.91. Also an incriminating document was seized and inventoried by Party no -22 as Annexure A, Exhibit 8, Pg No. 1 to 50 (APB 54-104). Further during survey action a sum of Rs. 72,00,000/- was deposited in bank account during demonetization i.e. during 09-11-2016 to 30-12-2016. Shri Naresh Kumar vide reply to Q no. 9 explained that the expenses of M/s Quick Advertising co had not yet been posted, and when he was asked to produce bills, vouches etc for un-posted expenditure, he submitted that no such documents could be made available as no such records were maintained. The ld. AO at pg. 3 alleged that :

"Vide reply to Q no. 30 he (Shri Naresh Kumar) *admitted that* ***Rs. 72,00,000/- deposited in bank account is out of cash in hand of Rs. 90.67 lacs*** *and was earned from un-disclosed sources and offered the same for taxation."*

Our submission in this regard are follows.

4.2.1 Sole Statement, not a good basis for Addition: At the outset, we may submit that no addition can be made merely and solely on the basis of a statement of a third party. The ld. AO heavily relied upon the statement of the Shri Naresh Jain recorded u/s 131) on dated 02.02.2017 by the Survey Team. However, the credibility of such statements is highly doubtful and not binding for various reasons, as enumerated below:

4.2.2 No addition permissible solely based on statements : Pertinently, the impugned additions have been made solely based on the statement of the assessee without any corroborative evidence, and **that too ignoring the retraction**. It is settled that an admission cannot be made the sole basis of assessment since it is a matter of common knowledge that during the course of Search/Survey, the Revenue Authorities normally do exert unwanted pressure and influence over the assessee's to get something surrendered to make their survey a success. To expect the assessee to furnish an infallible evidence of concrete nature in such a situation is totally beyond comprehension.

4.3 The authorities below even violated the binding **CBDT Circular No. 286/2/2003 dt. 10.03.2003** and the Budget Speech, 2003 by the Finance Minister please be referred, which is reproduced hereinbelow :

"Instances have come to the notice of the Board where assessee have claimed that they have been forced to confess the undisclosed income during the course of the search & seizure and survey operations. Such confessions, if not based upon credible evidence, are later retracted by

the concerned assessee while filing returns of income. In these circumstance, on confessions during the course of search & seizure and survey operations do not serve any useful purpose. It is, therefore advised that ***there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before*** *the Income Tax Departments, Similarly, while recording statement during the course of search & seizures and survey operations no attempt should be made to obtain confession as to the undisclosed income. Any action on the contrary shall be viewed adversely.*

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

The said instruction was relied upon in the cases of R. K. synthetics 30 TW 228 (Jd) , ITO vs. Suresh Chandra Koolwal (2004) 32 TW 23 (Jp) and also CIT v/s Shri Ramdas Motor Transport 238 ITR 177(AP).

4.4 Judicial Guideline: The authorities below did not appreciate that the Survey & Search creates tension in the mind of the person being searched and a layman normally used to lose confidence. It can't be denied that such action creates an anxiety and medical problem to the person being searched. Pertinently, the **Kelkar Committee** has also taken note of this prevailing attitude of the search parties and consequently remarked very adversely. Reliance is placed on:

4.4.1 The existence of tension and surcharged atmosphere has been recognised even by the courts. Kindly refer **Jagdish Narayan Ratan Kumar 22 TW 209 (JP).** Such statements, therefore are bound to give a distorted picture and are not fully reliable as such.

4.4.2 On this aspect it will be quite relevant to refer to decision of Hon'ble Gujarat High Court **Kailashben Manharlal Chokshi vs. CIT (2008) 14 DTR 257/ (2010) 328 ITR 411 (Guj.)** wherein, it was held as under:

*"****22.*** *It is also to be seen as to whether an addition made is merely based on the statement recorded by the AO under s. 132(4) of the Act and whether any cognizance may be taken of the retracted statement. So far as case on hand is concerned, the* ***glaring fact*** *required to be noted is that the* ***statement of the assessee was recorded under s. 132(4) of the Act at midnight. In normal circumstances, it is too much to give any credit*** *to the statement recorded at such odd hours. The person may not be in a position to make any correct or conscious disclosure in a statement if such statement is recorded at such odd hours. Moreover, this statement was retracted after two months.*

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 s. 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 the statement recorded at such odd hours cannot be considered to be a voluntary statement,*** *if it is subsequently retracted and necessary evidence is led contrary to such*

admission. Hence there is no reason not (sic) to disbelieve the retraction made by the AO (sic-assessee) 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 lacs on the basis of statement recorded by the AO under s. 132(4) of the Act. The Tribunal has committed an error in ignoring the retraction made by the assessee."

4.3 Admission retracted / Not acted upon - Hence addition invalid:

4.3.1 Unfortunately, in present case the AO ignored the settled legal position that **a person making a statement is legally entitled to retract** from what it had stated earlier. It has been held that an admission, though best evidence against such a person, if shown to be out of ambiguity, under tension or was against the facts or misconception of law, can be validly retracted. The assessee repeatedly submitted that it had prepared a retraction letter supported by affidavit dated 14.02.2017 (APB 140-143) which was filed before the ADIT(Inv.), Kota on 06.04.2017 for this purpose the assessee purchased a Non-Judicial Stamp Paper on 07.02.2017 (i.e. just within 4 days) executed on 14.02.2017, when it was signed in the presence of the Notary Commissioner. The contents of the same are reproduced here under :

"3. THAT the normal business hours of our business units are from 10:00 AM to 8:00 PM and business, activities are conducted at respective office 149, Ballabhbari, Kota during these hours only.

*4. THAT the Income Tax Investigation Team has visited **on 2nd February, 2017 at around 6:30 AM** at my residence without prior notice and forced me to open the business premises at the same time.*

*5. THAT the Officials of Income Tax Department after forcing me to open the business premises **started the survey on 2nd February, 2017 at around 7AM which continued till 5th February, 2017 around 3:30AM.** The survey was conducted based on some suspicious information about our connection with Allen Career Institute. The Officials of the survey team, recorded my statement from time to time to establish, that we have unrecorded transactions with M/s Allen Career Institute. Having not found anything incriminating with reference to our transaction with Allen Career Institute, they started looking into our personal affairs and pressurised me to give statement about my transactions/properties.*

*6. THAT I gave the statement as per my information and knowledge without any verification from the books of accounts. This statement continued from 2nd February, 2017 to 5th February, 2017 and my statement was recorded in more than 25 pages. The survey party **impounded various documents, books and papers** and asked me to sign each and every paper without providing me any opportunity to read what they have written in my statement and thus concluded the survey at around 3:30 AM on 5th February, 2017. **I was so exhausted** in this continuous survey that I signed the papers as required by the survey party.*

*7. THAT-on-7th February, 2017 from the media news on ETV News and Zee Marudhara, **I came to know that the Income Tax Survey Party has sought a declaration of undisclosed income of around Rs. 9 ers from me,** On hearing this news, I was shocked as I had not made any such declaration nor the survey party have stated about any such undisclosed income in course of survey. 1, therefore, immediately went to the Income Tax Office, CAD Road, Kota - Room No.217 at around 7 PM but no official who came for survey was present there. Therefore, I rang up Shri Dinesh Gehlot, Commissioner but as soon as I started talking to him about the media news of my declaration of undisclosed income, he disconnected the call. Thereafter, I tried to*

contact Shri Mukesh Ji Sharma (ITO) but he also did not meet me. Thereafter, I called Mr. Jakhad, Jodhpur who informed me that as per my statement on various points, I have mentioned some amount which amounts to approximately Rs. 9 crs and this is the amount which I have surrendered in my statement.

*8. THAT I am **not aware that what has been recorded** by the survey team in my statement recorded in survey as I was not given any opportunity to understand and read that statement. These statements were recorded under coercion and undue influence; therefore, I disown the statement recorded in course of survey.*

9. That I assure that after obtaining the various documents impounded from me and. after analyzing the same, if any unrecorded income is found, I will disclose the same in the return of income.

10. Whatever declaration 1 have made and wherever documents they have made me signed, 1 was not in a state of mind to analyze the situation at that time. So, I request you to please not to consider the statement given at the time of survey, they were all taken by coercion and misrepresentation by the income Tax Officials which is against the law.

11. That the facts stated in Paras 1 to 10 above are true and correct to the best of my knowledge and belief, SO HELP ME GOD."

4.3.2 The Authorities below doubted the fact of filing the affidavit yet however, no positive evidence has been brought on record by them from the office of the ADIT (Inv) denying the fact of receiving in the retraction letter/affidavit. The very fact of filing the affidavit together with the other facts and in absence of any contrary evidence, has to accept that the assessee did retract within a period of just four days from the date of admission during the course of survey statement on dated 02.02.2017. Even the revenue has not taken any specific ground on this aspect nor the ld. DR could controvert these facts.

4.4 Legal Principles:

4.4.1 It is trite law that an admission, though best evidence against such person, if **shown to be out of ambiguity, under tension or was against the facts or misconception of law,** can be validly retracted. It has been held by the Hon'ble Supreme Court in **Pullangode Rubber Produce Co. Ltd. vs. State of Kerala & Others 91 ITR 18 (SC):**

"Such admission is an extremely important piece of evidence, but it cannot be said that it is conclusive. It is open to the assessee who made the admission to show that it is incorrect, and the assessee should be given a proper opportunity to show that the books of accounts do not disclose the correct state of facts".

4.4.2 The Hon'ble Apex Court in Nagubai Ammal v/s B. Sharma Rao AIR 1956 (SC)593: held as under

*"An **admission is not conclusive as to be truth** of the matters stated therein. It is only a piece of evidence, the weight to be attached to which must depend on the circumstances under which it is made. It can be shown to be erroneous or untrue".*

4.4.3 In **Rajesh Jain v/s DCIT (2006) 100 TTJ 929 (Del),** held that computation of undisclosed income solely on the basis of confessional statement of the assessee was not justified, inter alia, where the conduct of

affairs by the Revenue Authorities showed that **good amount of psychological pressure** was built on the assessee to make the said statement and all material found during search **was duly explained by assessee on which no adverse comments was made by the AO.** This decision contains various references and relevant extract quoted from various case laws.

