

**आयकर अपीलीय अधिकरण "C" न्यायपीठ मुंबई में।**

**IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI  
BEFORE SHRI JOGINDER SINGH JUDICIAL MEMBER  
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 820/Mum/2015

(निर्धारण वर्ष / Assessment Year: 2009-10)

ACIT 21(2) R.No. 115, 1 <sup>st</sup> floor, Piramal Chambers, Parel Mumbai-400 012	<b>बनाम/</b>  v.	Oriental Decorators 4 , NSE Building, Next to Worli Sea Face, Worli, Mumbai 400025
स्थायी लेखा सं./PAN : AAAFO6814H		
(अपीलार्थी / <b>Appellant</b> )	..	(प्रत्यर्थी / <b>Respondent</b> )

Revenue by :	Shri Rajat Mittal
Assessee by:	Shri. Hari.S. Raheja

सुनवाई की तारीख /**Date of Hearing** : **20.12.2017**

घोषणा की तारीख /**Date of Pronouncement** : **05.01.2018**

आदेश / ORDER

**PER RAMIT KOCHAR, Accountant Member**

This appeal filed by the Revenue, being ITA No. 820/Mum/2015 for the assessment year 2009-10 is directed against the appellate order dated 10.11.2011 passed by learned Commissioner of Income-tax (Appeals)-29, Mumbai (hereinafter called "the CIT(A)") for assessment year 2009-10, appellate proceedings had arisen before learned CIT(A) from the assessment order dated 28-12-2011 passed by learned Assessing Officer (hereinafter called "the AO") u/s 143(3) of the Income-tax Act, 1961 (hereinafter called "the Act").

2. The grounds of appeal raised by the Revenue in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

" 1) "On the facts and circumstances of the case and in law, the Id. CIT (A) has erred in rejecting the statement of one of the partners Shri Inderjit Singh Khokhar recorded u/s 133A of the I. T. Act during the survey conducted on 19/09/2008 wherein the partner admitted an amount of Rs. 1.20 Cr as additional income during the relevant financial year."

2) "On the facts and circumstances of the case and in law, the Id. CIT(A) has erred in accepting the retraction of the statement of partner recorded u/s 133A almost 1 month after without giving any reasons & cogent evidence of using of threat & coercion by the AO during the survey proceeding."

3) "On the facts and circumstances of the case and in law, the Id. CIT (A) has erred in accepting that assessee had disclosed an amount of Rs. 1.20 Cr during the survey proceeding, though the circumstantial evidence, impounded papers & impugned cash transactions and admission by the assessee, purported that these cash transaction were done in the relevant financial year.

4) For this and other reasons it is submitted that the order of the CIT (A) may be set aside and that of the AO restored.

5) The appellant craves leave to amend or alter any ground or add a new ground which may be necessary."

3. The assessee is an interior decorator undertaking contracts for various corporate clients for the interior decoration. The survey action u/s. 133A was carried out by Revenue on 19.09.2008 and during the course of survey operations, certain loose documents were found and impounded by Revenue. Statement of assessee's firm partner Shri. Inderjit Singh Khokhar was recorded by Revenue during the course of survey operations u/s 133A in which he disclosed and made surrender of an income of Rs. 1.20 crores, as per details below.

Sr.No	Points on which disclosure was made.	Amount of disclosure.(Rs.)
1.	Cash receipts	62,00,000
2.	On account of purchases	20,00,000
3.	On account of labour charges	8,00,000
4.	On account of site expenses	3,67,000
5.	On account of octroi & transportation	1,10,000
6.	On account of wages & salaries	12,77,000
7.	On account of travelling & conveyance	46,000

8,	On account of capital introduced by partners	12,00,000
	<b>Total disclosure</b>	1,20,00,000

The assessee filed return of income on 30.09.2009 declaring total loss of Rs. 44,18,980/- . The assessee ,however, did not included income of Rs. 1.20 crores which was on account of disclosure made during the course of survey operations conducted by Revenue u/s 133A on 19-09-2008 in the aforesaid return of income filed with the Revenue. The assessee during the course of assessment proceedings u/s 143(3) r.w.s. 143(2) submitted that the statement recorded by Revenue during the course of survey operations u/s. 133A of Shri. Inderjit Singh Khokhar was not voluntarily recorded as the same was recorded by Revenue after threatening the partners of the assessee. These facts were also brought by the assessee to the notice of the learned Chief Commissioner of Income Tax-X,Mumbai and Commissioner of Income Tax-18, Mumbai . The assessee also filed writ petition with Hon'ble Bombay High Court which was later withdrawn by the assessee in view of the letter dated 03-11-2008 received by the assessee from CBDT assuring necessary justice. The assessee elaborated in details various facts narrating the sequence of events which took place during the course of survey operations conducted by Revenue u/s 133A. The assessee also brought to the notice of the AO observations of the Hon'ble Bombay High Court while disposing of writ petition on 06-01-2009 , directions to decide entries in the accounts on merits. The assessee , thus , submitted that an income of Rs. 1.20 crores which was declared during the course of survey operations u/s 133A on 19-09-2008 was not included in the return of income filed with Revenue as the said statement was taken forcefully by Revenue from partner of the assessee and the same was retracted by the assessee. It was also submitted that the statement recorded during the course of survey operations u/s 133A does not have any evidentiary value as the officer is not empowered to administer oath.

