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IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B" BENCH
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

vkvkla- 6320@eaqcbZ@2011 ¼fu-o- 2009&10½

ITA NO.6320/MUM/2011 (A.Y.2009-10)

Dy. Commissioner of Income Tax .....vihykFkhZ / Appellant
Central Circle 1(3), Mumbai,
Room No.905, 9th Floor, Old CGO Bldg.
M.K.Road
Mumbai-400 002

cuke Vs.

M/s NIBR Bullion Pvt. Ltd .....izfroknh / Respondent
78-A, Shaikh Memon Street,
Mumbai-400 002
PAN No.AABCN7138C

vihykFkhZ }kjk@Applicant by	:	Shri C. T. Mathews & Ms. Samruddhi Hande
izfroknh }kjk@Respondent by	:	Shri Dharmesh Shah & Ms Mitali Gopani

lquokbZ dh frfFk@Date of hearing	:	09/09/2022
?kks"kkk dh frfFk@Date of pronouncement	:	05/12/2022

vkns'k / ORDER

PER VIKAS AWASTHY, JM:

This appeal by the Revenue is against the order of Commissioner of Income Tax Appeals-36 Mumbai [hereinafter referred to as "the CIT(A)"], dated 30/05/2011 for the assessment year 2009-10.

2. The Revenue in appeal has raised solitary issue in ground No. 1 of the appeal, the same reads as under:

> *"On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the undisclosed income of Rs.8,18,19,881/- (being the difference between the sum of Rs.12,00,00,000/- disclosed as income in statement of the assessee recorded u/s 132(4) and the income disclosed) on the ground that the assessment was completed on the basis of statement without appreciating the evidentiary value of the statement of the assessee recorded u/s 132(4) and that there was no evidence of mistake of estimation or wrong interpretation of law justifying retraction according to the various court decision, by the assessee after a substantial period of time."*

3. The brief facts of the case as emanating from records are: The assessee is engaged in business of dealing in Bullion. A search action u/s 132 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") was carried out on NIBR Bullion group including its Directors and Associates on 25/09/2008. During the course of search, following incriminating materials were found and seized:

> *"i) Loose paper files A-1 to A-5 seized from the residence of Shri Ajay C. Arora.*
>
> *ii) Documents inventorised in A-1 and back up of pen-drive taken on CD seized from the residence of Shri Shrawan Kumar Bajaj, a close associate of this group."*

4. During search proceedings, statement of Ajay C. Arora, Director of the assessee company was recorded u/s 132(4) of the Act. In his disclosure statement, he offered Rs.12 crores towards undisclosed income in financial year 2008-09 to cover up discrepancies in the seized documents, digital data, stock, excess jewellery, etc. Thereafter, Ajay C. Arora retracted from his statement and restricted his disclosure to Rs.3.75 crores in respect of discrepancies aforesaid. The assessee filed his return of income on 22/12/2009 declaring total income of Rs.3,85,86,257/- including additional income of Rs.3.75 crores as a result of

search. The Assessing Officer (AO) vide assessment order dated 31/12/2010 passed u/s 143(3) of the Act assessed total income of assessee at Rs.12,10,70,727/-. The AO rejected assessee's retraction of statement and after making addition on various accounts as unaccounted stock, unaccounted investment, unaccounted commission, GP addition on unaccounted cash, GP addition of unaccounted purchases etc. made addition of the balance disclosure Rs.8,18,19,881/- (Rs.12,00,00,000/- – Rs.3,81,80,119/-) made u/s 132(4) of the Act. Aggrieved by the assessment order, the assessee carried the issue in appeal before the CIT(A). The CIT(A) deleted the addition of Rs.8,18,19,881/- made on account of disclosure statement u/s 132(4) of the Act. Against the aforesaid findings of the CIT(A), the Revenue is in appeal.