4.4.4 Further kindly refer Polat Marmo Agglomerates Ltd vs. Union of India (1994) 73 ELT 536 (Raj.) wherein it was held that the admission made in **ignorance** of correct position of law and facts are not binding upon a party.

4.4.5 Similarly, in the case of **Ambalal vs. Union of India (1983)13 ELT 1321 (SC)** it was held that confessional statements recorded under threat, coercion, inducement or promise are not valid but persons concerned should take care to retract such confessions without delay. Retraction would then be weighed in the light of other evidence available

4.4.6 The Hon'ble Supreme Court in **Vinod Solanki v/s Union of India (2009) 233 ELT 157 (SC)** makes it abundantly clear that the issue of summons and obtaining statements from the persons summoned, cannot and should not be the only basis to make out a case by the Revenue against the assessee. The Hon'ble Supreme Court took into account the fact that the **burden of the revenue cannot be dispensed with and the onus cannot be shifted by it to the assessee by obtaining confessional statement.** After elaborate judicial analysis of the legal position, the Hon'ble Supreme Court allowed the appeal of the assessee and vacated the orders of all the lower authorities.

4.4.7 Also refer **Heris and LRs of Late Laxman Bhai S. Patel v/s CIT (2009) 222 CTR 138 (Guj).**

4.5 Statement of assessee can't be incriminating material:

4.5.1 ACIT, Central Circle-1(4), Ahmedabad v. Himalaya Darshan Developers (Gujarat) (P.) Ltd [2021] 128 taxmann.com 435 (Ahmedabad - Trib.) held as under:

"Besides the above, the Assessing Officer has also made reference to the statement of the director of 'SJSL' recorded under section 132(4) and statement of another director under section 131(1A), wherein it was admitted that the company namely 'SJSL' is engaged in providing accommodation entries. Thus the same is a paper company. On perusal of the statement recorded under section 133(4) reproduced by the Assessing Officer in his order there was remarks made by such director to the effect that material/ document seized during the search does not belong to the PS i.e. 'SJSL', or belong to the assessee company. In this regard, there were no incriminating material against OP was found in the search. Further, ***section 153C emphasize that there should be material or document seized which belong to the OP. As such statement recorded during search is not a material or document found and seized. Therefore, the statement recorded under section 132(4) cannot be construed as material/document for invoking proceeding under section 153C specially, in the circumstances where no material of incriminating in nature found belonging to OP.*** *[Para 8.4]*

The documents/ any fact/ evidence which could suggest that the documents/ transactions claimed or submitted in any earlier proceedings were not genuine, being only a device/ make belief based on non-existent facts or suppressed/ misrepresented facts, fulfilling the ingredients of undisclosed income, would constitute the documents sufficient to make assessment for the purposes of the Act. The courts have referred such documents as an 'incriminating material'. While going through a large number of the decision rendered in the context of search assessment, it was observed that the word 'incriminating material' has been used very often, but the ***point here is that what is the meaning of 'incriminating material'*** *or in other words what meaning can be attributed to 'incriminating material', as the same is the main bone of contention while framing the search assessment order under section 153A/ 153C and the same has not been defined under the Act. Therefore, it is imperative to understand the meaning of the word 'incriminating material'. Practically stating it can be stated that the 'incriminating material' can be in any form such as a document, content of any document, entry in the books of account, an asset etc. [Para 8.5]*

Any fact/evidence which could suggest that the documents/transactions claimed or submitted in any earlier proceedings were not genuine, being only a device/make belief based on non-existent facts or suppressed/misrepresented facts, fulfilling the ingredients of undisclosed income, would constitute an 'incriminating material' sufficient to make assessment for the purposes of the Act. *[Para 8.6]"*

4.5.2 PCIT, Delhi-2 *v.* Best Infrastructure (India) (P.) Ltd.* [2017] 84 taxmann.com 287 (Delhi) Hon'ble High Court of Delhi held as under:

"38. *Fifthly, statements recorded under Section 132 (4) of the Act of the Act do not by themselves constitute incriminating material as has been explained by this Court in Harjeev Aggarwal (supra)…."*

4.6 No statement of assessee on impugned addition: Another aspect is that the AO upon the so-called admission made by Naresh Jain, there is no answer to the question as to why the statement of some other person could be blindly relied in the case of assesse, who is separate assesse and having separate PAN and regularly filling ROI. The affairs related to her own proprietary M/s Quick Advertising ("Prop." for short) and even the bank accounts wherein cash was Rs. 72 lakhs deposited was the bank account of such prop. If the Survey Team and the AO had to bind the assesse, then assesse herself must have been examined and if there has been admission by the assesse herself, that alone could be taken into consideration. On this legal aspect itself, entire case made out by the AO gets demolished.

5.1 Revenue's grounds lack on merit and legality both: It appears that the revenue has proceeded on serious misconception of fact and law while repeatedly alleging that the ld. CIT(A) has ignored the basic fact that the assessee had already admitted income on oath u/s 131, which contention appears totally contrary to the factual and legal finding recorded by the CIT(A) at pg 38:

"Applying the aforesaid legal proposition herein, I am of the opinion that admission is an extremely important piece of evidence though it is not conclusive.."

Thus, the CIT(A) clearly held that the statement recorded on oath do have evidentiary value. However, thereafter the ld. CIT(A) also held that statement

recorded during survey is not conclusive and also recorded categorical finding of fact that the corroborative material used by the AO wherein the assessee admitted, was fully explained and thereafter, in absence of any other corroborative evidence such admission alone could not be made a basis of the addition. Therefore, it is wrong to say that the CIT(A) completely ignored the admission made by the assessee.

5.2 Prayer u/r 27 of the ITAT Rules, 1963:

Though, assessee is not in appeal or co. against such findings of the CIT(A) on this legal aspect, however **assessee is entitled** to support his order on the issue decided against him u/r 27 of the Income-tax (Appellate Tribunal) Rules, 1963 **which provides that** ***"The respondent, though he may not have appealed,*** *may support the order appealed against on any of the grounds decided against him".* Since the CIT(A) did not appreciate that these were survey statement recorded u/s 133A(3)(iii) but not u/s 131 having no evidentiary value at all, hence this prayer. The said rule clearly support the assessee, because such aspect is inherently related to the ground taken by the assessee before him wherein, on merits he deleted the addition but on this particular legal aspect held against the assessee. Reliance is placed on the cases of ITO Vs IME International ITA No. 1873/JP/2012 dated 08.01.2016 (Del Trib), BPL Systems & Projects Ltd., and Sun Pharmaceuticals Industries Ltd and **Sanjay Sawhney v. Principal Commissioner of Income-tax [2020] 116 taxmann.com 701 (Delhi)** wherein it was held that:

"Section 253, read with section 153C, of the Income-tax Act, 1961 and rule 27 of the Income-tax (Appellate Tribunal) Rules, 1963 - Appellate Tribunal - Appealable orders (Aggrieved person) - Assessment year 2008-09 - Whether rule 27 embodies a fundamental principal that a respondent who may not have been aggrieved by final order of lower authority or court, and therefore, has not filed an appeal against same, is entitled to defend such an order before Appellate forum on all grounds, including ground which has been held against him by lower authority, though final order is in its favour - Held, yes - Whether where assessee succeeded before Commissioner (Appeal) in ultimate analysis and was, thus, not an aggrieved party, in Revenue's appeal, Tribunal committed a mistake by not permitting assessee (respondent before it) to support final order of Commissioner (Appeal) by assailing findings of Commissioner (Appeal) on issues that had been decided against him - Held, yes[Para 26] [In favour of assessee]

Words and phrases : Term 'thereon' as occurring in section 254(1) of the Income-tax Act,1961/ Term "though he may not have appealed" as occurring in rule 27 of the Income-tax(Appellate Tribunal) Rules, 1963"

6. No evidentiary value of Survey Statement:

6.1 Further as per section 133A, there is nothing which suggests that a statement can be recorded on oath before the commencement of Survey or during Survey. However, if recourse is taken to section 131(1), during the survey, a statement can be recorded on oath, as the powers to record a statement on oath are vested in the authority u/s. 131(1) read with section 133(6) and in the circumstances specified u/s. 133(6) only. Section 133A does

not empower any ITO to examine any person on oath, so **statement recorded under section 133A has no evidentiary value and any admission made during such statement cannot be made basis of addition**.

6.2 Further, the statute has provided different provisions looking to the different factual situations as regard recording of the statement, somewhere on oath and somewhere without oath, u/s 132(4) (in such matters), u/s 133A(3)(iii) (in survey case) and u/s131 (for general inquiry). These provisions operate independently in their respective fields and cannot be used interchangeably. S.133A(3)(iii) is separate and independent from S. 131, as evident from the further fact that S. 133A (6), refers to use of the powers u/s 131 only in a given fact situation (as stated above), which manifests the legislative intention that statement of the assessee can be recorded under any of these three provisions as the situation may demand. Further, S.132(4) provides that such statement recorded during search may be used as evidence against the assessee in any proceedings, which is not the situation with S. 133A(3)(iii) nor with S. 131. In other words, though statement may be recorded on oath u/s 131, yet the statute not having provided such statement to be used as evidence against the assessee in any proceedings, the statement recorded under these two provisions loses their evidentiary value on the strict interpretation of the fiscal statute. Ignoring this significant difference will render the use of these words intendedly u/s 132(4), purposeless or nugatory. Therefore, to say that statement recorded u/s 133A(3)(iii) is equivalent to statement recorded u/s 131 is a gross misinterpretation of the provisions.

