आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ "ई" मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

BEFORE S/SHRI B.R.BASKARAN, AM AND AMARJIT SINGH, JM

आयकर अपील सं./I.T.A. No.2250 and 2251/Mum/2013
(निर्धारण वर्ष / Assessment Year: 2009-10 and 2010-11)

M/s Tribhovandas Bhimji Zaveri (Delhi) Pvt.Ltd., Ground Floor, Somnath Apartments, Ram Mandir Road, Vile Parle (E), Mumbai-400057	**बनाम**/ Vs.	Asstt. Commissioner of Income Tax, Central Circle 9, Room No.806, Old C G O Annexe Bldg, M K Road, Marine Lines, Mumbai-400020
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A. No.2860 and 2861/Mum/2013
(निर्धारण वर्ष / Assessment Year: 2009-10 and 2010-11)

Dy. Commissioner of Income Tax, Central Circle-9, 9th floor, Old CGO Annexe building, M K Road, Mumbai-400020	**बनाम**/ Vs.	M/s Tribhovandas Bhimji Zaveri (Delhi) Pvt.Ltd., Ground Floor, Somnath Apartments, Ram Mandir Road, Vile Parle (E), Mumbai-400057
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

स्था यी लेखा सं./जीआइआर सं./PAN. :AABCT0165H

अपीलार्थी ओर से / Assessee by	S/Shri Deepak Shah Mohit Parekh, M D Dhruva, D.V.Bharati
प्रत्यर्थी की ओर से/Revenue by	Shri Manjunatha R.Swamy

सुनवाई की तारीख / Date of Hearing : 27.08.2015
घोषणा की तारीख /Date of Pronouncement: 04.11.2015

आदेश / O R D E R

Per Bench:

These cross appeals are directed against the orders passed by Ld CIT(A)-37, Mumbai and they relate to the assessment years 2009-10 and 2010-11. All these appeals were heard together and hence they are being disposed of by this common order, for the sake of convenience.

2. The assessee is aggrieved by the decision of Ld CIT(A) on the following issues:-

(a) Assessment Year 2009-10:-

Unexplained investment u/s 69 - Rs.62,21,950/-

(b) Assessment year 2010-11:-

Unaccounted Sales - Rs.31,77,094/-

Enhancement of value of jewellery by Ld CIT(A) -8,54,574/-

3. The revenue is aggrieved by the decision of Ld CIT(A) in deleting the income surrendered by the assessee in the statement given u/s 132(4) of the Act in both the years.

4. The facts relating to the case are set out in brief. The assessee company is engaged in the business of manufacturing, processing and trading of gold and diamond jewellery, silver articles, wrist watches and is carrying on its business from its showroom situated at New Delhi. The revenue carried out search and seizure operations u/s 132 of the Act in the hands of the assessee, its directors, group concerns and related persons on 18-09-2009. Consequent to the search operations, the assessments of the assessment years under consideration were completed u/s 143(3) r.w.s. 153A of the Act.

5. We shall first take up the appeals filed by the revenue, since the issues urged therein arise out of common set of facts. The revenue is aggrieved by the decision of Ld CIT(A) in deleting the addition of Rs.2.00 crores and Rs.4.00 crores made by the assessing officer in AY 2009-10 and 2010-11 respectively. The facts relating to the same are stated in brief. The search conducted at the premises of assessee commenced on 18.09.2009 @ 08.30 hrs and was concluded on 21.09.2009 @ 03.30 hrs. During the course of search, a sworn statement u/s 132(4) of the Act was recorded from one of the directors of assessee company named Shri Nand Kishore Zaveri, wherein he agreed to offer a sum of Rs.2.00 crores in AY 2009-10 and Rs.4.00 crores in AY 2010-11, vide the answer given to question no.43. For the sake of ready reference, the relevant question and the answer given thereto are extracted below:-

> *"Do you want to say anything else?*
> *Ans :- I hereby voluntary agree to declare sum of Rs. Six crores. In this F.Y. 2008-09. I declare Rs. Two crores and in the F.Y. 2009-10 Rs. Four crores. I undertake to pay the taxes as applicable."*

There is dispute between the parties with regard to the purpose of this disclosure. At the time of search, the stock of diamond was inventorized by the search officials at 7531 carats and the same was valued at Rs.35,62,85,369/-, whereas the books of account revealed stock of 7370.29 carats of diamond valued at Rs.30,17,08,349/-. Therefore, the difference of 161.29 carats of diamonds valued at Rs.5,45,77,020/- was taken as excess stock. According to the assessee, the alleged excess stock pointed out by the search officials has forced the director to offer a sum of Rs.6.00 crores as additional income in two years as stated above. It was further submitted that, during the course of post search enquiries also, the assessee made a plea before the investigating officials to assess the entire

amount of Rs.6.00 crores in AY 2010-11, since the excess stock aggregating to Rs.5,45,77,020/- was found during the course of search. Accordingly, the assessee contended that the surrender of Rs.6.00 crores was in connection with the alleged excess stock in diamonds, pointed out by the search officials. However, the assessing officer has taken the view that the surrender of Rs.6.00 crores is independent of the excess stock and the assessee has, for the first time, linked the excess stock with the surrender only in its letter dated 24.12.2009 written to the Assistant Director of Income tax.

6. However, in the returns of income filed in response to notices issued u/s 153A of the Act, the assessee did not offer the above said sums. It filed Returns of Income for AY 2009-10 declaring a total income of Rs.2,36,22,689/- and for A.Y. 2010-11 declaring a total income of Rs.4,45,18,640/-, which did not include the amounts offered in the statement given u/s 132(4) of the Act.