The AO referred to several additions made during the course of assessment proceedings conducted for AY 2007-08 and 2008-09. The AO also referred to the discrepancies in the books of accounts such as non entry of one bill

impounded during survey in books of accounts and some other discrepancies in the bills etc. . The A.O rejected the contentions of the assessee and made the addition of Rs. 1.20 crores mainly relying upon page no. 175 which was loose paper impounded during the course of survey operations u/s 133A, which is placed in paper book at page no. 155, on the ground that the assessee has voluntarily surrendered and disclosed income of Rs. 62.00 lacs based on this loose paper vide statement recorded of partner Sh. Inderjit Singh Khokhar . The perusal of page 175 of the impounded material during survey operations u/s 133A which is a loose paper reveals that it has notings as under:

*“Seven K-05/4*

*Five K-01/5*

*Eleven-K-5/6*

*Two K-18/06*

*Twelve K-15/7*

*Ten K-12/08*

*Fifteen K-17/08”*

The partner of the firm Mr Inderjit Singh Khokhar stated while replying to question no 11 in his statement recorded during the course of survey operations decoded the word ‘K’ for lakhs and it was stated that these amounts were received on various dates and it is difficult to recollect the sources of these receipts.

The AO observed that the assessee has voluntarily surrendered Rs. 1.20 crores during the course of survey proceedings u/s 133A vide statement of the partner recorded during the course of survey operations and it was not shown by the assessee that the statement was taken forcefully or under coercion except that letters were written to the higher authorities and writ petition was filed with Hon’ble Bombay High Court which was later withdrawn by the assessee. The AO also observed that the statement recorded by Revenue during the course of survey operations u/s 133A is relevant and useful for proceedings under the 1961 Act. The AO referred to decisions of the Courts/ tribunal to come to conclusion that retracted

statements can be acted upon . The AO observed that the disclosure made during the course of survey proceedings is not based solely on the basis of surrender of income made by the assessee but is also based on documents/evidences collected during the course of survey operations and also by earlier assessments in the case of the assessee. It was also observed by the AO that the assessee made disclosure of income as there were defects in maintenance of books of accounts. The AO also noted that the assessee as well its counsel has not co-operated with the Revenue during assessment proceedings and many details/evidences as were sought by the AO was not furnished /made available and to beat the time barring limitation, the assessment was framed based on the material available on records. Thus, the AO made additions to the tune of Rs. 1,20,00,000/- to the income of the assessee on account of amount surrendered by the assessee during the course of survey operations u/s 133A, vide assessment order dated 28-12-2011 passed by the AO u/s 143(3) of the 1961 Act.

4. Aggrieved by the assessment order dated 28-12-2011 passed by the AO u/s 143(3) , the assessee filed an appeal before the learned CIT-A and made detailed submissions. The learned CIT(A) after considering the submissions of the assessee deleted the additions of Rs. 1.20 crores , by holding as under, vide appellate order dated 10-11-2014 passed by learned CIT(A):-

“ 24. I have perused the assessment order passed by the AO as well as the submissions made by the AR of the appellant and all other material placed on record carefully.

25 The AO has made the following additions on account of additional income declared by the appellant during the course of survey u/s. 133A at their premises on 19/09/2008. The heads under which the disclosure was made are as under:-

		Amount of disclosure (Rs)
1	Cash receipts	62,00,000
2	On account of purchases	20,00,000
3	On account of labour charges	8,00,000
4	On account of site expenses	3,67,000
5	On-account of octroi & transportation	1,10,000
6	On account of wages & salaries	12,77,000
7	On account of travelling & conveyance	46,000
8	On account of capital introduced by partners	12,00,000.

	<b>Total disclosure</b>	<b>1,20,00,000</b>
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26. From the perusal of the chart it can be observed that the above additions have been made only on the basis of admission in the statement of the partner of the firm, Shri. Inderjit Singh Khokhar, recorded during the survey u/s 133A. The first major addition made is on account of the loose paper no. 175 found during the course of survey, containing the writings on it as under:-

Seven K - 05/4  
 Five K - 01/5  
 .Eleven K - 5/6  
 Two K - 18/06  
 Twelve K - 15/7  
 Ten K - 12/08  
 Fifteen K - 17/08

30. 'According to AR, ,in the circumstances explained above, the additions made on the basis of these impounded document (page 175) is merely on the basis of assumptions and presumptions in the absence of any corroborative evidence placed on record to prove the cash amounts received by the appellant from different parties. According to AR, no addition made on the basis of the figures mentioned in the impounded documents/papers can be sustained as admitted in the statement recorded during survey, as the appellant has already retracted the said statement receded on 19/09/2008, which was the sole basis of the additions made on account of cash receipts. The nature of the figures mentioned on these documents, in the absence of any supportive acceptance by the appellant, are not a conclusive proof of the unaccounted cash receipts of Rs. 62,00,000/- by the appellant for the period under c nsideration.

31. The above arguments of the AR of the appellant has merit. The contents of the statement recorded during the course of survey were retracted by the appellant vide letter dated 16/10/2008, which is within a month of the survey conducted at the premises of the appellant the contents of the letter of retraction of the statement recorded are as under:-

*In continuation to our letter dated 29/09/2008 relating to the survey action at our office premises on 19/20-09-2008, we' have to state that during the course of survey action statement of our partner Mt Sarabjit Singh Khokar was forcibly taken by the Assistant Commissioner of Income Tax, Circle-18(1). The said statement was written and prepare by the ACIT, Circle 18(1) and our partner was not allowed to read the contents of the same and was forced to sign the same under the circumstances as mentioned in our letter dated 29/09/2008.*

*Thus, we state that the said statement has not been given voluntarily and therefore the statement may be treated as retracted as the disclosure of additional income of Rs.1,20,00,000/- was taken through intimidation and threats given during the survey.*

*As we have already requested not to deposit the four post dated cheque of Rs. 10,00,000/- each taken forcibly from us, we may state that there*

*was no concealed income, which was found during the course of survey and once again request not to deposit the cheque.”*

32. *It is clear from the above retraction letter filed before the AO that the appellant has leveled not only the serious allegation of threat and coercion but also another serious allegation, that the statement was written and prepared by the ACIT Circle 18(1) and the partner of the firm was not allowed to read the contents of the same and was forced, to sign the statement. The AO should have taken such allegations leveled seriously and cross examined the appellant for the allegations leveled. Once the retraction statement was made by the appellant alleging the threat and coercion along with the allegation of forcefully getting the statement signed from the partner of the firm, the AO was to examine the contents of the retraction statement and should have afforded an opportunity to the partner of the firm to explain the circumstances which led to the retraction of the additional income and prove that the contents of the retractions letter were correct. The A.O did not cross examine the appellant on the issue of retraction of statement and thus denying the appellant the opportunity to explain the reasons leading to the retraction of the statement.*