6.3 Reliance placed on:

6.3.1 CIT v. Khader Khan Son (2008) 300 ITR 157 (Mad.) (HC). Affirmed by Apex Court in, **CIT v. S. Khader Khan Son (2012) 210 Taxman 248(2013) 352 ITR 480 (SC) / (2012) 25 taxmann.com 413 (SC).**

6.3.2 Moreover in a comparatively recent case of **Pr. CIT, Central -2, New Delhi v. Meeta Gutgutia [2017] 82 taxmann.com 287 (Delhi)** Hon'ble Delhi High Court referred to the decision of the Kerala High Court in Paul Mathews & Sons v. CIT [2003] 263 ITR 101/129 Taxman 416 and of the Madras High Court in S. Khader Khan while considering distinction between statements under Sections 132(4) and 133A held as under:

"40. The main plank of Mr. Manchanda's submission was that the disclosure made by Mr. Pawan Gadia in his statement under Section 133A was sufficient to be construed as incriminating material qua all the aforementioned AYs, the assessment for which could be re-opened by invoking Section 153A of the Act. It is significant that while in the written submission dated 26th April, 2017, Mr. Manchanda termed the statement of Mr. Pawan Gadia as "the statement dated 23rd December, 2005 recorded under Section 132(4) of the Act", he was careful to describe it as such in the subsequent written submission dated 2nd May, 2017. This was for a good reason. The statement was in fact not under Section 132(4) of the Act but under Section 133A of the Act. There is a difference between a statement made during a survey under Section 133A of the Act and that made during the course of search under Section 132 (4) of the Act. Section 132(4) of the

Act states that the authorized officer may, during the course of search and seizure, "examine on oath any person who is found to be in possession or control of any books of account, documents, monies, bullion, jewellery..."and that any statement made during such examination may be used thereafter in evidence in any proceeding under the Act. On the other hand, Section 133A does not talk of the recording of any statement on oath. Under Section 133A (3) (iii), the Income Tax Authority acting under the said provision could "record the statement of any person which may be useful for, or relevant to, any proceeding under this Act." Therefore, there is a considerable difference in the nature of the statement recorded under Section 132(4) and that recorded under Section 133A(3)(iii) of the Act.

41. This distinction was noticed by this Court in Dhingra Metal Works (supra). The Court there referred to the decision of the Kerala High Court in Paul Mathews & Sons v. CIT [2003] 263 ITR 101/129 Taxman 416 and of the Madras High Court in S. Khader Khan Son (supra) and observed that the word 'may' occurring in Section 133A(3)(iii) of the Act "clarifies beyond doubt that the material collected and the statement recorded during the survey is not a conclusive piece of evidence by itself." Incidentally, the decision of the Madras High Court in S. Khader Khan Son (supra) has been affirmed by the Supreme Court by the dismissal on 20th September, 2012 of SLP (Civil) No. 13224/2008 filed by the Revenue against the said decision after granting leave. To the same effect is the decision of this Court in Sunrise Tooling System (P.) Ltd. (supra) and of the Jharkhand High Court in Shree Ganesh Trading Co. (supra). The CBDT's instructions dated 10th March, 2003 and 18th December, 2014 have also emphasized that there should be no recording of statement during "search/seizure/other proceeding" under the Act under "undue pressure or coercion".

*42. Therefore, in the present case**, it would be wrong on the part of the Revenue to characterize the statement of Mr. Pawan Gadia as by itself an incriminating material that could be used for making additions** in all the AYs in question apart from the year of search."*

6.3.3 Covered issue: This Hon'ble ITAT in the case of **Unique Art Age v. AO [2014] 50 taxmann.com 194 (Jaipur - Trib.),** has also taken similar view holding that:

"3.8 Effect of admission made in statements recorded during survey under section 133A of the Act

*18. **The position of law regarding the evidentiary value of admissions made in such statements is now settled.** After considering the rival stands on this issue, we have already discussed the same in the earlier part of this order. **No admission made in a statement recorded under section 133A on oath during survey can be relied as evidence against the maker or the assessee.** Undeniably, the Assessing Officer has made impugned addition on the basis of the statement of Shri Manohar Lal Agarwal and specifically by relying on his reply to question No. 23 of his statement. As per the assessment order, the excess stock of Rs. 5,08,98,166 has been worked out after giving the benefit of discount and the gross profit rate but mainly relying on the statement of one of the partners of the assessee-firm. If the statement of Shri Manohar Lal Agarwal and others are excluded in view of the above legal position, the value of the alleged excess stock can be ascertained in the light of the facts of this case. The legal issue is decided in favour of the assessee"*

7. Statement recorded u/s131 and not u/s 133A(3)(iii)-misinterpretation of law:

7.1 In this regard it is submitted that, such a contention, on a bare perusal of the related provision, is completely devoid of merit and rather a misreading and misinterpretation of the provision. During survey statements are recorded u/s 133A(3)(iii) of the Act only. However, recourse u/s131 (1) can be taken only if S.133A(6) is invoked. For ready reference S. 133A (6) is being reproduced hereunder:

"(6) If a person under this section is required to afford facility to the income-tax authority to inspect books of account or other documents or to check or verify any cash, stock or other valuable article or thing or to furnish any information or to have his statement recorded either refuses or evades to do so, the income-tax authority shall have all the powers under [sub-section (1) of section 131] for enforcing compliance with the requirement made :
*[**Provided** that no action under sub-section (1) shall be taken by an Assistant Director or a Deputy Director or an Assessing Officer or a Tax Recovery Officer or an Inspector of Income-tax without obtaining the approval of the Joint Director or the Joint Commissioner, as the case may be.]"*

A bare perusal of the said provision shows that it is **only because of the non-co-operative or evasive attitude,** if adopted by the concerned person, who is summoned or is being enquired, then and then only the IT Authority shall be having powers u/s 131(1) under which, he may be summoned and on every failure to comply with, penalties can be imposed under other provisions of the law. But otherwise also, no action under this section could be taken by the survey authorities or the AO **without having the prior approval** of the Superior Authorities. The said **provision nowhere empowers the IT Authorities to record** the statement on oath.

7.2 The Revenue has also alleged in its grounds that the CIT (A) did not appreciate that the statements were recorded only u/s 131 but not u/s 133A (3)(iii). The revenue however, has not appreciated that statement u/s 131 can be recorded **only during the course of some proceedings if it is pending** which is indicated by the use of words "*for the purposes of this Act*" and therefore, the Hon'ble Courts have been consistently holding that unless there is a pendency of any proceedings, no summon can be issued nor statement could be recorded u/s 131(1). It is only when there is a purpose before the Revenue in relation to which, statements may be recorded but not otherwise. Only with a view to obviate with the necessity of any pending proceedings under the Act, the sub-section (1A) to section 131 was inserted by the Taxation Laws (Amendment) Act, 1975, w.e.f. 01.10.1975, however, this being not a case of search, this sub-section is not applicable in the instant case.

Therefore, to say that statement recorded u/s 133A(3)(iii) is equivalent to statement recorded u/s 131 is a gross misinterpretation of the provisions.

7.3 Decision cited by CIT(A) not applicable: The reliance placed by the ld. CIT(A) on certain decisions are based on the peculiar facts available in those cases only not available in the present case. eg. in Hukum Chand retraction was made **after 2 years** and in Kantilal C Shah retraction was made **after 9**

months hence both the cases are not applicable looking to the abnormally long period as **against merely 2 months** in the present case (04.02.2017) and affidavit towards retraction filed on 06.04.2017 (Pg.54 CIT(A) order).

7.4 It is pertinent to note that the CIT(A) has rejected the claim of filing retraction by the Assessee before him, at the same time, he considered the documentary evidences, furnished by the assessee, with a view to explain the impounded document and clarify the admission made, hence, it can't be said that the CIT(A) granted relief only and only on the legal aspect (that statement recorded during survey u/s 133A(3)(iii) and/or u/s 131, has no evidentary value and not being conclusive, no addition can be made merely on that basis). On the contrary, it is discernible from his findings in all the 4 cases, where he has granted relief, he has extensively dealt with the merits of each case for examining the impounded documents, explanation of assessee, remand report and rejoinder etc., independently.

Thus, under totality of the facts and circumstances detailed above, the CIT(A) order rightly deleted the addition. **Therefore, this ground taken by the revenue deserves to be dismissed here itself.**

8. Source established being cash withdrawal - No scope for suspicion:

8.1 A pertinent aspect of the matter is that, the assessee has been engaged in the business of Advertising agency since 1989 . During the impugned year total Turn Over of the assessee was Rs. 43,02,93,389/- from newspapers, hoarding and others. During the impugned year and more particularly on 12.11.2016 Total business receipts were Rs 30,76,17,041/-. Copy of ledger Account of Syndicate Bank A/C No...802 for the period 01.04.2016 to 12.11.2016 also support the contention of assessee (APB 144-146). One would appreciate the fact that most of the business sales receipts are routed through Banking channels. Also the major clients of the assessee includes Allen Career Institute, Career Point Limited, Career Point University, Kota, Kota Zila Dugdh Utpadak Sahkari Samiti, Rajasthan Technical University, Resonance, Eduwave Adventure Limited, Mangalam Cement Limited, etc which are Corporation and Govt Office only.

8.2 It was also submitted that **Cash deposited by the assessee during 'demonetization period' was out of Cash Withdrawal** from time to time from the Bank Accounts of assessee. The assessee has made deposits to their Bank Account No.84101250000802 with Syndicate Bank, Subzi Mandi Kota branch. Details of Cash withdrawal from Bank Account SB No 84103070000001025 with Syndicate Bank and Bank Account No.84101250000802 with Syndicate Bank, Subzi Mandi Kota branch and details of Bank Accounts was submitted by the to AO in reply dt15/05/2019 (APB127-133) and 18/12/2019 (APB134-139).