7. Hence the assessing officer called for explanations from the assessee as to why the income of Rs.6.00 crores surrendered in the statement given u/s 132(4) of the Act was not offered to tax. The assessee, vide its letter dated 28.11.2011, offered following explanations:-

> "51. With respect to your Query at Sl. No.51 regarding the disclosure of Rs.6.00 crores during the course of search operation on the basis of statement recorded on oath Shri Nandkishore Zaveri during the course of search operations and in connection therewith, it is submitted that as the raid continued for more than 72 hours at a stretch. At the fag end of the raid tremendous undue psychological pressure was built up to declare some amount to buy peace and more particularly to avoid harsh and uncalled for / untoward consequences and that any failure to comply to such indirect subtle suggestion would make him liable to face dire consequences under the various provisions of Law. Moreover, he was given the impression that they had immense unfettered powers at their disposal with them and this whole situation was explained to him repeatedly. Since this type of peculiar situation has never been

faced by the assessee company or its Director(s) and he was under tremendous pressure with distress and disturbed state of mind after 72 hours of continuous grueling questions/answers and mental pressure, he had no other alternative but to surrender to the illegal dictates of Search Party in duress. Accordingly, he has agreed in any way to voluntarily declare an income of Rs.6.00 crores against so-called alleged difference in stocks worked out by them without even allowing to verify from the financial and other records. After conclusion of the search, our Accounts Dept. has recalculated and rechecked the working of stock inventory prepared by the Dept. and found that there was no tangible difference in the stocks which, too, has also been explained elsewhere in this letter in response to your Query at Sl. No.3 and 4 and, as such, the basis of disclosure itself has no factual legs/foundation to stand/justify and, consequently, the declaration although made voluntarily, have no valid/ cogent ground, basis/ supportive plausible material and as such would be unfounded being indefensible in the eyes of law."

Thus, the assessee claimed that he was forced to agree to surrender Rs.6.00 crores by the search officials and he also agreed for the same under mental pressure or stress and was given under duress. The assessee also submitted that the alleged excess stock has since been reconciled and hence there was no excess stock at all, as alleged by the search officials. Accordingly, the assessee said that it did not offer additional income of Rs.6.00 crores in its return of income. The assessing officer did not accept that the director of the assessee was under stress and a pressure was built upon him by the search team, since the director seems to have maintained his cool throughout the search proceedings. In this regard, the AO made reference to some of the replies given by the director. Further, the AO observed that the assessee has surrendered the additional income voluntarily after having necessary consultation with the accountant and other directors. The AO also took the view that the initial mental pressure that would have built up at the time of commencement of search would have come down on the third day of search. Since the offer for surrender of additional income was made on the third day, it cannot be

said that the offer was made under mental pressure or given under duress. The AO also observed that the search officials did not proceed further, only because the assessee agreed to surrender its undisclosed income. If the director had not surrendered the income, the search officials would have continued the search and could have investigated entire matter on the basis of various facts & circumstances during the course of search itself. In this regard, the AO placed reliance on the decision rendered by the Mumbai bench of ITAT in the case of Hiralal Maganlal & Co. Vs. DCIT (2005)(96 ITD 113), wherein it was held that

> "having made a voluntary declaration on oath and induced the departmental authorities to act upon the same at the time of search, the assessee could not be permitted to turn around later and deny the truth of the aforesaid declarations or the representations made therein."

8. The assessing officer accordingly took the view that there is no nexus between the additional income of Rs.6.00 crores offered by the assessee and the excess stock of diamonds found during the course of search. The AO also expressed the view that the assessee has tried to establish the nexus between the additional offer of Rs.6.00 crores with the value of excess stock only during the course of post search enquiries and not at the time of search. Further, during the fag end of assessment proceedings only, the assessee has pointed out that there are computational errors in the valuation done by the search officials, so that the liability on account of voluntary disclosure of Rs.6.00 crores can be done away with. Accordingly, the assessing officer concluded that the availability of unaccounted stock was within the knowledge of the assessee and the additional income of Rs.6.00 crores was offered only to prevent search officials to investigate further. Accordingly he held that the attempt of the assessee to correlate the voluntary disclosure with computational error in the valuation done by the search officials is totally baseless. The

Assessing officer further held that the assessee did not retract from its offer on the earliest available occasion, but only after fourteen months. He further held that the admission made in the statement recorded u/s 132(4) of the Act falls squarely within the ambit of section 115 of the Indian Evidence Act, 1872 and hence the same is neither open for retraction nor required any further corroboration. Though the assessing officer accepted that the statement given under sec. 132(4) can be rebutted, yet he took the view that the assessee has failed to discharge the burden to show that it was involuntarily made or made under coercion or undue influence or was under mistaken belief or obtained by fraud or misrepresentation. Accordingly, the assessing officer assessed the additional income of Rs.2.00 crores and Rs.4.00 crores offered by the assessee in the sworn statement in AY 2009-10 and 2010-11 respectively.

9. The Ld CIT(A), however, was convinced with the explanations furnished by the assessee and accordingly deleted the addition of Rs.2.00 crores and Rs.4.00 crores referred above in AY 2009-10 and AY 2010-11 respectively. Aggrieved, the revenue has filed this appeal before us.

10. The Ld. D.R submitted that the assessee has offered the additional income voluntarily during the course of search and because of the said surrender, the search officials have concluded the search operations and thus, the assessee has cleverly prevented the search officials to proceed further. Hence, the assessee is not entitled to retract from the statement given by him as held by the Mumbai bench of Tribunal in the case of Hiralal Maganlal (supra). Even if the assessee wishes to retract from the statement given by him, the retraction should be corroborated with some credible material. He further submitted that the Hon'ble Punjab and Haryana High Court has held in the case of Bachittar Singh Vs. CIT (2010)(328 ITR 500) that the statement given during the course of survey

operations conducted u/s 133A, even though does not have evidentiary value, cannot be held to irrelevant. He submitted that the Hon'ble Supreme Court in the case of Padmausundara Rao (Dead) & Ors Vs. State of T.N & Ors (Appeal (Civil) 2226 of 1997 dated 13-03-2002) has held that the Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. It was further held that the Courts cannot read anything into a statutory provision which is plain and unambiguous. Accordingly he submitted that the provisions of sec. 132(4) are very clear that the statement given by the assessee has got evidentiary value and the same cannot be treated as irrelevant.