33. *It is also now accepted legal proposition that the Confession made by the assessee in the statement recorded during the proceedings u/s 133A are not conclusive evidence and it is open to the assessee to establish that the contents of the statement recorded during the survey were not true and correct by filing cogent evidence, which in the instant case was the letter filed by he appellant before the ACIT 18(1), Mumbai dated 16/10/2008. Specific provisions of the Income-tax Act as contained under Section 132(4), 133A(5), etc., provide that statements recorded in the income tax proceedings under the above sections have evidentiary value. In the instant case the statements made by Sh. Inderjit Singh Khokar was neither under 132(4) or under section 133A(5) but during the proceedings u/s 133A. Therefore, the evidentiary value of the statements relied upon in assessment by the AO, which has been, retracted subsequently by way of letter of retraction, cannot be accepted.*

34. *On this point, useful reference can be made to the decision of the Supreme Court in the case of Mehta Parikh & Co. v. CIT (1956) 30 ITR 181 where it was held that it will not be open to the revenue to challenge the statements made by the deponent in their affidavits later on, if no cross examination with reference to the statements made in the affidavits is done.*

35. *It is also a well-accepted principle that an admission is not conclusive evidence as to the truth of the matter stated therein. It is only a piece of evidence the relevancy of which is required to be judged basing on the material evidence and circumstances in which it is made.*

36. *In the decision in Pullangode Rubber Produce Co, Ltd. vs. State, of Kerala 1972 CTR (SC) 253: (1973) 91 ITR 18 (SC), the apex Court held that an admission is extremely an important piece of evidence but it cannot be said that it is conclusive and it: is open to the person who made the admission to show that it is incorrect.*

37. *Statement of the surveyed party recorded during the course of survey proceedings under section 133A has no evidentiary value.*

38. *In the case of COMMISSIONER' OF INCOME TAX vs. S. KHADERKHAN SON (2008) 214 ITR (Mad) 589 :(2008) 300 ITR 157 (Mad), it has been held that*

*"Sec. 133A does not empower any IT authority to examine any person on oath, hence, any such statement has no evidentiary value and any admission made during such statement cannot, by itself, be made the basis for addition,"*

39. *In the case of INCOME TAX OFFICER vs. VIJAY KUMAR KESAR, (2010) 231 ITR (Chattisgarh) 165 : (2010) 327 ITR 497 : (2010) 36 DTR 13, recently the Hon'ble High Court has held that*

*"Addition on the basis of statement recorded during survey-Assessee surrendered the cash and value of excess stock found during survey for taxation but did not offer any such amount in his return-He produced his updated books of account and other primary records during the assessment proceedings to explain the cash and stock found at the time of survey but the AO rejected the same solely on the ground that the assessee had made confessional statement during the survey proceedings and surrendered income from undisclosed sources in the form of cash and excess stock and such primary evidence was produced over considerable period - On appeal, CIT(A) accepted the explanation offered by the assessee and the books of account produced by him as the entries in the books were supported by primary evidence - CIT(A) also accepted the explanation that the statements were made by the assessee without understanding the import of the same as he was under stress due to the death of his daughter - Order passed by CIT(A) has been confirmed by the Tribunal-Findings recorded by both the authorities cannot be termed perverse or contrary to record Confession made by the assessee during survey proceedings is not conclusive and it is open to the assessee to establish that the same was not true and correct by filing cogent evidence- Additions rightly deleted"*

*" Additions cannot be made solely on the basis of statement recorded during survey in the absence of any corroborative evidence and supporting material in case where it has been retracted" [ACIT Vs. Prabhu Dayal Kanojia (2011) Tax World Vol. XLV Part-I, page 23, ( January 11)]*

40. *Perusal of the paper placed at page 175 of the impounded material shows that it is a plain paper, showing some words not even figures, without any corroborative evidence to show that the, words written on it represent the money received in cash by the appellant. The contention of the AO is that the appellant had admitted in the statement recorded during the survey that this document represent cash money received from various parties which has not been accounted for in the books of accounts. There is no further evidence regarding the names and addresses of the parties who have paid such amounts in cash and what is the nature of these transactions and further as to whether these are business transactions or some other transactions. During the assessment proceedings, the AO simply relied on this statement and made an addition of Rs.62,00,000/-, on account of cash receipts*

*despite knowing fully well that statement recorded during the survey has already been retracted in the post survey proceedings. Since the statement was already retracted by the appellant the AO, should have made further independent investigations to prove that the appellant had received the above cash payments. But no efforts were made in this direction and the AO proceeded to make the additions on the basis of the admission of additional income in the statement recorded during the course of survey u/s 133A.*

*41 The addition made merely on the basis of statement recorded during the course, of survey, without any further corroborative evidence, cannot be held to be justified. The additions cannot further be sustained in view of the allegation that the disclosure of additional income under the various heads was taken forcefully and the partner of the firm Shri. Inderjit Singh Khokhar was forced to sign the statement without disclosing its content to him. Such categorical assertion made by the appellant appears to be correct looking into the fact that the appellant had brought the facts of the survey proceedings and incidents of their harassment to the knowledge of the higher authorities of the department including Central Board of Directors Taxes and had also filed the writ petition before the High Court of Bombay narrating the events and, irregularities committed by the authorized officer during the course of survey. The AO has not rebutted the above arguments of the appellant in the assessment order, though the AO was made aware of these incidents during the course of assessment proceedings and proceeded to complete the assessment stating that the statement recorded and the additional income admitted during the course of survey proceedings was voluntary.*