8.2.1 It is submitted that vide reply letter dated 15/05/2019, the assessee has filed details of Bank Accounts viz. –

i. HDFC Bank, Jhalawar Road, Kota SB Account No. 1671530007608 having single Cash Deposit transaction dated 13/11/2016 of **Rs. 1,80,000/-** for their business needs, during demonetization period.

ii. Syndicate Bank, Subzi Mandi, Kota, SB Account No. 84103070001025, during the impugned year A/Y 2017-18 is having NIL Cash Deposit and only five transactions of Cash Withdrawal aggregating to **Rs. 2,00,000/-.** All the above transactions in cash have been made to meet their business needs.

iii. Syndicate Bank, Subzi Mandi Kota, OD Account No. 84101250000802, during the impugned year –A/Y 2017-18 there had been only one Transaction of Cash Deposit of **Rs. 72,00,000/-** on 12/11/2016 (helplessly during de-monetization period) and there had been total 52 transactions on different dates averaging 2-3 transactions each month of **Cash Withdrawal aggregating to Rs. 1,49,40,000/- to meet the business requirements.**

7.2.2 Detailed reply for Cash Deposits/withdrawals for the period 18/04/2016 to 13/11/2016, was submitted to AO (also reproduced at pg.11-13 of CIT(A) order). Thus, cash withdrawals were made out of business receipts. Further, **as per books of accounts, physical Cash in hand as on 13.11.2016, was Rs 77,14,269/- (APB 217-219),** assessee duly produced copy of Cash Book during Assessment, Remand and Appellate proceedings *(copy enclosed with this submission also).* Notably, there is **no negative cash balance in the books of accounts on any date** during the impugned year, much less prior to the 'de-monetization period' which fact was not rebutted by lower authorities. Thus, allegation of an afterthought is absolutely without any basis and a mere suspicion.

8.3 Availability of funds cannot be denied: The Hon'ble High Courts and the Tribunals in different factual situations have considered the availability of the cash when the Dept. failed to establish that such cash (which was available on account of withdrawal from the banks or sale proceeds of the goods traded, the jewellery and so on) stood utilized elsewhere and have held that no addition can be made.

8.4 In the instant case, in view of the undisputed fact of sufficient cash availability from the sales, immediately prior to the subjected bank deposits, the AO was not supposed to doubt the explanation of the assessee, more particularly, in view of the following cases, which is a settled law now:

8.4.1 Kindly refer **CIT v/s P.V. Bhoopathy** (2006) 205 CTR 495 (Mad) **held:**

"Appeal (High Court)—Substantial question of law—Income from undisclosed sources—AO did not accept various sources of income explained by the assessee and made additions under ss. 68 and 69 in respect of difference between the investments and the sources accepted by him—Tribunal accepted the explanation of the assessee vis-a-vis ***availability of funds with the***

assessee from the sale proceeds of jewellery belonging to his mother- in-law, receipt from a party and also the amount of opening balance and savings from earlier years *and deleted all the additions—Findings recorded by the Tribunal are purely findings of fact—There is no reason to interfere with the same—No substantial question of law arises—CIT vs. Pradeep ShantaramPadgaonkar (1983) 143 ITR 785 (MP) relied on"*

8.4.2 Also refer **CIT vs Kulwant Rai (2007)** 210 CTR 380 (Delhi) para 16-17 Held as under:

"Search and seizure—Block assessment—Computation of undisclosed income—Cash found during search—Assessee had ***withdrawn Rs. 2 lakh from bank some time back and there is no material with the Department to show that this money had been spent*** *and was not available with the assessee—Tribunal has found that the withdrawals shown by the assessee are far in excess of cash found during the course of search— In the absence of any material to support the view that the entire cash withdrawals must have been spent by the assessee, Tribunal was justified in holding that the addition was not sustainable—Order of the Tribunal does not give rise to a substantial question of law"*

In this case, cash was found on search carried out on 04.02.2001 and was explained to be out of the cash withdrawal in Dec-2000.

8.4.3 Also refer **Anand Prakash Soni v/s DCIT (2006) 101 TTJ 97 (Jd)** para 5-6 held as under:

"Search and seizure—Block assessment—Computation of undisclosed income—Cash found during search—Assessee is entitled to furnish cash flow statement to explain the transactions when no books of account are maintained—In such circumstances it becomes the duty of the AO to verify the balance sheet and ***cash flow statement*** *with the necessary material including the details already filed along with the returns in the past—Assessee explained that the* ***cash found at the time of search was withdrawn from the bank*** *some time back which was partly used for purchasing gold and part of the amount was given by the assessee to his wife—There is* ***nothing to suggest the utilization of the withdrawal amount elsewhere****—Said withdrawal is duly reflected in the cash flow statement and closing cash balance is more than the amount found at the time of search—Thus, addition cannot be sustained"*

9. Double Taxation Not Permissible:

9.1 It is submitted that the impugned addition, so made, has resulted into double addition in as much as the fact is not denied that the receipts from Advertising by the assessee were duly booked and the turnover was around Rs. 43 Cr. from news papers, hording and otherwise also during the impugned year and upto 12.11.2016 total business receipts is of Rs 30 Cr. which has been duly accounted for in the cashbook on a day to day basis and it is only out of the same, the subjected cash deposits were made. The amount so received was duly considered while preparing the P&L account and the net income based hereon has already been declared and tax paid thereon. Once the assessee has already declared the very source of the cash deposits being its income which has already suffered tax, these admitted facts itself are sufficient to explain the source by the assessee, without any further questioning and raising any doubt.

9.2 There is absolutely no convincing reason provided by the authorities below as to why not to accept the sales so made. Very pertinently, **there is absolutely not a single word whispered doubting the claim of the sales made. What to talk of establishing otherwise.** Once the sale is declared as income by the assessee, the question of treating the same amount as unexplained money u/s 69A of the Act **results in double addition** which is not permissible in the eyes of law.

9.3 Reliance is placed on:

9.3.1 Kindly refer **Smt. Harshila Chordiya vs. ITO (2008) 208 CTR 208 / 298 ITR 349 (Raj)** wherein it was **held** that the Tribunal has found as a fact that the assessee was receiving money from the customers against which delivery of vehicles was made – such cash deposits are self – explanatory and would not attract S. 68/69A – Therefore, no addition could be made. The relevant extract of the said judgement is reproduced hereunder:

"23. So far as question No. 2 is concerned, apparently when the Tribunal has found as a fact that the assessee was receiving money from the customers in hands against the payment on delivery of the vehicles on receipt from the dealer the question of such amount standing in the books of account of the assessee would not attract Section 68 because the cash deposits becomes self-explanatory and such amounts were received by the assessee from the customers against which the delivery of the vehicle was made to the customers. The question of sustaining the addition of Rs. 6,98,000 would not arise.

24. We, therefore, hold that no addition was required to be made in respect of Rs. 6,98,000, which was found to be the cash receipts from the customers and against which delivery of vehicle was made to them."

9.3.2 Very recently Hon'ble Jurisdictional ITAT-Jaipur Bench in the matter of **Rukmani Jewellers Private Limited Vs. DCIT, Circle-04, Jaipur** (ITA. No. 539/JP/2023, Dated: 20/12/2023) held as under:

"13. Thus, considering all the facets of the case the bench noted that the revenue did not pinpoint any defects in the books of accounts, quantitative records available with the assessee, cash book and invoice presented in the assessment proceedings. Merely the assessee unable to record the mobile number it does not make the sale as non-genuine and we find support of this contention from the decision of the jurisdictional high court in the case of Smt. Harshil Chordia Vs. ITO reported at 298 ITR 349 (Rajasthan-HC)(supra) ***we do not find any merits on the finding of the ld. AO and that of the ld. CIT(A) in disbelieving the sales recorded by the assessee as the sales is in course of business is duly supported by the invoice and delivery of the goods recorded in the books of the assessee.*** *The cash is generated out of the stock already on record and thus the sales made by the assessee company is genuine sales recorded in the books of account. All the details required to prove the sales made by the assessee were provided in the assessment proceedings. Now on the part of the receipt of the cash from the customer the jurisdiction high court judgement in the case of Smt. Harshil Chordia Vs. ITO reported at 298 ITR 349 (Rajasthan-HC) held that…."*

9.3.3 In the case of **Rachit Aggarwal (Prop.), Ashok Kumar Gupta & Co. vs ITO (2024) 162 taxmann.com 49 (Chandigarh - Trib.),** the Hon'ble ITAT held as under:

"Section 68 of the Income-tax Act, 1961 - Cash credit (Others) - Assessment year 2017-18 - Assessee was engaged in wholesale trading of karyana goods, specifically sugar, khandsari, jiggery, cereals, etc. - Business of assessee was very old and as a trend of trade, assessee in routine and every year received cash against cash sales - Same was deposited in current account with bank and amount in bank was used for paying off creditors - Assessing Officer found that cash deposits made in bank account of assessee remained unexplained and, accordingly, he made addition of such cash deposits to income of assessee under section 68 - It was noted that ***cash deposit in bank on account of cash sales and cash realizations from debtors*** *was a normal feature of assessee's business and that cash deposit figures of October and November were a little higher due to cyclic variations, mainly on account of festivals and marriage season in Northern India during that time - It was also noted that cash deposits in November mainly came from opening cash in hand which was duly supported by fact that assessee throughout year maintained corresponding cash in hand balances on every first day of preceding months of financial year - Whether, on facts, impugned addition made under section 68 would not be sustainable - Held, yes [Paras 8.2, 8.3, 14.4 and 14.5] [In favour of assessee]."*

9.3.4 The Hon'ble High Court of Delhi in the case of **PCIT v. Agson Global (P.) Ltd. [2022] 134 taxmann.com 256 (Delhi)**has held that:

"Section 68 of the Income-tax Act, 1961 - Cash credit (Bank deposits) - Assessment year 2017-18 - Assessee-company was engaged in business of selling dry fruits - Post-demonetization, assessee deposited cash amounting to Rs. 180.53 crore in its bank accounts - Assessing Officer held that cash deposits made by assessee represented unaccounted income and accordingly, made additions - Tribunal analysed data pertaining to cash sales and cash deposits made in relevant assessment year as against two earlier assessment years and noted that in year of demonetization percentage increase in sales was less than earlier year - He, thus, held that growth in sales compared to earlier two years showed similar trend, and it could not be said that assessee had booked non-existing sales in its books post-demonetization - Furthermore, revenue made no allegation that assessee had backdated its entries - Whether since assessee placed material on record that cash deposits made with banks more or less corresponded with cash sales, it could only be concluded that there was growth in assessee's business and impugned addition was to be deleted - Held, yes [Paras 16.9 and 17.6] [In favour of assessee]"

Thus, the assessee has already offered the sales receipts for taxation hence the onus has been discharged by it and the same income cannot be taxed again.