11. The Ld D.R further submitted the assessee has not only offered the additional income of Rs.6.00 crores voluntarily at the time of search proceedings, but also confirmed the said fact during the course of post search enquiries by pleading that the entire amount of Rs.6.00 crores should be assessed in AY 2010-11. He further submitted that the assessee did not retract from the statement given by him by filing any letter or affidavit. Hence the addition made by the assessing officer should be upheld as held by the Hon'ble Delhi High Court in the case of Bhagirath Aggarwal Vs. CIT (2013)(351 ITR 143). He further submitted that there is no allegation that the statement was obtained from the assessee under coercion or duress and further the assessee did not retract from the statement immediately after the search was over. Hence the assessing officer was justified in assessing the income surrendered in the statement given u/s 132(4) of the Act as held by the Hon'ble High Court of Chhattisgarh in the case of ACIT Vs. Hukum Chand Jain (2011)(337 ITR 238). Accordingly he submitted that the Ld CIT(A) was not justified in

deleting the additions of Rs.2.00 crores and Rs.4.00 crores made respectively in AY 2009-10 and 2010-11.

12. The Ld A.R, on the contrary, submitted that the additions of Rs.2.00 crores and Rs.4.00 crores have been made by the AO in AY 2009-10 and 2010-11 respectively on the basis of the reply given to Question No.43 (referred supra). He further submitted that the tax authorities are not correct in observing that the search officials were precluded from proceeding further by the voluntary offer made by the assessee. He submitted the conduct of the search officials and surrounding circumstances would amply prove this fact. He submitted that search operations commenced at 8.30 am on 18-09-2009 and concluded at 3.30 a.m. on 21.9.2009, i.e., for almost for four days and during the course of search no incriminating material was found except a diary, which was disowned by the assessee. Even the said diary contained transactions for about Rs.62.00 lakhs only. He submitted that it is not correct to state that the search officials did not put pressure or undue influence upon the assessee. The very fact that the assessee was put a lot of pressure or undue influence could be inferred from the conduct of the search officials. He submitted that the recording of sworn statement commenced on the date of commencement of search on 18.09.2009 and on that date 24 questions were posed to the assessee. It was discontinued on 18.09.2009 and again commenced on 19-09-2009 and on that date six questions were posed. It was discontinued at 11.30 p.m on 19-09-2009 and again commenced on 20-09-2009 at 02.30 p.m. Thirteen questions were posed to the assessee on that date. In the sworn statement, it was not stated that the recording of sworn statement was discontinued on 20-09-2009. Further, sworn statement would show that Q.No.42 was put to the assessee on 20th September, 2009 and the next question, i.e., Q.No.43 was asked on 21st September, 2009, meaning thereby, the search officials

were putting pressure upon the assessee without break since 20-09-2009 and continued with recording sworn statement on 21.09.2009. These conduct would show that the search officials did not intend to conclude the search until the additional income was offered by the assessee. Hence, the assessee was forced to offer additional income of Rs.6.00 crores in the answer given to Q.No.43 and immediately thereafter, the search officials concluded the search operation. He submitted that this conduct of the search official would amply make it clear that the confession was obtained by force. He submitted that the search officials did not find any incriminating material, even though the search operations were conducted for almost four days and hence they had no other option but to put pressure upon the assessee.

13. He submitted that the kind of action of the search officials is against the dictates of the CBDT Circular dated 10th March, 2003, wherein the CBDT has clearly instructed that confessional statements should not be obtained. He submitted that the above said conduct would show that the search officials were pressuring the assessee to offer additional income.

14. The Ld A.R further submitted that the assessing officer was not correct in observing that the additional income of Rs.6.00 crores surrendered by the assessee is independent of the alleged excess stock found at the time of search. He submitted that search officials simply stated to the director of the assessee that there was excess stock of diamonds without furnishing a copy of inventory taken by them and thus, they were putting pressure upon the assessee. He further submitted that the fact that the concerned director was not aware of accounting details is well established by the answers given by him to various questions, which has been extracted by the assessing officer in the assessment order as well as available in the sworn statement itself. The Ld A.R submitted that

the director has pleaded his ignorance or stated that he has to consult his accountant/C.A, whenever questions pertaining to accounts were put to him. Hence, when it was repeatedly pointed out that there was excess stock to the tune of Rs.5.45 crores, that too without explaining as to how they have arrived at the excess stock and when the search team was not ready to conclude the search proceedings, the director had no other option, but to make offer under the mistaken belief that the statement of search officials may be correct. Even otherwise, the director did not have any other option, since the search officials were not concluding the search despite the fact that nothing incriminating was found during the course of search conducted for four days.

15. The Ld A.R submitted that the list of inventory taken by the search officials were later scrutinized and it was found that there were glaring mistakes in the computation of weight as well as value of physical stock. Accordingly, the alleged difference between the physical stock and book stock was duly reconciled and submitted to the assessing officer. It is pertinent to note that the assessing officer has accepted the reconciliation statement and hence he did not make any addition towards alleged excess stock. Hence the assessing officer has proceeded to take the view that the additional officer of Rs.6.00 crores is independent of the alleged excess stock and accordingly made the addition.

16. The Ld A.R further submitted that income under the Income tax Act is not computed on the basis of admission alone, but as per the provisions of the Act. He also submitted that the proceeding u/s 132 are quite different from the normal assessments framed u/s 143 (3). Though there is admission during the course of search in the statement recorded u/s 132(4), yet the Assessee can demonstrate that statement was incorrect by leading to cogent evidence and demonstrating that the admission was

incorrect in law as well as on facts. From the statement recorded from the director of the assessee company, it can be seen that the search officials conveniently omitted the difference diamond stock arrived at by them at Rs.5.45 crores and has taken admission without referring to any of the seized material or any transaction giving rise to the income. He submitted that the admission was retracted by the assessee immediately before the ADI and is also deemed to have been retracted in view of return of income filed in pursuance to the notice u/s 153A of the Act. He submitted that though the admission is the best piece of evidence, yet the same is not conclusive and the assessee is well within his right to demonstrate that the same was incorrectly made and not voluntary. In support of his contentions, the Ld A.R placed his reliance upon various case laws, to which we will refer in the subsequent paragraphs.