*42. As outlined above the various courts have held that the statement recorded during the survey u/s 133A does not have any evidentiary value, as the proceedings u/s 133A does not authorize the officer to take a sworn-in statement. Rather the tax payers are not required to make a statement admitting or denying any concealment of income during the course of survey statement recorded during the survey, if any, cannot be the only basis of making any addition to the income of the assessee unless and until the statement is supported by corroborative evidence. This has been made clear by the CBDT instruction F. No. 286/2/2003-IT(lw) dated 10.3.2003 has ".....*

*Instances have come to the notice of the Board where assesseees have claimed that they have been forced to confess the undisclosed income during the course of the search and seizure and survey operations. Such confessions, if not based upon credible evidence, are later retracted by the concerned assesseees while filing returns of income. In these circumstances, on confessions during the course of search and 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 IT Department. Similarly, while recording statement during the course of search and seizure 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, AOs should rely upon the evidences/materials gathered during the' course of search/survey operations or thereafter while framing the relevant assessment orders."

43. In view of the above CBDT instructions also, it would not be open for an assessing officer to make an assessment merely on the admission of additional income made in the statement recorded during the survey u/s 133A It has been made amply clear in the above instructions that an Assessing Officer should rely solely upon the evidences and materials gathered during the survey for making additions and framing the assessment orders and the statements or confession taken during the survey do not serve any useful purpose.

44, In view of the facts and' circumstances explained above, in my considered opinion, there is no justification for making addition of Rs. 62,00,000/- to the income of the appellant on account of cash receipts as there is no credible evidences placed on record to prove the same. As far as the paper placed at page 175 of the impounded material is concerned, it is a plain paper or a dumb document, showing some words not even figures written on it without any corroborative evidence to show that these represent the money received in cash by the appellant. There is no further evidence regarding the names and addresses of the parties who have paid such amounts in cash and what is the nature of these transactions. In the absence of any such corroborative evidence placed on record by the AO, the addition made amounting to Rs. 62,00,000/- cannot be sustained and hence deleted.

45. The AO has made further additions to the income of the appellant as under:-

On account of pu chases	20,00,000/-
On account of labour charges	8,00,000/-
On account of site expenses	3,67,000/-
On account of octroi & transportation	1,10,000/-
On account of wages and salaries	12,77,000/-
On account of travelling & Conveyance	46,000/-
Capital introduced by the partners	<u>12,00,000/-</u>
Total	<u>58,00,000/-</u>

46. The above additions are also made purely on the basis of the statement recoded during the course of survey proceedings. The extract of the statement leading to the above declaration of additional income is as under:-

"Q.16 Since you have expressed inability to substantiate the purchases as well as expenses narrated below, how the same can be treated as genuine and incurred during the day to business affairs Please explain?"

Ans: The bills/vouchers in respect of purchases and expenses which we are unable to produced are quantified below:-

On account of purchases	20,00,000/-
On account of labour charges	8,00,000/-
On account of site expenses	3,67,000/-
On account of octroi & transportation	1,10,000/-
wages and salaries	12,77,000/-

On account of travelling & boarding 46,000/-

*We admit that these expenses are not properly supported by bills & vouchers. In the absence of any documentary evidence to substantiate the same, in the circumstances to buy peace of mind, I offer a sum of Rs. 46,00,000/- to cover up the possible leakage on the part of the purchases and expenses notified above.*

*Q.17. Your attention is drawn to the ledger a/c of the partners capital a/c. which consists of cash credits amounting to Rs. 6,00,000/- (Rupees Six lakhs only) each in the a/c. of the partners .*

*Ans: The partners have introduced cash in the capital account during the period April to August 2008 which we offer for tax over and above our regular income*

*Q. 18 00 you want to say anything else?*

*Ans: Yes, Whatever stated above is true and correct to the best of my knowledge. We have declared a sum of RS 62,00 000/- (Rupees sixty two lakhs only) on account of cash receipts, Rs. 46,00,000/- (Rupees forty six lakhs) on account of unproved vouchers/expense, Rs.12,00,000 (Rupees Twelve lakhs) on a/c of capital introduced by the partners during the period 01/04/2008 to 31/08/2008 totalling to Rs. 1,20,00,000/- (Rupees One crore Twenty lakhs only) over and above our regular income to buy peace of mind and to avoid any penal action. We anticipated that no penal action will be imposed/initiated upon us taking cognizance of above declaration Further, we the partners of the M/s. Oriental Decorators confirmed that the above statement is given by us without any threat , coercion or undue influence on us."*

*47. It is clear from the above answers to the questions that the above additions have been made by the AO solely based on the statement recorded during the course of survey proceedings u/s 133A. There is no mention of any documentary evidence or any impounded documents in the above statement which could, have led the, AO to conclude that the above income had not been disclosed by the appellant for the period under consideration. The AO has neither placed any evidence on record nor has referred to any impounded material in the assessment order before making the above additions to the income of the appellant for the period under consideration, The AO has not even discussed the different heads under which the additions are made in the, assessment order. What are the unaccounted purchases of Rs. 20,00,000/- and how this figure has been arrived at, has not been discussed by the AO in the assessment order. There is no corroborative evidence to prove the unaccounted nature of the above income, which has been added to the total income of the appellant for the year under consideration. Similarly in respect of the other additions made under the heads unaccounted purchases, labour charges, site expenses, salary & wages and capital introduction by the partners in the capital account etc, there is no corroborative evidence to prove the unaccounted nature of these expenses. All these additions made by the AO are purely on the basis of statement recorded during the course of survey on the basis of the questions and answers at sr. no. 16, 17 and 18 of the statement recorded without any supporting evidences. The AO has not even*

discussed these issues, in the assessment order and straightaway added back total amount of Rs, 58,00,000/- to the income of the appellant firm. Such an action of the AO cannot be justified.