9.3.5 In the case of **PCIT vs. Dilip Kumar Swami [2019] 106 taxmann.com 59 (Raj)** it was held that:

"Assessee filed his return declaring certain taxable income - In course of assessment, Assessing Officer noted that assessee had deposited certain amount in his bank account - On being enquired about source of said deposit, assessee explained that it represented amount received from various purchasers against sale of goods i.e., tractors and accessories thereof - Assessing Officer accepted assessee's explanation and completed assessment - Commissioner taking a view that cash deposits not being satisfactorily explained, passed a revisional order setting aside assessment - Tribunal, however, set aside revisional order so passed - It was noted that order passed by Assessing Officer that deposits stood reconciled was preceded by a proper inquiry - It was also found that assessee had produced statement of bank account, copies of bills issued to purchasers of tractors as also books of account showing entries of deposits made in bank - Moreover, Assessing Officer had recorded a categorical finding that entries in bank account were verifiable from cash book and also bills produced by assessee - Whether in view of aforesaid, Tribunal was justified in setting aside revisional order passed by Commissioner - Held, yes".

The principal propounded in the above case directly applies in the present case.

9.3.6 Apex court decision in the case of **Mehta Parikh & Co. vs. CIT [1956] 30 ITR 181 (SC)** also directly support the facts of the present case in as much as in that case also, the assessee was in possession of 61 high denomination currency notes on 12.01.1946, when such currency notes were demonetized. The assessee at the time was established availability of currency notes with the help of regularly maintain cash book showing opening cash in hand on 01.01.1946 and further receipt thereafter, apart from affidavits of the payer. The authorities below rejected the contention alleging the same to be impossible for the one reason or other and was upheld by the high court also. However, the Hon'ble apex court decided the issue in favour of the assessee mainly relying upon the entries in the cash book (as also the fact that contents of the affidavits were not controverted by the department). The Hon'ble court held that:

"It has to be noted, however, that beyond these calculations of figures, no further scrutiny was made by the Income-tax Officer or the Appellate Assistant Commissioner of the entries in the cash book of the appellants. The cash book of the appellants was accepted and the entries therein were not challenged. No further documents or vouchers in relation to those entries were called for, nor was the presence of the deponents of the three affidavits considered necessary by either party. The appellants took it that the affidavits of these parties were enough and neither the Appellate Assistant Commissioner, nor the Income-tax Officer, who was present at the hearing of the appeal before the Appellate Assistant Commissioner, considered it necessary to call for them in order to cross-examine them with reference to the statements made by them in their affidavits. Under these circumstances it was not open to the Revenue to challenge the correctness of the cash book entries or the statements made by those deponents in their affidavits.

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A mere calculation of the nature indulged in by the Income-tax Officer or the Appellate Assistant Commissioner was not enough, without any further scrutiny, to dislodge the position taken up by the appellants, supported as it was, by the entries in the cash book and the affidavits put in by the appellants before the Appellate Assistant Commissioner.

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To put the matter in a nut-shell, the accounts of the appellant have been accepted by the Tribunal as genuine, and it is impossible to say, having regard to the cash balance as shown therein, that the notes in question could not have been included therein. The Tribunal observes that it is unlikely that so many high denomination notes would have been held as part of the cash on hand for a such a large number of days. That, no doubt, is highly suspicious; but the decision of the Tribunal must rest not on suspicion but on legal testimony".

9.4 Alternatively, even assuming all the contentions raised by the assessee are reversed and the findings recorded by the ld. CIT(A) are also not found to be sustainable yet then at the end of the day the fact remain that the cashbook impounded during survey, being Annexure-A Exhibit-8 Page No.1-50 (APB54-104) it is a cashbook for FY 2016-17, admittedly and undisputedly shows cash

balance of Rs. 1,57,62,376/- on 08.11.2016 (see AO pg4 and APB 97) which, in any case was more than Rs. 72, lakhs deposited in the bank accounts.

10. Incomplete accounts not a good basis for additions:

10.1 It is submitted that unfortunately, the ld. AO completely relied on impounded document, being incomplete cash book, being marked as Exhibit-8 Pg. 1 to 50 (APB 54-104). The AO ignored the audited record made available before him by assessee without rebutting and rejecting the record merely proceeded on suspicion, conjecture and surmises.

10.2 It is further submitted that difference in balances does not *ipso facto* result in undisclosed income. For the reason that, only the finally prepared annual accounts, which are based for computing total income and is relied upon by the assessee. In fact, **one can never place reliance on such incomplete record** for the purposes of declaring income or otherwise and merely because it was found and impounded during the course of survey does not make it credible.

11.1 Complete Accounts Maintained: While examining the source of the cash deposits, the best and valid evidence normally, is the regularly maintained books of accounts. It is submitted that undisputedly & admittedly the **assessee has maintained all the books of account** consisting of **cash book, ledgers** and **stock register etc.** The entire receipts from Advertising work and consequential expenses are fully vouched. The accounts are **audited** u/s 44AB of the Act (APB 22-40). The cash book was maintained on a day-to-day basis showing all the receipts/incoming and expenses/outgoings. Further all the required details from books of account were **duly submitted** before the AO during the subjected assessment proceedings. Hence, there was no reason as to why the AO should have doubted.

11.2.1 It is now well settled that where the assessee has **regularly maintained books of accounts** is an admissible evidence u/s 34 of the Indian Evidence Act, 1872. This holds good more particularly, when the ld. AO did not disbelieve or did not doubt or **even did not reject the same u/s 145 of the Act, as in this case.** In other words, he felt satisfied with the books of accounts maintained by assessee and duly audited and produced before him and therefore feeling satisfied, he did not reject the same. Once this is the admitted fact, there is no reason as to why the AO must have alleged that the regularly maintained cashbook as unreliable.

11.2.2 The ld. AO, no doubt, raised an objection at Pg.3 of order (also reproduced at pg 8 of CIT(A) order) that:

"During assessment proceedings the appellant has produced copy of cash books for the relevant year. As per cash book cash balance as on 08/11/2016 was Rs. 77,66,469/- ; however, as per Annexure-8, page No 8, copy of cash book for F/Y 2016-17, the cash balance was Rs. 1,57,62,376/- on 08/11/2016. Therefore it clearly shows that cash books maintained by the

appellant and submitted during assessment proceedings are different than the cash book found during survey action. Hence it is considered that the appellant has manipulated the figures in cash book, therefore the contents of cash book are not reliable, hence reply of appellant on the basis of cash in hand is not found satisfactory"

However, there is no much force or substance in the contention so raised for the simple reason that the assessee right from the beginning has being stating that various expenses on account of repair and maintain, business promotion, etc were pending and could not be entered therein. Since the survey was carried out mid of the year, and it is not abnormal if various transactions could remain pending and to be recorded. However it is only when the accounts are completed and got Audited, which are relied upon by the assessee, then only the true and correct picture can be ascertained. Thus it was only a case where an incomplete cash book impounded was wrongly considered by the AO ignoring the regularly maintained and audited cash book produced before him.

This way, **there was no substantial discrepancy as such** was pointed out by the AO. Interestingly, the AO did not make any addition on account of such alleged difference and the **ld. CIT(A) has dealt with this aspect in great detail.** The ld. DR is not in a position to refute his findings on this aspect. Also, no specific ground was taken by the revenue on the so called discrepancy being the difference between the two.

11.2.3 It has to be appreciated that the assessee after completing all the transactions very fairly and honestly, has shown cash in hand at Rs. 77,66,469/- only as against Rs. 1,57,62,376/- (in the incomplete cashbook found during survey). In other words, **the assessee did not attempt to take advantage of the cash balance found** during the course of survey which had got the complete evidentiary value. In fact, the assessee being consistent with its contention that various transactions were yet to be posted, he honestly declared whatever was the result i.e. the cash in hand on 08.11.2016. Therefore, it can't be said that the assessee did manipulate the books of account.

11.3 There is a consistent view of various High Courts and Tribunals to this effect. Kindly refer:

11.3.1 M/s Bansilal Abirchand Spg. & Wvg. Mills 75 ITR 260 (Bom)

a. A finding has to be recorded as to the unacceptability of the method and irregularity of the method and irregularity of accounts kept.
b. The mere fact that percentage of dead loss of cotton is high in a particular year cannot lead to the loan inference that thereby there has been a suppression of the production in a spinning mill.
c. If it is not possible to keep such record (record of loss or wastage at subsequent stages) there was no other reason not to accept the book results of the records kept addition by way of estimate not permissible.

d. Merely by comparison of the percentage of loss in a particular year, we do not think it is possible to say with any reasonable certainty that the increase in the percentage of loss must be attributable and must lead to a reasonable inference of suppression of production of yarn.
e. Higher wastages alone was no ground for rejecting the claim for wastage

11.3.2 CIT vs. Maharaja Shree Umaid Mills Ltd. 192 ITR 565 (Raj.)

"The Tribunal was justified in holding that since the books of account had not been rejected the mere fact that there had been a fall in the gross profit rate would not lead to the inference that the expenditure had been inflated. No question of law arose form the order of the Tribunal."