17. In the rejoinder, the Ld D.R submitted that the assessee did not file any letter or affidavit to retract the statement given by him u/s 132(4) of the Act. However, with regard to the specific query as to whether there was any other material or evidence, other than the alleged excess stock/diary, the Ld D.R admitted that no other incriminating material supporting the additional income was found by the search team.

18. We have heard the rival contentions and carefully perused the materials available on record. Since the impugned addition of Rs.6.00 crores made in the two years under consideration was made on the basis of statement given by the assessee u/s 132(4) of the Act, it is imperative to discuss about the search operations. We have noticed earlier that the search operations commenced at the premises of the assessee on 18-09-2009 at 8.30 a.m. and it concluded on 21.09.2009 at 3.30 a.m., i.e., the search has continued for about four days. During the course of search only one diary was found which contained noting about certain trade

transactions. Further, the search officials have taken inventory of gold and diamond jewellery and valued them. The valuation, according to the search officials, has disclosed excess stock to the tune of Rs.5.45 crores in respect of diamond jewellery and shortage to the tune of Rs.31.77 lakhs in respect of gold jewellery. According to the assessee, the surrender of Rs.6.00 crores was made only in connection with the alleged excess stock of diamonds, but according to the assessing officer, the surrender of Rs.6.00 crores was independent of excess stock found during the course of search.

19. We shall examine the claim of both the parties on this issue first. The Ld A.R has explained the sequence in which the sworn statement u/s 132(4) of the Act was recorded, i.e., it was recorded piece meal by duly noting as to when the recording of statement was commenced and when it was discontinued. As pointed out by the Ld A.R, the question No.42 was posed to the assessee on 20-09-2009 and without discontinuing the recording of statement, the question no.43 was posed on 21.09.2009 in the early morning by about 3.00 a.m. This peculiar fact gives ample scope to infer that the assessee was put pressure to surrender additional income. This inference is further fortified by the fact that the search was concluded immediately after the surrender of Rs.6.00 crores. It is also pertinent to note that the recording of sworn statement commenced on 18-09-2009 and continued upto 21.09.2009, i.e., the search officials were posing questions to the assessee for almost four days. Hence, in our view, it is not correct to say that the assessee was not put any pressure. Continuous grilling of any person, that too for four days, would put lot of mental pressure on any person. Under these set of facts, it is difficult to accept that the disclosure was voluntary.

20. The next question that arises is whether the surrender of Rs.6.00 crores is independent of the alleged excess stock computed by the search officials or not. A careful perusal of the sworn statement would show that the search team did not put any question to the assessee about the alleged excess stock, which was claimed to the huge amount of Rs.5.45 crores. It is quite strange, since normally the explanations of the assessee with regard to any incriminating material/difference would be sought in the sworn statement recorded u/s 132(4) of the Act. However, the assessee has contended before the tax authorities that the search team was pointing out the excess stock without furnishing copy of inventory statement. We have also noticed that the search took place for about four days continuously and only a diary containing certain trade transactions was found. Barring the pocket diary, referred earlier, the only incriminating material that was found during the course of search was the alleged stock difference only. Under these set of facts, it is inconceivable that the assessee would have agreed to offer additional income of Rs.6.00 crores over and above the excess stock of Rs.5.45 crores claimed to have been found during the course of search. The assessee has furnished the details of net profit declared by it from AY 2004-05 onwards at page 34 of the paper book. The average net profit declared by the assessee was seen at around Rs.2.50 crores. It is not inconceivable that an assessee declaring such a huge profit would agree to offer such a huge sum for no reason. Hence, in our view, the surrounding circumstances would show that the surrender of Rs.6.00 crores should have been made only on the basis of alleged excess stock found during the course of search. This view is further reinforced by the fact that the search officials did not unearth any other incriminating material except a pocket diary referred above.

21. We notice that Learned CIT (A) has also held that there is neither any basis for addition nor any material that suggests that the Appellant Company had any undisclosed income based on which the declaration was made. It is well settled proposition that the strict rules of Evidence are not attracted in relation to income tax proceedings and further there is nothing like *res judicata* or estoppel. In order to tax any income under the Income Tax Act, it is required to be shown that such income has accrued to the assessee or is deemed to have accrued. Income is not earned in air or vacuum. The income presupposes receipt or movement of funds, which are revenue in nature. It is settled law that normally, the onus is upon the revenue to show that any income has accrued to the assessee, particularly when the assessee is disputing the claim of the revenue. In this regard, a gainful reference may be made to the decision rendered in the case of Janki Ram Bahadur Ram v. CIT (57 ITR 21 SC). In the instant case, the assessing officer is harping upon the admission made in the sworn statement. He has also alleged that the assessee has stopped the search officials to proceed further during the course of search proceedings. We are unable to agree with the said view of the AO simply for the reason that the search has taken place for almost four days and the entire business premises were under the control of search team. Hence it is not a case that the search was completed within a short period from the time of commencement of search because of surrender of additional income. If no incriminating material supporting the offer of Rs.6.00 crores was found in four days, then it is not correct to say that the search team could have found some other thing, if the offer of Rs.6.00 crores had not been made. Hence, in our view, the assessee was justified in claiming that the additional income of Rs.6.00 crores was offered only in connection with the alleged excess stock.