48, As stated above, various courts including the Apex Court have taken a consistent view that the confessional statement made by any person during the course of survey u/s 133A are not conclusive evidence and does not have any evidentiary value. "No addition to the income on the basis of disclosure could be made where assessee had retracted certain income after disclosing it and no material had been found to prove this income during the survey"[Ashok Manilal Thakkar vs ACIT 279 ITR 143 (ITAT-AHM)]. Merely the statement cannot be made the basis for making additions to the income of the assessee while completing' the assessment proceedings. This issue has already been discussed in detail in the preceding paras above.

49, In view of the facts and circumstances explained above, in my considered opinion, there is no justification for making addition of Rs. 58,00,000/- to the income of the appellant on account of unaccounted purchases, labour charges, site expenses, salary, & wages, octroi/transportation, conveyance and capital introduction by the partners, as there is no credible evidence, placed on record to prove the appellant had incurred the above expenses and not recorded in the books of accounts, These additions have been made purely on the basis of statement recorded during the course of survey u/s 133A which was later on retracted. In the absence of any other corroborative evidence placed on record by the AO to support the additions made, such addition made cannot be sustained and hence additions made amounting to Rs. 58,00,000/ is hereby deleted.

50. Regarding the instances of additions made in the case of the appellant for the AY 2007-08 and 2008-09 quoted by the AO in the assessment order, there is no relevance of quoting these instances for the year under consideration as every assessment year is separate assessment year and the principle of res judicata does not apply to the income tax proceedings. The additions made in those years will have no material effect on the proceedings for the year under consideration as the issues in both the years are different. Moreover, it has been informed by the AR of the appellant that the additions made for the AY. 2007-08 and 2008-09 have all been deleted by the appellate authorities subsequently, Therefore quoting the instances of additions made in the case of the appellant in the AY. 2007-08 and 2008-09 by the AO is an exercise in futile.

51. At para 5.4 the AO has made the observation that at page 5 of the impounded material is the account of Deccan Lime Depot, wherein a bill amounting to. Rs. 88,004/- dated 09/09/2008 was not accounted for in the final accounts. From this the AO conclude that the account of the appellant are defective. Similarly, at the page 12 of the impounded material, the AO pointed that there is an account of Pyramid Ply Veneers and Laminates and a bill amounting to Rs, 27,000/- dated 26/05/2000 was not accounted for in the final accounts.

52. Again at para 5.6, the AO has pointed out discrepancies in respect of the account of M/s. Weather Cool Sales. The AO observed

*that the bills of Rs.61,03,450/- and Rs. 21,19,636/- were recorded in the final accounts as Rs.60,40,584/- and Rs. 20,97,804/- respectively.*

*53, While explaining the above discrepancies, the AR of the appellant has contended that as far as the non-accounting of the bills of Rs. 88,004/- and Rs. 27,000/- in the final account is concerned, the same can be due to an oversight which was explained to the survey party during the survey proceedings. During the assessment proceedings also, the same explanation was given to the AO which was accepted by him. Such explanation is placed at page 139 to 152 of the paper book filed during the appellate proceedings.*

*54. The above contention of the AR of the appellant is correct. The appellant had filed the explanations regarding the impounded material which included the explanation in respect of the page 5 and page 11 (wrongly written as 12 by the AO) referred in the assessment order, The explanation offered by the appellant were accepted by the AO and no addition was made by the AO for non-accounting the bills of Rs. 88,004/- and Rs, 27,000/-. Such an action of the AO s not correct. One the above discrepancy was noted and it was found that the above bills have not been accounted for and the expenditure has been incurred, the same should have been added back to the income of the assessee. the only explanation offered by the appellant is that these bills were not accounted for due to oversight. Such an explanation cannot be accepted. The AO is directed to add back the above amounts of Rs.88,004/- and Rs 27,000/ as unaccounted expenditure u/s. 69C of the I.T Act 1961.*

*55. Regarding the other discrepancy of two bills of M/s Weather Cool Sales, of Rs. 61,03,450/- and Rs. 21,19,636/- were recorded in the final accounts as Rs. 60,40,584/- and Rs. 20,97,804/- respectively, the AR of the appellant has contended that this difference in the amounts is on account of Tax Deducted at Source. The AR of the appellant has also filed the copy of the Ledger account of the above party (placed at annexure S of the paper book) wherein it is clear that though the amount of the bill is Rs. 61,03,450/- after deducting TDS of Rs 62,866/-, the net amount credited to the account of the above party is Rs. 60,40,584/-. Similar is the case in respect of the amount of Rs. 21,19,636/-, out of which TDS of Rs. 21,832/- has been deducted and net amount credited to the account of the above party is Rs. 20,97,804/-. So, there is no discrepancies in the above amounts as pointed out by the AO.”*

5. Aggrieved by the appellate order dated 10-11-2014 passed by learned CIT(A), Revenue has come in an appeal before the tribunal.

6. The Ld. DR submitted that the assessee made disclosure of Rs. 1.2 crores during the course of survey operation u/s 133A of the Act, which was subsequently retracted by the assessee. Our attention was drawn to page no. 22 of the learned CIT-A orders wherein the detail of the surrender of income of Rs. 1.20 crore made by the assessee is placed . It was submitted that the statement was given by the assessee at the time of survey operations