12. Addition u/s 69A not mandatory:

12.1 In this regard it is submitted that from the analysis of S.69A reveal that addition of amount can be called for when the said sum is found not recorded in the books of accounts maintained by the assessee and the assessee offers no explanation about the nature and source of such amount. But undisputedly in the case of assessee there are numerous evidences produced before lower authorities and proper explanation has been accorded, as discussed in great details in this submission earlier, hence, there appears no reason to invoke S. 69A of the Act.

12.2 Further S. 69A requires an explanation from the assessee and once given, it has to be objectively tested. A good proof cannot be converted into no proof. Moreover, discretion conferred upon the AO has to be exercised judiciously as held in **CIT vs Smt. P.K. Noorjahan (1999) 237 ITR 0570 (SC)** wherein it was held:

"As pointed out by the Tribunal, in the corresponding clause in the Bill which was introduced in Parliament, the word "shall" had been used but during the course of consideration of the Bill and on the recommendation of the Select Committee, the said word was substituted by the word "may". This clearly indicates that the intention of Parliament in enacting s. 69 was to confer a discretion on the ITO in the matter of treating the source of investment which has not been satisfactorily explained by the assessee as the income of the assessee and the ***ITO is not obliged to treat such source of investment as income in every case where the explanation offered by the assessee is found to be not satisfactory.*** *The question whether the source of the investment should be treated as income or not under s. 69 has to be considered in the light of the facts of each case. In other words,* ***a discretion has been conferred on the ITO under s. 69 to treat the source of investment as the income of the assessee if the explanation offered by the assessee is not found satisfactory and the said discretion has to be exercised keeping in view the facts and circumstances of the particular case.*** *In the instant case, the Tribunal has held that the discretion had not been properly exercised by the ITO and the AAC in taking into account the circumstances in which the assessee was placed and the Tribunal has found that the sources of investments could not be treated as income of the assessee. The High Court has agreed with the said view of the Tribunal. There is no error in the said finding recorded by the Tribunal. There is thus no merit in these appeals and the same are*

accordingly dismissed.—CIT vs. Smt. P.K. Noorjehan (1980) 15 CTR (Ker) 138 : (1980) 123 ITR 3 (Ker) : 42R.1622, affirmed."

13. No addition permissible merely on suspicion: It is well settled that suspicion, however strong, cannot take the place of reality. Thus, the impugned additions have been made merely on suspicion, impugned addition deserves to be deleted here itself. Kindly refer **Dhakeshwari Cotton Mills v/s CIT (1954) 26 ITR 775 (SC),** wherein it is held as under:

*"Assessment—Validity—ITO is not barred by technical rules of evidence and pleadings, and he is entitled to act on material which may not be accepted as evidence in a Court of law, but in making the assessment under sub-s. (3) of s. 23 the ITO is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all—**There must be something more than bare suspicion to support the assessment** under s. 23(3)—ITO and the Tribunal in estimating the gross profit rate on sales **did not act on any material but acted on pure guess and suspicion**—In arriving at its estimate of gross profits and sales **Tribunal should give full opportunity to the assessee** to place any relevant material on the point that it has before the Tribunal, whether it is found in the books of account or elsewhere and it should also disclose to the assessee the material on which the Tribunal is going to found its estimate and then afford him full opportunity to meet the substance of any private inquiries made by the ITO if it is intended to make the estimate on the foot of those enquiries."*

14. S.115BBE wrongly invoked: The ld. AO at pg. 4 of the order noted as under:

*"Further, it is also submitted that the assessee has admitted the said amount as income from undisclosed sources and surrendered the same amount for taxation during the survey action. Considering the facts of the case, the cash deposited during demonetization period at Rs. 72,00,000/- is added to the total income of the assessee treated as unexplained money u/s 69A and tax is charged as per provisions of section 115BBE of the IT act. **Since the assessed income of the assessee includes income chargeable u/s 115BBE, therefore I am satisfied to initiate penalty proceeding u/s 271AAC of the IT Act."***

14.1 Invoking S. 115BBE of the Act is without jurisdiction: There is absolutely no case made out by AO to invoke sec.115BBE. Admittedly the additions so made by the AO which were under challenge, are **not the income from other sources** but by AO's own admission, these are the cases of business income only. Once it is so, S.115BBE cannot be invoked. Otherwise also the **ld. CIT(A) having already deleted the entire addition, there is no question of invoking S.115BBE**. Moreover, the Revenue has also not taken any specific ground/argument on this aspect.

14.2 Reliance is placed on:

- CIT vs Bajargan Traders (Raj HC)in ITA No. 258/2017 dated 12.09.2017
- Shri Ram Narayan Birla (ITAT Jaipur) in ITA No. 482/JP/2015 dated 30.09.2016
- Chokshi Hiralal Maganlal vs DCIT (ITAT Ahmadabad) ITA No. 3281/Ahd/2009 AY 2004-05 dated 05.08.2011

In view of the facts & circumstances, judicial guidelines and the statutory provisions, the addition of Rs. 72 lakhs could not be subjected to S. 115BBE

of the Act. **Therefore, this ground of appeal taken by the revenue deserves to be dismissed.**

DGOA 2: Rs. 35,550/- alleged undisclosed income during Survey.

Facts: The AO has dealt with this issue at Pg 2 Pr 2 and copied at page no.3 para 4 of CIT(A) order. The detailed written submissions dt.18.07.2023 filed before the CIT(A) are at page no.3 para 4.2, the remand report thereupon by the AO dt. 14.09.2023 is at page no.4 para 4.4, the rejoinder dt. 30.10.2023 at page no. 6 para 4.5 and finally the ld. CIT(A), after considering the detailed submissions, the remand report, rejoinder made before him, at Page 6, Para. 4.6 concluded in following words:

"4.6 I have considered the submission of Ld. A/R and carefully gone through the material available on record. The AO reported that during the survey proceedings, Shri Naresh Jain husband of assessee and main person dealing with financial transactions had declared Rs.2,00,00,000/- as undisclosed income on account of bogus expenses in the hands of applicant in various years and same has been declared on the basis of incriminating documents.

Accordingly, an amount of Rs.1,71,72,858/- and Rs.27,91,592/- has been added to the total income of the assessee for the A.Y. 2015-16 & A.Y. 2016-17 respectively. Therefore the balance amount of Rs.35,500/- [Rs.2,00,00,000/- minus (Rs.1,71,72,858+ Rs.27,91,592)] was added to the total income of the assessee for the A.Y. 2017-18 as accepted and surrendered during survey action i.e. 02.02.2017. Hence, if the addition of Rs.1,71,72,858/- for the A.Y. 2015-16 has been considered at Rs.1,81,18,746/- and addition of Rs.24,69,065/- (after giving relief of Rs.3,22,527/- out of total addition of Rs. 27,91,592/-by the Worthy CIT(A)-2, Udaipur) has also been considered, then the aggregate addition become Rs.2,05,87,811/- (17172858+2469065), which already exceeded the total undisclosed income of Rs.2,00,00,000/-. Hence, there is no amount left from undisclosed income declared during the survey for the A.Y. 2017-18.

The remand report furnished by the AO is considered. The only basis of addition of Rs. 35,500/- is the statementrecorded during survey *in which surrender of income was made. The AO explained that this amount is balance figure of the total addition made with respect to surrender of Rs. 2,00,00,000/-.* ***The AO accepted that if the addition of Rs.1,71,72,858/- for the A.Y. 2015-16 has been considered at Rs.1,81,18,746/- then the issue may be decided on the basis of record and Assessment Order.*** *The appellant has already explained in the Written submission voluntarily in support of grounds of appeal for A/Y 2015-16 regarding addition of Rs. 1,71,72,858/- instead of 1,81,18,746/- which was totalling error in the impounded documents.*

The facts of the case are considered. The appellant has voluntarily accepted that for A/Y 2015-16 the amount considered for addition of Rs. 1,71,72,858/- should have been of Rs. 1,81,18,746/-. ***The AO also stated that this figure of Rs. 35,500/- was only balancing figure to make the total of Rs. 2 crore of disclosure*** *made in the statement. In these circumstances, the addition made by the AO is not found to be based on some evidence and the addition made of Rs. 35,500/- is not found to be sustainable and the same is deleted.*

This ground of appeal is treated as allowed."

Hence this ground.

Submission:

1. At the outset we strongly place reliance upon our detailed submissions made before AO as also before the CIT(A).

2. We also place strong reliance upon the order of the CIT(A) to the extent (Pg. 6, Para 4.6) his findings and observations are given in the favour of assessee.

3. The ld. AO during the verification proceedings, noticed that the total of difference of expenses booked *"as per audit report"* and *"as per Income and Expenditure"* are wrongly written as Rs.1,71,72,858/- due to arithmetical error, which should have been Rs.1,81,18,746/-. Thus, while framing the assessment order u/s 143(3) r.w.s. 147 of the I.T.Act, 1961 on 31.12.2019, the then AO had wrongly made addition of Rs.1,71,72,858/- due to arithmetical error instead of Rs. 1,81,18,746/-.

4. Further, during the survey proceedings, it was alleged that Shri Naresh Jain declared Rs.2 Crore as undisclosed income on account of bogus expenses in the hands of applicant in various years and same has been declared on the basis of incriminating documents. Accordingly, an amount of Rs.1,71,72,858/- and Rs.27,91,592/- has been added to the total income of the assessee for the A.Y. 2015-16 & A.Y. 2016-17 respectively. Therefore the balance amount of Rs.35,500/-[Rs.2,00,00,000/- minus (Rs.1,71,72,858 + Rs.27,91,592)] was added to the total income of the assessee for the A.Y. 2017-18 as merely because same was alleged to be accepted and surrendered during survey action i.e. 02.02.2017. On this aspect ld. AO submitted his comment in remand report (also at pg.6 of CIT(A) order) reproduced hereunder:

"Hence, if the addition of Rs.1,71,72,858/- for the A.Y. 2015-16 has been considered at Rs.1,81,18,746/- and addition of Rs.24,69,065/- (after giving relief of Rs.3,22,527/- out of total addition of Rs. 27,91,592/-by the Worthy CIT(A)-2, Udaipur) has also been considered, then the aggregate addition become Rs.2,05,87,811/- (17172858+2469065), which already exceeded the total undisclosed income of Rs.2,00,00,000/-. ***Hence, there is no amount left from undisclosed income declared during the survey for the A.Y. 2017-18.*** *Therefore, it may be decided on the basis of record and assessment order."*

5. No incriminating material found: It is further submitted that impugned addition was as a consequence of statement of Shri Naresh Jain. However, it's crucial to note that Shri Naresh Jain retracted his statement on 14.02.2017 (APB 140-143). In the light of this fact, the addition of Rs. 35,500/- is baseless and erroneous.