22. The Ld A.R placed reliance on the decision rendered by Hon'ble Gujarat High Court in the case of Kailashben Manharlal Choksi V/s. CIT (328 ITR 411), wherein it was held as under:

> *"It is true that in normal circumstances this Court would not interfere in the finding of fact arrived at by the authorities. It is, however, to be seen as to whether the explanation tendered by the assessee would be considered by the authorities below.* ***It is also to be seen as to whether an addition made is merely based on the statement recorded by the Assessing Officer under section 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 section 132(4) of the Act at mid night. 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.***
>
> ***23.*** *The main grievance of the Assessing Officer was that the statement was not retracted immediately and it was done after two months. It was an afterthought and made under legal advise.* ***However, if such retraction is to be viewed in light of the evidence furnished along with the affidavit, it would immediately be clear that the assessee has given proper explanation for all the items under which disclosure was sought to be obtained from the assessee...***
>
> ***26.*** *In view of what has been stated hereinabove we are of the view that this explanation seems to be more convincing, has not been considered by the authorities below and additions were made and/or confirmed merely on the basis of statement recorded under section 132(4) of the Act. Despite the fact that the said statement was later on retracted no evidence has been led by the Revenue authority.* ***We are, therefore, of the view that merely on the basis of***

> ***admission the assessee could not have been subjected to such additions unless and until, some corroborative evidence is found in support of such admission. We are also of the view that from the statement recorded at such odd hours cannot be considered to be a voluntary statement,*** *if it is subsequently retracted and necessary evidence is led contrary to such admission. Hence there is no reason not to disbelieve the retraction made by the Assessing Officer and explanation duly supported by the evidence. We are, therefore, of the view that the Tribunal was not justified in making addition of Rs. 6 lakhs on the basis of statement recorded by the Assessing Officer under section 132(4) of the Act. The Tribunal has committed an error in ignoring the retraction made by the assessee." (emphasis supplied.)*

In the instant case also the search was concluded at 3.30 am on 21.09.2009, while it was commenced on 18-09-2009 at 8.30 a.m. As stated earlier, the Question no.42 was posed on 20-09-2009 and the last question, i.e., Question no.43 was posed on 21.09.2009, possibly by 3.00 a.m., without discontinuing the recording of statement on 20-09-2009. Hence, even if the view of the assessing officer that the surrender of Rs.6.00 crores is independent of alleged excess stock is considered to be correct for a moment, the very fact that the surrender was made in odd hours, that too after grilling the assessee for almost four days, would only take us to the conclusion that the assessee should have been pressurized to offer additional income, without which the search team was not ready to conclude the search proceedings. It is further stated that the search was concluded immediately after the surrender of Rs.6.00 crores. A careful perusal of the assessment order would show that the assessing officer has not brought on record any corroborative material to support the surrender of Rs.6.00 crores. Hence, in our view, there is merit in the claim of the assessee that the above said surrender of Rs.6.00 crores was made only on account of alleged excess stock.

23. At this juncture, we may extract the instruction dated 10.3.2003 issued by the CBDT, wherein it has advised the search officials in following term":

Confession of additional income during the course of search and seizure and survey operation

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 & 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, such 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 Department. Similarly, while recording statement during the course of search & 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, Assessing Officers should rely upon the evidences/materials gathered during the course of search/survey operations or thereafter while framing the relevant assessment orders.

Instruction : F. No. 286/2/2003-IT (Inv. II), dated 10-3-2003.

The assessing officer's stand that the surrender of Rs.6.00 crores was voluntary and independent of alleged excess stock is in contradiction to the instruction issued by the CBDT.

24. Before us, the Ld A.R also placed reliance on the decision rendered by Hon'ble Supreme Court in the case of CIT vs. V. MR.P Firm (1965) 56 ITR 67, wherein it was held that the principle of estoppels will not against the Income tax Act. The relevant observations are extracted below:

"The contention is that the assessees having opted to accept the scheme, derived benefit there-under, and agreed to have their discharged debts excluded from the assets side in the balance-sheet subject to the condition that subsequent recoveries by them would be taxable income, they are now precluded, on the principle of "approbate and reprobate", from pleading that the income they derived subsequently by realization of the revived debts is not taxable income. The doctrine of "approbate and reprobate" is only a species of estoppel ; it applies only to the conduct of parties. ***As in the case of estoppel, it cannot operate against the provisions of a statute. If a particular income is not taxable under the Income-tax Act, it cannot be taxed on the basis of estoppel or any other equitable doctrine. Equity is out of place in tax law; a particular income is either eligible to tax under the taxing statute or it is not. If it is not, the Income-tax Officer has no power to impose tax on the said income****."*

(emphasis supplied.)

Hence, mere admission of additional income would not automatically entitle the assessing officer to assess the same, if the assessee disputes the same subsequently with corroborative evidences. Hence, in our view, the assessing officer was not justified in placing sole reliance on the provision of section 115 of the Indian Evidence Act.

25. The Ld D.R as well as the assessing officer has reiterated that the admission was made in the sworn statement recorded u/s. 132(4) and the same is admissible in evidence. A careful perusal of provisions of sec. 132(4) as well sec. 292C would show that the said provisions state that the statement taken u/s 132(4) "may be used in evidence in any proceeding under the Act". Thus, this provision gives a discretion to the assessing officer not to use the statement in evidence. In fact, the assessing officer himself has observed that the admission made under sec. 132(4) can be rebutted. The Hon'ble Supreme Court in the case of Pullangode Rubber Products Company Limited Vs. State of Kerala (91 ITR

18) 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"*.