conducted by Revenue u/s 133A on 19.09.2008 and retraction was made afterwards on 16.10.2008 . Our attention was drawn to page no. 51 of the paper book wherein the retraction letter dated 16-10-2008 of the assessee is placed . Our attention was also drawn to page no. 34 to 42 wherein the statement of assessee recorded on 19-09-2008 during the course of survey operations u/s 133A is placed . our attention was also drawn to page no. 5 of the assessment order passed by the AO, wherein several discrepancies as were found by the AO in the material impounded and books of accounts were found by the AO. Our attention is also drawn to para 5.4 to 5.6 of the assessment order dated 28-12-2011 passed by the AO u/s 143(3) was drawn. Our attention is also drawn to page no 175 of the impounded material which is placed in paper book at page no. 155 . It was submitted that this impounded document which is a loose paper i.e. page no. 175 of the impounded material was in the handwriting of the assessee and is placed in paper book/page 155. At this point Ld. Counsel for the assessee submitted that this document was prepared at the instruction of the survey team during the course of survey operations wherein the assessee was asked by survey team to prepare the said document. Our attention was also drawn by learned counsel for the assessee to page no. 80-101 of paper book which is a report of the tally data base of the assessee prepared by P systems which shows that there were tampering and manipulation in the computer system and the files were updated/alterd in the mid-night of 19<sup>th</sup>/20<sup>th</sup> September 2008 to manipulate the books of accounts to have the forced confession/admission by way of surrender of income to the tune of Rs. 1.20 crore from the partners of the assessee. It was submitted that inspection of the computer was done on 06-10-2008 by P system which showed last updation of data base entry on 20-09-2008 and alterations were carried out in the midnight of 19/20-09-2008. Our attention was also drawn to page no. 83 to 84 and 86 to show that the files of tally were manipulated and modified during the course of survey operation at the mid-night of 19/20-09-2008 to suit the forced confession from the partner of the assessee. It was submitted that survey started on 19.09.2008 and ended on 20.09.2008 and letter was written by the assessee on 29.09.2008 retracting the said surrender of income through an advocate. It was also submitted that retraction letter dated 16-10-2008 was given before the tax authorities retracting from the surrender of the income to the tune of Rs. 1.20 crore. It was submitted that

the writ petition was filed by the assessee with Hon'ble Bombay High Court on 05-12-2008 which was later withdrawn on 06-01-2009 on the assurance of CBDT that the grievance of the assessee will be looked into. It was submitted that there was forced confession obtained from the assessee vide statement recorded of partner Sh. Inderjit Singh Khokhar on 19-09-2008. It was submitted that page 175 of impounded material was a loose document which is a dumb document and additions have been made without any evidence on record merely based on forced extraction of confession/admission of undisclosed income to the tune of Rs. 1.20 crores. It was submitted that there was some bills which were not entered into the books of accounts when survey took place on 19-09-2008 but it is not a ground for making additions otherwise there is no discrepancy in the books of accounts and whatever differences in the books of accounts as is referred in the assessment order of the A.O. was on account of VAT/TDS for which reconciliation details were submitted. It is also submitted that additions made in preceding year has no relation to the additions made in this year and in any case, those additions stood deleted. It was submitted that no other incriminating document/material was found during course of survey operations u/s 133A which incriminate assessee and no cogent material/evidences were brought on record by Revenue to justify the additions made to the tune of Rs. 1.20 crores except forced confession/admission. The assessee relied upon decision of Hon'ble Delhi High Court in the case of CIT v. Dhingra Metal Works in ITA no. 1111/2010 vide orders dated 04-10-2010.

7. We have considered rival contentions and perused the material on record carefully including orders of the authorities below and case laws relied upon. We have observed that the assessee is an interior decorator undertaking contracts for various corporate clients for the interior decoration. The survey operations u/s. 133A was carried out by Revenue on 19.09.2008 against the assessee and during the course of survey operations, certain loose documents were found and impounded by Revenue. During the course of survey operations u/s 133A, statement of assessee's firm partner Shri. Inderjit Singh Khokhar was recorded by Revenue wherein he disclosed an income of Rs. 1.20 crores in the hands of the assessee, as per details below.

Sr.No	Points on which disclosure was made.	Amount of disclosure.(Rs.)
1.	Cash receipts	62,00,000
2.	On account of purchases	20,00,000
3.	On account of labour charges	8,00,000
4.	On account of site expenses	3,67,000
5.	On account of octroi & transportation	1,10,000
6.	On account of wages & salaries	12,77,000
7.	On account of travelling & conveyance	46,000
8.	On account of capital introduced by partners	12,00,000
	<b>Total disclosure</b>	<b>1,20,00,000</b>

The assessee filed return of income on 30.09.2009 declaring total loss of Rs. 44,18,980/- . The assessee ,however, did not included income of Rs. 1.20 crores which was on account of disclosure of concealed income made during the course of survey operations conducted by Revenue u/s 133A on 19-09-2008 , in the aforesaid return of income filed with the Revenue. The assessee immediately after conclusion of survey u/s 133A vide several written communications to the income tax authorities including CBDT as well during the course of assessment proceedings u/s 143(3) r.w.s. 143(2) had consistently submitted that the statement recorded by Revenue during the course of survey operations u/s. 133A of Shri. Inderjit Singh Khokhar was not voluntarily recorded as the same was recorded by Revenue after threatening/coercing the partners of the assessee. These facts were also brought by the assessee to the notice of the learned Chief Commissioner of Income Tax-X,Mumbai and Commissioner of Income Tax-18, Mumbai immediately after the conclusion of survey on 19/20-09-2008, vide advocate letter dated 29-09-2008 as well retraction letter filed on 16-10-2008 . The assessee also filed Writ Petition with Hon'ble Bombay High Court on 5-12-