Thus, under totality of the facts and circumstances detailed above, the CIT(A) order rightly acknowledged this and deleted the addition. **Therefore, this ground taken by the revenue as also entire appeal deserves to be dismissed.**

Common submission: The AO and Revenue in its GOA have repeatedly relied upon the Survey statement of Shri Naresh Jain alleging admission made by him w.r.t. different addition which, are wrongly relied upon being survey

statement and further once stood retracted, which has been elaborately submitted in this WS and may be considered towards all such grounds.

Thus, the appeal of the Revenue be dismissed as submitted hereinabove and relief may be granted u/r 27 may be prayed for.

The above submissions have been made based on the instructions and the information provided of/by the client."

3.1 In Ground No. 1, the Revenue in this ground has assailed the deletion of the addition of Rs. 72 lakh made by the AO, w.r.t. the cash deposits made by the assessee Smt. Nisha Jain in her bank accounts alleging that the ld. CIT(A) did not appreciate that there were incriminating material and information revealed during the course of survey and that Shri Naresh Jain, Husband of assessee, in his statement recorded on oath u/s 131 during survey had admitted such deposits as assessee's undisclosed income. Since the CIT(A) has already stated the relevant facts hence, the same are not being repeated here. During the course of hearing the parties were directed to file detailed written submissions in support of their oral arguments, if so desired. It is noted that the ld. DR relied upon the order of the AO and the ld. AR of the assessee has filed the written submission (supra)

3.2 We have carefully gone through the order of the first appellate authority and find that very elaborate discussion has been made considering each and every aspect raised by the AO in the assessment order and in the remand report, after consideration of the written submissions and the rejoinder filed by the assessee.

We have also gone through the assessment order, the oral and written contentions raised by the parties and the judicial precedents cited at bar. Hence, for these reasons and also for the reasons stated hereinafter, we are in full agreement with the findings so recorded by the ld. CIT(A). The relevant observations of the ld. CIT(A) made in his order at page 54 , para 5.11 are reproduced in following words.

"5.6 I have considered the submission of Ld. A/R and ***carefully gone through the material available on record.***

5.6.1 The AO noted that during survey the physical cash in hand was found at Rs. 2,08,000/- where as tally printout the cash in hand as per books of accounts of M/s Quick Advertising Co was Rs. 90,67,052.91/-.

An incriminating documents was seized, Sh. Naresh Jain husband of the appellant Mrs. Nisha jain explained that these documents were the cash book of M/s Quick Advertising Co for the period 01.04.2016 to 20.01.2017 whose proprietor was the assessee, Smt. Nisha Jain (Wife of Shri Naresh Jain) and the cash balance as per this incriminating document was Rs. 90,67,052.91/-. It was also found during survey action that a sum of Rs. 72,00,000/- was deposited in bank account during demonetization i.e. 09.11.2016 to 30.12.2016.

Shri Naresh Jain explained that the expenses of M/s Quick Advertising Co had not yet been posted, and when he was asked to produce bills, vouches etc for un-posted expenditure, he submitted that no such documents could not be made available as no such records were maintained. He admitted that Rs. 72,00,000/- lacs and was earned from un-disclosed sources and offered the same for taxation.

During the assessment proceedings the assessee was asked to explain the same. The assessee ***submitted reply and stated that the cash of Rs. 72 Lacs deposited during demonetization period was the cash withdrawn from the Bank accounts in FY 2016-17 from time to time.***

During the assessment proceedings, the assessee has ***produced copy of cash books*** *for the relevant year.* ***As per cash book balance as on 08.11.2016 was Rs. 77,66,469/-*** *however, as per party annexure A-8 Page NO. 8 (Copy of Cash Book for FY 2016-17) the cash balance was Rs. 1,57,62,376/- on 08.11.2016. Therefore, it clearly shown that the cash book maintained by the assessee and submitted during the assessment proceedings are different than the cash book found during the survey action. Hence, it is considered that the assessee has manipulated the figures in the cash book, therefore the contents of the cash book are not reliable.*

In the assessment order the AO has noted that the assessee has manipulated the figures in the cash book, therefore the contents of the cash book are not reliable. The AO has also relied upon the statement recorded during the survey.

5.6.2 ***Both of these issues are examined****. The AO has relied upon the statement recorded during the survey where it was admitted that Rs. 72,00,000/- deposited during demonetization was earned from un-disclosed sources and offered the same for taxation. The statement recorded under oath is an important piece of evidence.*

Relevancy and evidentiary value of statement obtained under oath during the search/survey proceedings are no longer res integra. In the decision of the Supreme Court in the case of BanalalJat Constructions (P.) Ltd. v. Asstt. CIT [2019] 106 taxmann.com 128/264 Taxman 5, after referring to the judgment of Pullangode Rubber Produce Co. Ltd. v. State of Kerala [1973] 91 ITR 0018, the legal position in relation to a statement under section 132(4) of the Income-tax Act, 1961 was set out as under :

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Applying the aforesaid legal proposition herein, I am of the opinion that ***admission is an extremely important piece of evidence though it is not conclusive.***

On the issue of retraction of statement recorded during search Hon'ble High Court Of Madras in the case of Thiru. A.J. Ramesh Kumar v. Deputy Commissioner of Income-tax [2022] 139 taxmann.com 190 (Madras) noted as under –

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In this case, the retraction is with sufficient, credible and corroborative evidence to support his claim. *It is also to be noted that in the original statement also the claim of the assessee was that the expenses of M/s Quick Advertising Co had not yet been posted as noted by the AO in the assessment order. When Mr. Naresh Jain was asked to produce bills, vouches etc for unposted expenditure, he submitted that such documents could not be made available. Non furnishing of expenditure vouchers was a serious lapse on the part of the assessee. However, it is equally true that* ***the AO has not stated that the bills vouchers produced during the assessment proceedings are not genuine. The evidences furnished by the assessee cannot be rejected simply by stating that these are afterthought.*** *Without rejecting the bills vouchers produced during the assessment proceedings the AO was not found to be justified in holding that the books are manipulated. The AO did not examine the correctness of the claim of the appellant during assessment proceedings. It is noted that as per seized documents the cash was Rs. 1.57 Crore, however as per cash book of the appellant, the cash balance on date of survey comes to Rs. 77.66 Lakhs as on 8.11.2016. The difference was required to be examined.*

Per contra the appellant during the appellate proceedings stated that the ***cash of Rs. 72,00,000/- deposited during demonetization period was the cash withdrawn from bank accounts*** *in F.Y. 2016-17. It is argued that there had been total 52 transactions on different dates averaging 2-3 transactions each month of Cash Withdrawl aggregating to Rs. 1,49,40,000/- to meet the business requirements.* ***It is further submitted that Cash in Hand as on (i) 01/04/2016 was Rs 3,11,451.91 (ii) as on 08/11/2016 was Rs. 77,66,449/- (iii) 31/03/2017 was Rs 3,18,640.28.***

It is argued that the appellant is engaged in the business of Advertising agency. During the impugned year ***total Turn Over of the appellant was Rs. 43,02,93,389/-*** *from news papers, hording and others. During the impugned year and upto 12/11/2016 total business receipts is of Rs 30,76,17,041/-. It is submitted that most of the business transactions are routed through Banking channels. All the receipts from advertising are through cheques and deposited in Bank.*

It is argued that the cash deposited Rs. 72,00,000/- during the period of 'demonetization' was also declared in the Income Tax Return at S No. 13 of column No 7

It is submitted that ***difference in Rs. 1,57,62,376/- and Rs. 77,66,469/- (79,95,907/-) is due to the expenses like*** *repair and maintenance, business promotion, design & graphics, computer, flex printing, Hording, misc expenses, printing & stationery, staff welfare, vehicle running, water, labour, construction of building and house construction at Sarovar Road.*

The appellant also argued on evidentiary value of statement, retracted by the concerned persons for the appellant Shri Naresh Jain by filing an affidavit. It is argued that Shri Naresh Kumar Jain

has duly retracted from his statement which was given under mental unconsciousness, pressure and fatigue and just within 4 days (The relevant stamp paper was purchased on 07/02/2017, executed on the same day i.e 07/02/2017 and notarized on 14/02/2017) of recording of his statement the appellant vide affidavit dated 14.02.2017 filed before the ADIT(Inv.) on 06.04.2017 retracted the same and as such the statement does not have any evidentiary value.

It is argued that it is well settled in law that presumption u/s 292C of Income Tax Act 1961 is rebuttable presumption. Even if such presumption is drawn against an assessee the same is rebuttable and the person against whom such presumption is drawn is free to lead evidence to rebut such presumption and when that is done, the officer or authority shall consider all the evidence and facts judiciously.

***5.6.3** Considering facts of the case, **a remand report was asked from the AO**. The AO was asked to verify the claim of the appellant that the cash deposited during demonetization was out of bank accounts which are part of regular books of account.*

The AO was asked to verify whether the cash withdrawn was out of accounted sources of income or it is not accounted.

The AO was asked to verify the difference of cash as per seized documents of Rs. 1.57 Crore, and as per cash book of Rs. 77.66 Lakhs. It was also asked to verify if the difference is because of personal purpose utilization of cash then this should have reflected in capital account of the appellant and if the cash is utilized for business purpose and claimed in P&L A/c then allowability of such cash expenses needs to be examined as per provisions of Income Tax Act.