26. The Hon'ble Bombay High Court has dealt with this issue in case of Balmukund Acharya (310 ITR 310) and has held as under:-

> ***"31.*** *Having said so, we must observe that the Apex Court and the various High Courts have ruled that the authorities under the Act are under an obligation to act in accordance with law. Tax can be collected only as provided under the Act. If any assessee, under a mistake, misconceptions or on not being properly instructed is over assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected (see S.R. Kosti v. CIT [2005] 276 ITR 165 (Guj.), CPA Yoosuf v. ITO [1970] 77 ITR 237 (Ker.), CIT v. Bharat General Reinsurance Co. Ltd. [1971] 81 ITR 303 (Delhi), CIT v. Archana R. Dhanwatey [1982] 136 ITR 355 (Bom.).*
>
> ***32. If particular levy is not permitted under the Act, tax cannot be levied applying the doctrine of estoppel. (See Dy. CST v. Sreeni Printers [1987] 67 SCC 279.***
>
> ***33. This Court in the case of Nirmala L. Mehta v. A. Balasubramaniam, CIT [2004] 269 ITR 1 has held that there cannot be any estoppel against the statute. Article 265 of the Constitution of India in unmistakable terms provides that no tax shall be levied or collected except by authority of law. Acquiescence cannot take away from a party the relief that he is entitled to where the tax is levied or collected without authority of law.*** *In the case on hand, it was obligatory on the part of the Assessing Officer to apply his mind to the facts disclosed in the return and assess the assessee keeping in mind the law holding the field."*

The Hon'ble Calcutta High court in case of CIT V. Bhaskar Mitter (73 Taxmann 437 has held as under:

> ***"8.*** *The controversy raised in the second question is as to whether the annual letting value of the property determined by the Tribunal could be a figure lower than that returned by the assessee. The principles for determining the annual letting value under section 23 are now well-settled and if the value returned is not in accordance with such principles, it is open to the assessee to contend that the value as may be determined upon correct application of the law should form the basis of assessment.* ***The revenue authorities, in our view, cannot be heard to say that merely because the assessee has returned a figure which is higher than the annual value determined in accordance with the correct legal principles, such higher amount and not the correct amount should be lawfully assessed. An assessee is liable to pay tax only upon such income as can be in law included in his total income and which can be lawfully assessed under the Act. The law empowers the ITO to assess the income of an assessee according to law and determine the tax payable thereon. In doing so he cannot assess an assessee on an amount, which is not taxable in law, even if the same is shown by an assessee. There is no estoppel by conduct against law nor is there any waiver of the legal right as much as the legal liability to be assessed otherwise than according to the mandate of the law*** *(sic). It is always open to an assessee to take the plea that the figure, though shown in his return of total income, is not taxable in law. The Tribunal, therefore, in our view did not commit any error in directing to fix the correct annual letting value of the premises in question, in accordance with the provisions of section 23 of the said Act with reference to the municipal valuation, although such sum was lower than the figure shown by the assessee in his returns of total income."*

27. In the instant case, the Ld CIT(A) has given a clear finding that the alleged excess stock pointed out by the search officials has since been reconciled by the assessee. It is also pertinent to note that the assessing officer did not make any addition on account of alleged excess stock, meaning thereby, he was also satisfied with the reconciliation statement furnished by the assessee. We have already taken the view that the admission of Rs.6.00 crores is related to the alleged excess stock found

during the course of search. We have also noticed that the assessee has reconciled the difference in stock, meaning thereby, the assessee has rebutted the admission made by it, which was under pressure and mistaken belief.

28. Now we shall examine the facts available on the case laws relied upon by Ld D.R. In the case of Hukum chand Jain (supra), the assessee therein failed to discharge the onus of proving that concession made by him u/s 132(4) was as a result of intimidation, duress or coercion or that same was made as a result of mistaken belief or law. However, in the instant case, we have already held that the conduct of the proceedings shows that the search team has put up pressure upon the assessee and further the assessee was under mistaken belief that there was actually excess stock. Hence the assessee has agreed to surrender Rs.6.00 crores under the mistaken belief that there was alleged excess stock. In the case of Bachittar Singh (supra), the revenue carried out a survey operation u/s 133A of the Act and the addition was made on the basis of statement recorded during the course of survey proceedings. The assessee contended that the statement taken during the course of survey does not have evidentiary value. However, a careful perusal of the facts available in the above said case would show that the assessee therein did not produce any record, books of account or income tax record to rebut the presumption. Hence the decision was taken against the assessee. However, in the instant case, the assessee has maintained books of account and further the alleged difference in stock has been duly reconciled. In the case of Bhagirath Aggarwal (supra), the Tribunal has given a specific finding that there was no allegation of any threat or intimidation having been meted out by the revenue authorities. This factual aspect distinguishes the facts prevailing in the instant case. The decision rendered by the Hon'ble Supreme Court in the case of

Padmausundara Rao was relied upon by Ld D.R only to reiterate certain legal principles.

29. Hence, in our view, the various case laws relied upon by Ld D.R is either distinguishable on facts or not applicable to the facts prevailing in the instant case.

30. In view of the foregoing discussions, we are of the view that the Ld CIT(A) was justified in deleting the addition of Rs.2.00 crores and Rs.4.00 crores made by the assessing officer in AY 2009-10 and 2010-11 respectively.

31. We shall now take up the appeal filed by the assessee for assessment year 2009-10. The solitary issue urged in this appeal relates to assessing a sum of Rs.62,21,950/- u/s 69 of the Act.

32. The facts relating to the same are discussed in brief. During the course of search a pocket diary consisting of five pages was found. It contained the name of "Naresh Gupta" and below that following three items were found noted:-

Cash	30,00,000	13.10.08
Total amount	37,88,318	Voucher clear YKZ

Pending	7,88,318	
50 chains	10,76,720	15.10.08

	18,65,038	
28 H Set	13,56,912	

	32,21,950	

In the sworn statement taken u/s 132(4) of the Act, the director of the assessee disowned the diary. In fact, in the sworn statement, he was asked only about Rs.30.00 lakhs stated in the above said noting and no question was asked about the remaining items. However, the addition

was made by the AO with regard to the remaining items only. During the course of assessment proceedings, the AO took the view that the amounts noted as Rs.37,88,318/- + Rs.10,76,720/- + Rs.13,56,912/- represents purchases of gold jewellery, since the descriptions stated as "chains", "H set" corresponds the items dealt in by the assessee. Further the abbreviation "YKZ" tallied with the name of another director named "Yashovardan Kishore Zaveri". Accordingly, the assessing officer assessed the aggregate amount of three items mentioned above, viz., Rs.62,21,950/- as unexplained investment in the hands of the assessee. In the appellate proceedings, the assessee stood by its contentions that the pocket diary did not belong to it. However, the Ld CIT(A) was not convinced with the said contentions, since the provisions of sec. 132(4A) places presumption against the assessee. Accordingly he confirmed the assessment of Rs.62,21,950/-, referred above.