2008 which was later withdrawn by the assessee in view of the CBDT assuring necessary justice to the assessee. The Hon'ble Bombay High Court gave liberty to the assessee to raise all contentions during assessment proceedings to explain entries in the account books . It is pertinent to mention that the assessee had immediately after the completion of survey on 19.09.2008 , vide notice of the advocates dated 29.09.2008 written to the Chief Commissioner of Income Tax as well as to the Commissioner of Income Tax intimating about the threats and coercion exerted by officials of Revenue in extracting forced confession/admission vide statement recorded on 19-09-2008 during survey operations u/s 133A which was alleged by the assessee to be involuntary in nature, wherein detailed account of survey proceedings being conducted by Revenue in an objectionable/vitiated manner has been explained by the assessee. It has been explained by the assessee in the said notice of the advocates in nutshell that survey team maltreated partners of the assessee and their father with an objective to force them to prepare loose document marked page no. 175 of the impounded documents during the course of survey proceedings itself to admit and surrender an income of Rs. 62 lacs as concealed income which is placed at paper book page no. 155 placed before the tribunal . It is also alleged by the assessee that fictitious entries were also introduced in the tally software in the computer of the assessee wherein books of accounts were maintained of the assessee at the behest of the survey team wherein books of accounts were manipulated/tampered with and the partner of the assessee was coerced/threatened by survey team to give forced statement to voluntarily disclose an concealed income of Rs. 58 lacs based on such tampering of books of accounts . Hence, in all alleged concealed income of Rs1.20 crore was forced by survey team to be surrendered by the assessee's partner Sh Inderjit Singh Khokhar on behalf of assessee as its concealed income for the previous year relevant to the impugned assessment year The assessee vide letter dated 16-10-2008 also retraced from the statement of its partner recorded on 19-09-2008 during the course of survey action u/s 133A. It is also been explained that there was no discrepancy in the books of accounts although some of the bills were not entered in the books of accounts when survey took place and so far as discrepancies in the books of accounts and bills are concerned , same were explained to be on account of differential due to VAT/TDS. The assessee has also explained that preceding years additions

as made by Revenue stood deleted at appellate forums . All these contentions of the assessee had remained un-rebutted by Revenue even before us. It was also explained by the assessee that Writ Petition was filed with Hon'ble Bombay High Court on 05.12.2008 copy of which is placed at paper book at page no. 54 to 105 but the same was withdrawn by the assessee as the Revenue had assured that grievance of the assessee will be suitably addressed. In the said writ petition, allegations of very serious nature are made by the assessee against survey party and the manner in which survey operations were conducted and it is claimed that assessee was threatened and coerced to give forced statement and to surrender income of Rs. 1.20 crore as well to prepare documents reflecting concealed income to the tune of Rs. 62 lacs vide impounded page no 175 which is placed at paper book 155 . We have also carefully gone through the impounded document marked at page 175 . The said document has following written on it , as under :

*“Seven K-05/4*

*Five K-01/5*

*Eleven-K-5/6*

*Two K-18/06*

*Twelve K-15/7*

*Ten K-12/08*

*Fifteen K-17/08”*

There is no further evidence regarding the names and addresses of the parties in the said impounded documents and also there is no mention as to who paid such amounts in cash and what is the nature of these transactions as is recorded in loose document marked page 175 and further as to whether these are business transactions or some other transactions. The aforesaid relied upon document marked at page 175 , in our considered view is a dumb document and is not sufficient to fasten tax liability unless the same is corroborated by further incriminating material/evidences on record which in the instant case is lacking. It was also explained by the assessee that tally software containing account books was tempered/manipualted in the night

of 19/20-09-2008 to introduced fictitious entries to justify surrender of income to the tune of Rs. 58 lacs. The assessee has also brought report from software / technical experts to substantiate tampering in tally software in the night of 19/20-09-2008 which has remain un-rebutted by Revenue even before us . The Revenue has not chosen to send the said computer system /hard disk for forensic examination by experts to counter aforesaid serious allegations levied by the assessee nor any report of technical expert was called by Revenue to counter allegations of the assessee. These documents were also placed by the assessee before Hon'ble Bombay High Court in the writ petition filed with Hon'ble Bombay High Court. The dismissal of the said writ petition no. 2831 of 2008 vide orders dated 06.01.2009 permitting withdrawal of the writ petition by Hon'ble Bombay High Court is placed in paper book at page no. 106 , wherein Hon'ble Bombay High court permitted assessee to raise all grievances relating to entries in books of accounts before the authorities during the course of assessment proceedings. CBDT vide letter dated 03-11-2008 has also written letter to the assessee assuring suitable action to resolve grievance of the assessee which is placed on record in paper book. The assessee filed its return of income on 30-09-2009 wherein the said surrendered income of Rs. 1.2 crore was not declared as income in the return of income filed with revenue consequent to the survey u/s. 133A. Thus , in nutshell the assessee made the retraction of the said surrendered income of Rs. 1.20 crore vide letters dated 29.09.2008, 16.10.2008 , filing of writ petition with Hon'ble Bombay High Court and several other communications with the tax-authorities including CBDT which are placed in record in paper book filed with the Revenue. It is also pertinent to mention that Revenue chose not to cross examine assessee's partner Mr Inderjit Singh Khokhar pursuant to retraction of the voluntarily disclosure of Rs. 1.2 crores made by the assessee . The Revenue has also chosen not to place on record report of vigilance and other enquiries initiated by it as directed by CBDT. Now under these circumstances , we have to see whether there is sufficient incriminating material on record to justify additions as were made by the AO . The statement of the partner of the assessee Mr Inderjit Singh Khokkar recorded on 19-09-2008 stood retracted by the assessee within 10 days from the date of survey as detailed above . CBDT vide its instruction F.No.286/2/2003-IT(Inv) dated 10-03-2003 had directed its officers to focus on collection of incriminating material

/ evidences during the search and survey operations which could lead to detection of undisclosed income rather than focussing on confession of undisclosed income, as under:-

*“Instances have come to the notice of the Board where assessees have claimed that they have been forced to confess the undisclosed income during the course of the search and seizure and survey operations. Such confessions, if not based upon credible evidence, are later retracted by the concerned assessees while filing returns of income. In these circumstances, on confessions during the course of search and 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 IT Department. Similarly, while recording statement during the course of search and seizure 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, AOs should rely upon the evidences/materials gathered during the course of search/survey operations or thereafter while framing the relevant assessment orders.”*