5.6.4** The **AO reported after carefully examining the reply of the assessee as well as documentary evidences produced during the re-verification proceedings that cash book produced by the assessee are tallied with the bills/vouchers & all the withdrawal from bank account are also matched with the cash deposit in cash book. Further, it is also noticed from the cash book produced during the re-verification proceedings that the cash balance as on 13.11.2016 is Rs.77,14,629/- & cash deposited on 13.11.2016 is Rs. 72,00,000/-. Hence, as per the cash book produced during the reverification proceedings, it is found that there is a sufficient fund in the form of cash was available with the assessee to deposit in her respective bank account during the course of demonetization period.

***Considering the verification made by the AO, it is seen that the argument of the appellant is found to be acceptable** that the cash of Rs. 72,00,000/- was deposited during demonetization period was out of cash withdrawn from bank accounts in F.Y. 2016-17. The AO has reiterated the findings of assessment order on the difference of cash as per seized documents of Rs. 1.57 Crore, and as per cash book of Rs. 77.66 Lakhs. However, the AO has also reported that book produced by the assessee are tallied with the bills/vouchers. Considering these facts, the main reason for making the addition is not found to be sustainable as the appellant is able to explain the source of cash deposited with the help of books of accounts.*

*The issue now remains whether addition could have been made only on the basis of statement recorded under oath during the survey as the incriminating document has been explained by the appellant. **As discussed earlier, the retraction from earlier statement is with sufficient, credible and corroborative evidence to support his claim. Even if the retraction is not considered**, in the original statement also the claim of Sh. Naresh Jain was that the expenses of M/s Quick Advertising Co had not yet been posted. From the reading of statement, it is noticed that the books of accounts were not updated at the time of survey. Now, the appellant has furnished the source of cash deposited during the period of demonetization. **Therefore, considering these facts, the addition made by the AO is not found to be sustainable.** The addition made of Rs. 72,00,000/- is deleted accordingly. Since, the addition is deleted, other issues raised by the appellant do not require adjudication and treated as disposed of.*

This ground of appeal is treated as allowed."

3.3 It is noticed that during the survey a document being Ann. A, page no. 1 to 50 was found (APB 54-104). This is a cash book maintained by M/s Quick Advertising Company, a proprietary of the assessee, for the F.Y. 2016-17 starting for the period from 01.04.2016 to 20.01.2017,copy of which is placed at APB 54-104. The said cash book at page 8 was showing cash in hand balance of Rs. 1,57,62,376/- on 08.11.2016. It is noticed that right from the very beginning Naresh Jain has been explaining the source of deposits of Rs. 72 lakh out of the cash balance in the books of M/s Quick Advertising Company (Q& A 9). Later on in the replies dt 15.05.2019 & 18.12.2019 also, it was submitted that the amount was deposited out of the cash withdrawals made from the bank during F.Y. 2016-17 from time to time. It is not denied that the Assessee has been maintaining regular books accounts which consisted of cash books which were subjected to tax audit. Some undisputed facts are that there was a huge turnover of more than Rs. 43 Crores and upto 12.11.2016 total business receipts are Rs. 30,76,17,041/- on account of advertising receipts and most of the transactions were routed through banking channels, which resulted into cash balance of Rs. 77,66,449/- on 08.11.2016. Pertinently, there is no dispute that the accounts including the cash book were produced before the lower authorities during the assessment & appellate proceedings (relevant extract are at APB Pg. 217 to 219) and were not found any

fault with nor were rejected invoking S. 145 and therefore, as per mandate of that provision, they were binding upon the authorities below. There were aggregate cash withdrawals of Rs. 1.49 Crores made from the bank accounts to meet the day-to-day business requirement as also to make deposits in the bank accounts. The only point raised was that there was a difference of Rs. 79.95 lakhs between the cash balance of Rs. 1.58 Crores shown in the impounded cash book and Rs. 77,66,449/- shown in the regularly maintained cash book on 08.11.2016. The AO vaguely whispered of some manipulation but failed to establish as such. However, the alleged difference was also explained by the assessee stating that various expenses on account of repair & maintenance, business promotion, etc. were pending and could not be entered therein. We agree with the contention of the ld. AR Adv. Mahendra Gargieya that the survey was carried out mid of the year and it is not abnormal if various transactions remained to be recorded. The correct picture can be seen only after the completion of the accounts from all aspects, more particularly when they are audited. The ld. CIT(A) has already dealt with this issue but the revenue has not taken any specific ground on the aspect of the difference of Rs. 79.95 lakhs. His findings could not be negatived by the ld. DR during the course of hearing. But as stated above, otherwise also the aspect of the allegation of difference is nothing but a suspicion and not at all material. To repeat, the AO completely failed to point out any substantial mistake in the regular cash book

produced during assessment proceedings. The ld. CIT(A) called for a detailed remand report from the AO on all the relevant aspects as stated in Para 5.6.3 and pertinently, the AO has clearly certified, after due verification of the entire record including the cash book that all entries in the cash book are duly supported with the bills and vouchers and that the same also shows the entries of the cash deposits in the bank. He also admitted that the cash balance on 13.11.2016 was of Rs. 77,14,269/- (APB 218) against which cash deposit on 13.11.2016 was only of Rs. 72,00,000. The AO has not shown utilization of such cash balance elsewhere. Thus, even assuming for a moment that there was admission made by the assessee (which aspect we are dealing hereinafter) we find no justification behind the addition made on merits of the case, for the reasons stated above. Without prejudice to our findings recorded on merits, we shall now deal with the admission of Shri Naresh Jain. For this purpose reliance has been placed on Q&A - 9, 23 and 30 of his statement recorded u/s 133A on 02.02.2017 (extract), copy of which is placed in the Assessee(s) Paper Book (APB at Pg. 105 to 110). However, we find that such a reliance on the admission seriously suffer from various and legal infirmities and such statement alone (ignoring the explanation of the assessee w.r.t. impounded document, if any) could and should not have been based blindly for making the addition by the AO, for various reasons being Shri Jain/assessee never admitted undisclosed income without any qualification but right from beginning

the case of Shri Jain the assessee was that deposits were out of the balance of cash of M/s Quick Advertising Company (see Q&A 9). Further such statement was made during the survey u/s 133A(3)(iii) r/w S. 131 and do not have binding evidentiary value as is the case of admission made in the statement recorded u/s 132(4) of the Act, we find support from the case of **Paul Matthew's & sons Vs CIT [2003] 263 ITR 101 : 181 CTR 207 (Kerala), S. Kadar Khan Sons [2008] 300 ITR 157 (Madaras) affirmed by Hon'ble Apex court in CIT Vs S. Kadar Khan [2013] 352 ITR 480 (SC) and PCIT Vs. Meeta Gutgutia [2017] 295 CTR 466 (Delhi).** We have dealt with this issue in greater detail in the case Naresh Jain for A.Y. 16-17 vide para 3.2 of our order dt. 5-08-2024 in ITA No.349 (D) and 358 (A)/JPR/2024. In any case, such admission was not at all corroborated by any document found during the survey except the incomplete cash book which itself was not incriminating. Thus, we find no reason as to why the statement admitting the bank deposits as income (that too on behalf of the assessee but not even by the assessee) should be accepted. The alleged admission is claimed to have been retracted by filing affidavit dt. 14.02.2017 (APB 140-143) before the ADIT (INV) on 06.04.2017 i.e within a period around 2 months after the survey when admission was made. The ld. CIT(A) although rejected the claim of the assessee of filing retraction in absence of any evidence brought on record of approaching to the higher authorities. However, he appreciated the contents of the impounded

documents and the explanation furnished by the assessee thereon and recorded independent finding, while granting relief. Therefore, he recorded a categorical finding that the retraction from the earlier statement was with sufficient, credible and corroborate evidence to support the claim of the assessee. We have also carefully considered the claim of filling retraction; however, in view of the contrary claim raised, we are not going into this controversy. However, we find that the ld. CIT(A) was justified in its approach. In the ultimate analysis taking a conspectus view of the entire facts & circumstances and the legal position, we find no perversity in the order of the CIT(A). There is no case made out by the revenue to reverse the findings of the first appellate authority. **Hence this ground No. 1 of the revenue is hereby dismissed.**

4.1 In the ground of appeal no. 2 taken by the Revenue, the deletion of an addition of Rs. 35,550/- made by the AO on account of undisclosed income surrendered during the survey is under challenge. We have carefully considered the rival submissions in the light of the judicial precedents cited by the parties. We have also carefully gone through the findings recorded by the AO in the assessment order and also the detailed findings recorded by the ld. CIT(A). After careful consideration of the entire matter, we find no substance in this ground taken by the revenue in view of the detailed findings recorded by the ld. CIT(A)

and also in view of the fact that admittedly no incrementing material to support this addition was found nor any other document has been relied upon by the AO. This addition appears to be a part of the surrender of Rs. 2 Crore made by the assessee which was firstly retracted and secondly was not otherwise supported by any documentary evidence as such found during survey. Hence this ground No. 2 of the revenue is hereby dismissed.

5.0 In the result, the appeal of the Revenue is dismissed with no orders as to cost.

Order pronounced in the open court on 05/08/2024.

Sd/- Sd/-

(डा॰ मीठा लाल मीना) (संदीप गोसाई)
(Dr. Mitha Lal Meena) (Sandeep Gosain)
लेखा सदस्य / Accountant Member न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 05/08/2024
*Mishra

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

1. The Appellant- The ACIT, Central Circle, Kota
2. प्रत्यर्थी / The Respondent- Nisha Jain, Kota
3. आयकर आयुक्त / The ld CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
5. गार्ड फाईल / Guard File (ITA No.378/JP/2024)

आदेशानुसार / By order,

सहायक पंजीकार / Asstt. Registrar