5. Ms. Samruddhi Hande appearing on behalf of the Revenue submits that in the instant case assessment is made consequent to search. During the course of search, statement of Ajay C. Arora was recorded u/s 132(4) of the Act on 26/09/2008. In his statement, he offered an additional income of Rs.12 crores for the Financial Year 2008-09 corresponding to the assessment year 2009-10. In his statement, he confirmed that declaration has been made after consulting the other two Directors of the assessee company that is Harmesh C. Arora and Anil C. Arora. Again on the 19/11/2008 Ajay C. Arora confirmed that additional income of Rs.12 crores is offered on the basis of seized documents and other discrepancies which may be found in the books of account. The learned Departmental Representative (DR) referred to the extract of statement of Ajay C. Arora in para 14 of the assessment order. The learned DR submits that Ajay C. Arora retracted from the statement after more than 6 months vide letter

dated 06/05/2009. The learned DR submits that the CIT(A) has erred in accepting the retraction statement and directing the AO to delete the addition made on the basis of disclosure u/s 132(4) of the Act. Once, the disclosure has been made after duly consulting the other Directors of the company and the disclosure was reiterated in the subsequent statement, there is no valid reason for the assessee to retract from the said statement. The learned DR prayed for reversing the findings of the CIT(A) on this issue and confirming the addition based on the disclosure.

6. Per Contra, Shri Dharmesh Shah appearing on behalf of the assessee vehemently defended the findings of CIT(A) in deleting the addition solely made on the basis of disclosure statement without any corroborative evidence. The learned Authorised Representative (AR) submits that a perusal of the assessment order would show that the AO made addition of Rs.3,81,80,119/- on the basis of seized material. The learned AR asserted that once the addition has been made by the AO separately under different heads after examining the seized material, no further addition on disclosure was required to be made. The disclosure was made to cover all the discrepancies. The learned AR submitted that the retraction was made by the assessee only after the assessee was provided copy of the documents seized during search. In retraction statement, the assessee restricted disclosure to Rs.3.75 crores which is approximately the same, for which the AO made addition in respect of different items. The learned AR referred to the observations of the CIT(A) in para 46 and 52 of the impugned order, wherein, the CIT(A) categorically mentioned that addition of Rs.8,18,19,881/- is based only on the statement of the assessee, there is no

corroborating documentary evidence to match the said disclosure. The learned AR placed reliance on the CBDT Circular No.286/2003 dated 18/02/2014 to contend that addition cannot be made based on mere confession of additional income during the course of search operation. The learned AR in support of his submissions placed reliance on the following decisions:

i. CIT v. Ashok Kumar Jain [369 ITR 145 (Raj.)]
ii. Shree Ganesh Trading Co. v. CIT [257 CTR (Jharkhand) 159]
iii. ACIT v. Ghatge Patil Industries Limited and vice-versa [ITA No. 1281 to 1284/Pun/2016] dated 19.09.2018
iv. Avishkar Infrastructure Pvt. Ltd. v. DCIT [ITA No.7165/MUM/2011] dated 17.06.2015.

7. The learned DR rebutting the arguments made on behalf of the assessee pointed that the copies of the seized documents were provided to the assessee on 19/11/2018 and the retraction statement was filed by the assessee on 06/05/2009 i.e. that almost after 6 months from the date of providing the documents. Such a long delay in making the retraction statement clearly shows that it is an after thought. Hence, the AO rightly rejected retraction statement.

8. We have heard the submissions made by rival sides and have examined the orders of authorities below. Undisputedly, during the course of search in a statement recorded u/s 132(4) of the Act, Ajay C. Aroraj, Director of the assessee company offered Rs.12 crores to cover up discrepancies in the seized documents. During the course of assessment proceedings, the AO thoroughly examined books of the assessee and thereafter, made addition in respect of

each of the shortcomings found in the book. The AO rejected the books of the assessee and made addition on following counts:

Sr. No	*Particulars*	*Rs.*
1	*Unaccounted opening stock on 22.08.08*	*1,21,10,000*
2	*Unaccounted peak investment in cash purchases for the period 22.08.08 to 24.09.08*	*2,21,15,062*
3	*Unaccounted investment in silver*	*3,37,370*
4	*Unexplained commission u/s 69C*	*4,45,687*
5	*G.P. addition on unaccounted cash from 22.08.08 to 24.09.08*	*23,85,000*
6	*G.P. addition on purchases regularized through entry operators*	*4,19,836*
7	*Out of expenses*	*2,02,204*
8	*Out of entertainment exp.*	*1,64,960*
	Total	*3,81,80,119/-*

9. The assessee by way of an affidavit dated 06/05/2009 restricting the disclosure to Rs.3.75 crores. The primary reason for retraction of the disclosure amount mentioned in statement recorded u/s 132(4) of the Act was, the assessee was not having copies of the seized documents. It was only after the assessee received copies of seized documents, the assessee revised the amount of declaration. Apart from the additions mentioned above, the AO made further addition of Rs.8,18,19,881/- (12,00,00,000 – 3,81,80,119) on account of disclosure u/s 132(4) of the Act. The addition made u/s 132(4) of the Act is

merely on the basis of statement and is not corroborated by any documentary evidence. It is not denying the fact that statement recorded u/s 132(4) of the Act, is on oath and can be used as evidence. However, mere statement cannot be the basis of addition. The Board vide instruction F.N. 286/2/2003 dated 10/03/2003 has clearly instructed that the confessions if not based upon credible evidence are letter retracted by the concerned assesseeses in the return of income. Therefore, focus and concentration should be on collection of evidence of income which leads to information about the income which has not been disclosed. The aforesaid instructions were reiterated by the Board vide communication dated 18/12/2014.

10. The assessee has placed reliance on various decisions to contend that no addition can be made on the basis of statement recorded in the absence of cogent evidence:

(i) In the case of CIT(A) Vs. Ashok Kumar Jain (supra). The Hon'ble High Court held as under:

> *"8. ..... **As we have noticed earlier the AO has not found or bothered to found or traced anything additional as a result of survey from the assessee except relying on the recorded statements at the time of survey** and therefore this view found favour with the two appellate authorities that the funds are arising from the same business and have a direct nexus and the income was invested/utilized during the year under consideration. In our view, the conclusion reached by the Income Tax Appellate Tribunal is based on the appreciation of evidence and is reached on the basis of finding of fact. It is also a finding of fact admittedly that in assessment year 2007-08 despite surrender in statements of Rs.2 crore the income was offered at Rs.1.5 crore only and accepted by the Revenue/Assessing Officer.*
>
> ***9.** Thus, the Income Tax Appellate Tribunal, after appreciation of evidence, has come to the conclusion that the amount of Rs.1.5 crore, which was surrendered/offered in the assessment year 2007-08, was also available as a*

fund which came to be used partly in the investment of share capital, creditors or other investments as well as other defects, unverifiable creditors etc.

10. *We may add that* ***if the assessee does not adhere to the surrender made during the course of survey, then it is for the Assessing Officer to bring on record cogent material and other evidences to support the addition rather than rely on statements simplicitor."***

(Emphasized by us)

(ii) In the case of Shree Ganesh Trading Company Vs. CIT (supra), one of the question before the Hon'ble High Court was:

"3. Whether the addition of Rs.20 lakhs was proper and justified on the basis of the admission in the statement u/s 132(4) voluntarily made without there being any corroborative evidence of the existence of any such income in any tangible form?"

The Hon'ble High Court answered the said question by observing as under:

"6. *We are of the considered opinion that statement recorded under section 132(4) of the Income Tax Act, 1961 is evidence but its reliability depends upon the facts of the case and particularly surrounding circumstances. Drawing inference from the facts is a question of law. Here in this case, all the authorities below have merely reached to the conclusion of one conclusion merely on the basis of assumption resulting into fastening of the liability upon the assessee. The statement on oath of the assessee is a piece of evidence as per section 132(4) of the Income Tax Act and when there is incriminating admission against himself, then it is required to be examined with due care and caution. In the judgment of Kailashben Manharlal Chokshi (supra), the Division Bench of Gujarat High Court has considered the issue in the facts of that case and found the explanation given by the assessee to be more convincing and that was not considered by the authorities below. Here in this case also, no specific reason has been given for rejection of the assessee's contention by which the assessee has retracted from his admission. None of the authorities gave any reason as to why Assessing Officer did not proceed further to enquire into the undisclosed income as admitted by the assessee in his statement under section 134(2) in fact situation where during the course of search, there was no recovery of assets or cash by the Department. This fact also has not been taken care of and considered by any of the authorities that in a case where there was search operation, no assets or cash was recovered from the assessee,*