We have observed that the A.O has referred to minor discrepancies in the books of accounts and the bills which has not been entered in the books of accounts which has been suitably explained by the assessee that these minor variations were on account of VAT/TDS differentials which stood reconciled by the assessee as also it is explained that merely because one bill is not entered in the books of accounts on the day of survey is not sufficient to reject books of accounts and come to adverse conclusions. These minor discrepancies in the absence of other tangible incriminating material against the assessee in our considered view does not warrant any addition as was made by the A.O. . The AO has referred to additions being made in the preceding years which the assessee has explained to be deleted by appellate authorities which has also remained un-rebutted by Revenue even before us and in any case merely because additions on some grounds in preceding years have been made does not warrant that the books of accounts have become unreliable for even the subsequent years as principles of res judicata are not applicable to income-tax proceedings as additions in every year is to be made on its own merits. There were additions made to the tune of Rs. 58 lacs on account of alleged discrepancies in the books apart from as is reflected in loose page 175 to the tune of Rs. 62 lacs as under :

Sr.No	Points on which disclosure was made.	Amount of disclosure.(Rs.)
1.	Cash receipts	62,00,000
2.	On account of purchases	20,00,000
3.	On account of labour charges	8,00,000
4.	On account of site expenses	3,67,000
5.	On account of octroi & transportation	1,10,000
6.	On account of wages & salaries	12,77,000
7.	On account of travelling & conveyance	46,000
8.	On account of capital introduced by partners	12,00,000
	<b>Total disclosure</b>	<b>1,20,00,000</b>

With Respect to the aforesaid additions to the tune of Rs. 58 lacs , there is no whisper in the assessment order as to how these additions are being made in context of the books of accounts by referring to any incriminating material impounded during the survey or even otherwise apart from merely relying on the statement of Mr Inderjit Singh Khokhar which stood retracted. No doubt the statement recorded during the survey is relevant and useful during assessment proceedings for making additions but it raises rebuttable presumption . It is always open for the assessee to rebut the same by bringing on record necessary corroboratory evidences including circumstantial evidences to aver that the statements obtained during survey is vitiated by threat , coercion, fraud or force and is in-voluntary in nature which cannot be acted upon to fasten tax-liability . Then it become

incumbents on the Courts to see whether the said retracted statement inspire confidence to fasten tax liability or is vitiated by coercion, threat , force or fraud which will make it not reliable enough to fasten tax liability on the tax-payer being involuntary in nature . The assessee in the instant case has consistently raised serious allegation against survey team at various forums of the tax authorities including CBDT, Hon'ble Bombay High Court as well before us as to the statement being obtained by threat, force and coercion but Revenue has chosen not to counter these allegations with concrete and material evidences rather a bald statements of denial has been made by Revenue which is not sufficient enough to fasten tax liability in the instant case keeping in view nature of serious allegation raised by the assessee and the entire factual matrix surrounding the case. The assessee has retracted the said statement within few days of the making of the said statement on 19-09-2008 during course of survey proceedings vide advocates letter dated 29-09-2008 as well retraction letter dated 16-10-2008 filed by the assessee. The Ld. CIT-A has rightly appreciated the stand of the assessee in deleting the additions as the revenue has no cogent incriminating materiel with it to justify the addition of Rs. 1.2 crores apart from the forced confessional statement which is involuntary in nature. The loose document impounded being page no 175 during survey operations is held by us to be dumb document which is alleged by the assessee to have been prepared at the me of survey itself at the behest of survey team to justify surrender of concealed income. The said statement as well material on record keeping in view the entire factual spectrum of the case does not inspire confidence to justify the additions as was made by the AO and in our considered view the learned CIT(A) has rightly appreciated the entire factual matrix of the case and deleted the additions vide his appellate order. The assessee has rightly relied upon the decision in the case of CIT v. Dhingra Metal Works in ITA no. 1111/2010 vide orders dated 04-10-2010. Search and Surveys conducted under the provisions of the 1961 Act is an serious infringement of Right to life and liberty of the person searched/surveyed as enshrined in Article 21 of the Constitution of India as it impinges on Right to Privacy and it cannot be carried out in a casual manner except through the procedures established by law which also entailed that there will be no use of coercion, fraud, threat or force during the course of these proceedings in obtaining confessions as well incriminating material to prejudice the persons

searched/survey. What is relevant under these circumstances is to see whether the additions can be made independent of the retracted statement based on incriminating material on record and if it is so possible then there is no need to rely on the retracted statement. The said statement can be used as an aid for making additions based on incriminating material on record and if the additions can be independently sustained based on incriminating material on record, then there is no need to call for the forced confessional statement in aid which stood retracted. The decision of the Hon'ble Supreme Court in the case of Kashmira Singh v. State of Madhya Pradesh reported in 1952 AIR 159 is also relevant so far as factual matrix of the instant case is concerned. In the instant case, if we eschew the said retracted forced confession from record, then we are afraid there are no incriminating material on record to justify additions as was made by the AO which learned CIT(A) has rightly appreciated in deleting the additions vide his appellate orders. The Revenue in the instant case has not even bothered to cross examine the partner of the assessee post retraction of his statement. The retraction has been made by the assessee within 10 days of the aforesaid alleged forced statement and writ petition has also been filed with Hon'ble Bombay High Court. There are several letters written by the assessee to various authorities within Income Tax Department including CBDT alleging that the statement was obtained forcibly by survey team. These correspondences/writ petition sans absence of cogent incriminating material on record to prejudice the assessee speak loudly and points to one and only one irresistible conclusion that Revenue has obtained forced confession from the assessee to surrender income of Rs. 1.20 crores and we have no hesitation in confirming the well reasoned order of the Ld. CIT-A which we affirm/sustain. Thus, Revenue fails in this appeal which stands dismissed. We order accordingly.

8. In the result appeal of the Revenue is dismissed.

Order pronounced in the open court on 05.01.2018

आदेश की घोषणा खुले न्यायालय में दिनांक: 05.01.2018 को की गई।

Sd/-  
(JOGINDER SINGH)  
JUDICIAL MEMBER

Sd/-  
(RAMIT KOCHAR)  
ACCOUNTANT MEMBER

Mumbai, dated: 05.01.2018

*Nishant Verma*  
*Sr. Private Secretary*

copy to...

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench, E
6. Master File

// Tue copy//

BY ORDER

DY/ASST. REGISTRAR  
ITAT MUMBAI