33. Before us, the Ld A.R vehemently argued that the pocket diary was a dumb document and hence the same cannot be relied upon. He submitted that the director of the assessee was questioned about the entry relating to Rs.30.00 lakhs only and no question was asked about other entries. He further submitted that the assessee was not aware of any person by name "Naresh Gupta" and the assessing officer has also not taken any steps to locate or make enquiries with Naresh Gupta. Further, Shri Yashovardan Kishore Zaver", whose name is considered to be the abbreviation of "YKZ" has filed an affidavit explaining that the same is not related to him. Accordingly he submitted that the Ld CIT(A) was not justified in confirming the addition of Rs.62,21,950/- made on the basis of a dumb document.

34. On the contrary, the Ld D.R submitted that the entries found in the pocket diary tallied with the transactions carried on by the assessee and it

also contained the name of one of the directors and hence the same cannot be considered as dumb document. He further submitted that the assessee could not rebut the presumption placed upon it u/s 132(4A) of the Act. He submitted that the assessee has merely disowned the pocket diary and the same cannot be considered as rebuttal of presumption placed u/s 132(4A) of the Act.

35. We have heard rival contentions on this issue and perused the record. There is no dispute with regard to the fact that the pocket diary was found in the premises of the assessee. There cannot be any dispute that the entries noted down in the diary was in accordance with the normal trade transactions carried on by the assessee. In view of the presumption enshrined in sec. 132(4A) of the Act, the burden to disprove the documents found during the course of search lies upon the assessee. We notice that the assessee has simply disowned the document, but did not offer any other explanation. Hence, we agree with the contentions of the Ld D.R that the assessee did not discharge the burden placed upon it u/s 132(4A) of the Act.

36. At the same time, we notice that the tax authorities themselves have stated that the transactions noted down in the diary tallies with the jewellery items dealt with by the assessee. In fact the noting of "50 chains" and "28 H set" , in our view, could only lead to the inference that they could only be trade transactions. Hence the inference drawn by the assessing officer that it may represent "unexplained investment", in our view, does not fit with the noting made in the pocket diary. It is possible that the assessee, being a dealer in jewelleries, could have either purchased or sold 50 chains and 28 H sets, as nobody will purchase such a huge quantity of chains and other sets as investment. Hence, in our view, the transactions noted down in the pocket diary could possibly be in the

nature of trade transactions only. Since the assessee has not discharged the presumption and further since the assessing officer has failed to substantiate the addition as unexplained investment, in our view, this issue could be resolved only via media. We have noticed that the transactions noted down in the diary could possibly be in the nature of trade transactions. In that case, it may be possible to infer that the assessee might not have accounted these transactions in the books of account. Under these set of facts, in our view, the possible view could be that the assessee might have also sold the gold jewellery noted down in the pocket diary without recording the same in the books of account. Though there is no supporting evidence in support of the above said inference, in the absence of proper explanations from the assessee and also in the absence of proper case being made out by the AO, we have no other option but to proceed on the inference cited above. In this back ground, in our view, this issue could be resolved by estimating the gross profit that would have been earned on sale of the above said jewelleries. The assessee has furnished details of sales and gross profit ratio in page 34 of the paper book. We notice that the assessee has declared gross profit rate of 8.69% in AY 2009-10. Accordingly, we are of the view that the gross profit on Rs.62,21,950/- computed @ 9% should be assessed in respect of the transactions noted down in the diary and the same works out to Rs.5,59,975/- or say Rs.5,60,000/- (rounded off). Accordingly, we modify the order of Ld CIT(A) on this issue and direct the AO to restrict the addition to the above said sum of Rs.5,60,000/- on this issue.

37. We shall now take up the appeal filed by the assessee for assessment year 2010-11. The issue arising therein is whether the Ld CIT (A) was justified in facts and in law in converting the addition made by the AO from "unaccounted sales" into "unexplained stock" and in that process enhancing the addition in violation of sec.251(2) of the Act.

38. The facts relating to the above said issue are discussed in brief. During the course of search, the physical stock of gold jewellery was found to be 93051.300 grams as against the book stock of 95365.600 grams. The assessing officer treated the difference between the two as unaccounted sales and accordingly assessed a sum of Rs.31,77,094/-. Post search, the assessee furnished a reconciliation statement, wherein it was pointed out that the physical stock should be increased by following items, since they have not been considered by the search officials:-

(a)	Old gold	3686.350
(b)	Broken pieces	233.050
(c)	Standard gold bars	709.400
(d)	Receivable from karigars	622.300
		5251.100

The assessee further submitted that it had received following items on sale or return basis from its suppliers and hence they should be excluded from the book stock:-

(a)	M/s Rajeev Jewels, Rajkot	2,028.000
(b)	M/s K.K. Exports, New Delhi	233.150
		2,261.150

By making adjustments of above said two categories, the assessee arrived at the physical stock of gold at 96,051.250 (93051.300 (+) 5251.100 (-) 2261.150). The book stock was 95365.600 and hence the assessee worked out the excess stock of gold at 685.650 grams. The assessee submitted that the difference of 685.650 grams represents only 0.7% of the physical stock and it may represent weight difference etc.

39. The AO did not accept the reconciliation statement filed by the assessee. In the sworn statement, the director of the assessee had stated that the jewelleries belonging to the assessee were not kept with outsiders

and similarly the jewelleries belonging to others were not available with him. Hence the assessing officer held that the shortage in the stock of jewellerry (95365.600 less 93051.300) is to be treated as unaccounted sales and accordingly assessed a sum of Rs.31,77,094/- as income of the assessee.