> *in that situation what had prompted the assessee to make declaration of undisclosed income of Rs.20 lacs. Mere reading of statement of assessee is not the assessment of evidentiary value of the evidence when such statement is self-incriminating. Therefore, we are of the considered opinion that in the present case, a wrong inference had been drawn by the authorities below in holding that there was undisclosed income to the tune of Rs.20 lacs."*
>
> **(Emphasized by us)**

(iii) The Pune Bench of Tribunal in the case of Assistant CIT Vs. Ghatge Patil Industries Limited (supra), where the assessee had retracted from the statement given u/s 132(4) of the Act concluded as under:

> *10.1 We have also perused the order of Mumbai Bench of the Tribunal in the case of M/s. Avishkar Infrastructure Pvt. Ltd. and the finding given by the Tribunal in Para Nos. 6.1 to 6.3 of the order reads as under:*
>
> > *"6.1 Under these facts and circumstances of the case we have to exam me that whether sustenance of impugned addition is in accordance with law or not. The law in this regard has already been described in the above part of this order and reference can be made to the decision of Hon'ble Telangana & Andhra Pradesh High Court in the case of Gajjam Chinna Yellapa vs. ITO (supra), where their Lordships have observed that in case statement is retracted then totally different consideration altogether will ensue and the situation would resemble to section 164 of the Code of Criminal Procedure. The evidentiary value of retracted statement become diluted and it loses its strength to stand on its own. In that case Assessing authority has to garner some support to the statement [or passing an order of assessment. It. is also held that retracted statement would not put an end to the procedure, then the AO is under an obligation to support his findings on the basis of other materials and if he does not have such material then it would reflect upon the very perfunctory nature of the survey. For holding so their Lordships have referred to the aforementioned circular dated 10/3/2003, wherein CBDT has clearly given the mandate to the officers that during the course of search, seizures and survey no attempt should be made to obtain confession as to the undisclosed income and such instructions to CBDT were applicable when the search and seizure was made and assessment was framed. CBDT has further mandated that in respect of pending assessment also AO should rely upon the evidences/materials gathered during the course of search/survey operations or thereafter while framing relevant assessment order. The addition made in the present case is contrary to the aforementioned decision of Hon'ble Telangana & Andhra Pradesh High Court as well as aforementioned circular of CBDT as the assessment is entirely based upon the statement recorded during the course of search and no*

independent material has been brought on record by the AO to show that the income returned was incorrect. 6.2 The other decisions which have been relied upon by Ld. AR also supports similar proposition and these have been discussed in the above part of this order and for the sake of brevity they are not repeated.

6.3 So far as it relates to findings recorded by Ld. CIT(A), one of the finding is that by making admission under section 132(4) the assessee has altered the position of the Department because of which the Department did not pursue the matter further and did not visit the said Acme Centre at Ahmedabad. It may be mentioned that such opinion of Ld. CIT(A) would be contrary to the aforementioned circular issued by CBDT, where the clear mandate has been given to the Income Tax Authorities working under the CBDT that while recording the statement during the course of search/survey no attempt should be made to obtain confession of the undisclosed income and any such action would be viewed adversely. Recognizing such position their Lordships of Telangana & Andhra Pradesh High court have already observed that if addition is made simply on the basis of statement recorded under section 132(4) and no material is brought on record by the Revenue authorities then it would reflect upon very perfunctory nature of the survey/search action of the Department. Therefore, in absence of supporting material, the addition simply on the basis of statement cannot be upheld. The other findings of Ld. CIT(A) do not support the addition as they are only based upon the admission of the assessee. According, to the facts of the case, the assessee had furnished all required particulars regarding sale and expenditure incurred on the impugned project and AO could not point out any defect in those particulars submitted by the assessee. ***Thus, the addition is made simply on the basis of statement recorded during the course of search and is not supported by any material. In view of case law relied upon by Ld. AR, the addition is not sustainable and is deleted."***

The above extract from the Tribunal supports the view that the statement recorded during the search and seizure action in the absence of any independent and corroborating/incriminating material is not to be relied upon. Assessee offered the undisclosed income to the extent the corroborating evidences were seized. It is not the case of the AO that total sum of Rs.8 crores is backed up by such incriminating material. Considering the above, we are of the opinion that factually the assessee offered the income to the extent the seized material was available and not otherwise. AO's attempt to make the differential amounts of undisclosed strictly relying on the sworn statement of Mr. Kiran Patil, MD of the company is unsustainable considering the written submission of the assessee and the order of the Tribunal in the case of M/s. Avishkar Infrastructure Pvt. Ld. (supra). Therefore, we hold that the relief granted by the CIT(A) in his order is fair and reasonable and it does not call for

any interference. Accordingly, the common ground raised by the Revenue in the grounds of appeal has to be decided against the Revenue and in favour of the assessee.

11. The Revenue on contrary has placed reliance on the decision in the case of Bhagirath Agarwal Vs. CIT (supra). In the said case, the Hon'ble High Court held that the appellant/assessee has not produced any material to show that the admissions made by him were incorrect. The statements recorded u/s 132(4) of the said Act are clearly relevant and admissible and they can be used as evidence. In fact, once there is a clear admissions, voluntarily made, on part of the assessee, that would constitute good piece of evidence at the hands of the Revenue.

We find that the Hon'ble High Court made aforesaid observations in the peculiar facts of that case, the aforesaid ratio would not apply in the instant case as the assessee has given a plausible reason for retraction. Undoubtedly, in the instant case there is no allegation by the assessee that the statement was recorded under threat, coercion or any pressure. However, the basis for making such huge disclosure is also unsubstantiated. It was only when the assessee received copies of the seized documents, the assessee could recalibrated the equation and made disclosure of Rs.3.75 crores. The said disclosure made by the assessee is quite close to the addition made by the AO on each of the items examined and addition made during assessment proceedings.

12. During First Appellant Proceedings, the CIT(A) asked the AO to clarify whether the addition made of the disclosed amount correlated to any seized material, documents, papers etc. The AO vide replied dated 16/05/2011 reiterated that the addition has been made on the basis of the declaration made

by the Ajay C. Arora u/s 132(4) of the Act and subsequently confirmed. However, the AO was not able to point any seized document that could be correlated to the disclosure statement. Thus, in the light of the facts of the case, various decisions and CBDT instructions referred above, we see no infirmity in the impugned order granting partial relief to the assessee. Hence, the impugned order is upheld and appeal of the Revenue is dismissed.

Order pronounced in the open court on Monday the 05th day of December 2022.

Sd/-	Sd/-
(AMARJIT SINGH)	(VIKAS AWASTHY)
Yks[kk lnL; / ACCOUNTANT MEMBER	U;kf;d lnL; / JUDICIALMEMBER

eacbZ / Mumbai,
fnukad / Dated: 05/12/2022
Mahesh R. Sonavane

izfrfyi vxzsf"kr of the Order forwarded to:

1. vihykFkh / The Appellant ,
2. izfroknh / The Respondent.
3. vk;dj vk;qDr ¼v½ / The CIT(A)-
4. vk;dj vk;qDr / CIT
5. foHkkxh; izfrfu/kh] vk;- vih- vf/k-] eqcbZ / DR, ITAT,Mumbai
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BY ORDER,

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(Dy./Asstt. Registrar)/
Sr. Private Secretary
ITAT, Mumbai