40. In the appellate proceedings, the Ld CIT(A) partially accepted the reconciliation statement filed by the assessee, i.e., he accepted that the search team did not consider the old gold, broken pieces, standard gold bars and items receivable from karigars aggregating to 5251.100 grams. By including the same, the physical stock worked out to 98302.400 grams. However, the Ld CIT(A) did not accept the claim of the assessee that it had received 2261.150 grams on sale or return basis from suppliers. Accordingly, the Ld CIT(A) held that the physical stock should be taken at 98,302.400 and the difference between the above said physical stock and book stock of 95365.600 should be assessed as income of the assessee as unexplained investment u/s 69A of the Act. It is pertinent to note that the Ld CIT(A) did not consider it necessary to give an opportunity to the assessee as mandated in sec.251(2) of the Act on the following reasons:-

> "4.7.8 *In view of the above factual legal analysis, I am of the firm view that the actual stock found on the datge of seartch was to be calfulated at 98302.400 gms as against which the admitted stock as per appellants books of accounts as on th same date was 95365.600 and therefore an addition of 2936.800 gms of excess stock is to be made and to that extent the addition needs to be rvised.*
>
> *4.7.9 However, in view of the decision being given in respect of ground nos. 5(a)to 5(d), overall there will be no enhancement of income and hence there will be no requirement of giving an opportunity to the appellant as the modification of excess stock leads to no enhancement of income. In any case, the appellant is fully aware of the claim being made by it, which is not backed by any seized documents and hence, there will be no denial of principles of natural justice in this case which is the*

sole criteria for affording an opportunity to the appellant in case the income is enhanced. Hence, ground nos 4(a)to 4(c) are dismissed subject to above observation."

However, it is pertinent to note that the addition of Rs. 31,77,094/- made by the assessing officer as "unaccounted sales" was deleted by the Ld CIT(A) and instead, he directed the AO to make addition towards excess stock as unexplained investment and the same has resulted in an addition of Rs.40,31,668/- .

41. It is pertinent to note that the department has not preferred any appeal against the decision of the Ld CIT(A), meaning thereby, the addition of Rs.31,77,094/- made by the AO as "unaccounted sale" has since been reversed by Ld CIT(A) and the same has been accepted by the revenue and the said decision of Ld CIT(A) has attained finality. Hence, we are now concerned with the addition of Rs.40,31,668/- made by the Ld CIT(A) as unexplained investment u/s 69A of the Act.

42. From the discussions made supra, we notice that the Ld CIT(A) did not accept the submission of the assessee that it was holding jewellerires belonging to the suppliers weighing 2261.150 grams, which were sent by them on sale or return basis. From the paper book, we notice that the assessee has furnished the delivery challans sent by the two suppliers cited above and also the purchase bills subsequently raised by them. We notice that the tax authorities has discarded these evidences as self serving documents on the reasoning that (a) the delivery challans were not found at the time of search and (b) the director of the assessee did not state these facts in the sworn statement.

43. We notice that the tax authorities did not opt to examine the suppliers before rejecting the evidences furnished by the assessee. A careful perusal of the sworn statement would show that the director of the

assessee was not aware of minute details that were asked by the search team and whenever such kind of questions were posed, he has replied that he needs to consult his accountant. Hence, in our view, it may not be correct to place full reliance on the statement given by the director to the effect that the gold stock belonging to others were not available with the assessee. We notice that the director had also stated that the gold stock belonging to the assessee were not kept with others. However, the Ld CIT(A) has accepted that the gold stock belonging to the assessee was available with the karigars, which is in contradiction to the stand taken by him when the assessee submitted that it has received jewelleries on sale or return basis from the suppliers. Thus, we notice that the Ld CIT(A) has chosen to accept the explanations on pick and choose basis, which is not permissible. Since the documentary evidences furnished by the assessee in support of claim of receipt of goods on sale or return basis have not been controverted by the tax authorities, in our view, the explanation of the assessee should be accepted. In the reconciliation statement prepared by the assessee, the assessee has arrived at excess stock of 685.650 grams. During the course of arguments, the Ld A.R submitted that the weight of physical gold was measured by the search team themselves and hence there is always possibility of weight difference. Accordingly it was submitted that the excess stock of 685.650 grams, which work out to 0.7% of the physical stock could be the result of weight difference or on account of other minor factors like beeds, alloys, tie slips etc. In our view, there is merit in the said explanations of the assessee that the above said minor difference should be ignored, in the facts and circumstances of the case.

44. On legal grounds also, we find merit in the contentions of the assessee. The Ld CIT(A) while altering the head of income and also in enhancing the addition has violated the provisions of sec. 251(2) of the Act

in not providing opportunity to the assessee. Further, in the following cases, it has been held that the Ld CIT(A) was not entitled to bring in any new sources of income:-

a). CIT v. Shapoorji Pallonji Mistry (44 ITR 891 SC)
b). CIT v Rai Bahadur Harduttroy Motilal Chamaria (66 ITR 443)
c). CIT v. Union Tyres (240 ITR 556 Del HC)
d.) CIT v. Sardarilal & Co. (251 ITR 864 Del HC FB).

45. In view of the foregoing discussions, we do not find merit in the decision of Ld CIT(A) and accordingly direct the assessing officer to delete the addition of Rs.40,31,668/- directed to be made by the Ld CIT(A).

46. In the result, the appeal filed by the assessee for assessment year 2009-10 is partly allowed and the appeal filed for AY 2010-11 is allowed. The appeals filed by the revenue for AY 2009-10 and 2010-11 are dismissed.

Pronounced accordingly on 04 th Nov, 2015.

घोषणा खुले न्यायालय में दिनांकः 04th Nov, 2015 को की गई ।

Sd **sd**

(AMARJIT SINGH)
JUDICIAL MEMBER

(B.R. BASKARAN)
ACCOUNTANT MEMBER

मुंबई Mumbai: 04th Nov, 2015.

व.नि.स./ SRL , Sr. PS

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned
4. आयकर आयुक्त / CIT concerned

5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai concerned
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

True copy

सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai