Why Is The Evidence Act So Critical For Income-tax Proceedings: Entire Law Explained With All Imp Judgements

Shri Firoze B. Andhyarujina, Sr. Advocate, has explained the entire law relating to the interplay between the Income-tax Act and the Evidence Act with particular reference to retraction of recorded statements and affidavits, cross-examination, drawing of presumptions etc. All the important judgements on the topic, including the latest Supreme Court judgements, have been discussed threadbare. The discussion will prove invaluable to all taxpayers and tax professionals

1. Preface

1.1 The Income-tax Act is an All India statute. It has its own mechanism and methodology for levy, recovery and collection of taxes. The Income Tax Authorities who are empowered under the Income-tax Act, 196 l ("the Act") have got certain powers which are conferred to them under the Act. However, there are certain areas where for the purposes of proper execution of the Act and the proceedings thereunder resort has to be made to other allied Acts.

1.2 It is therefore essential that certain methodologies and procedures prescribed under Evidence Act, Civil Procedure Code, 1908 ("CPC"} and the Limitation Act come into play.

1.3 At the outset, it must be clarified that if a procedure is prescribed under the Income-tax Act, the same is required to be followed. It is only in the absence of a particular procedure which is required to be followed that the Income Tax Authorities have to fall back upon and rely upon other allied laws.

1.4 There are certain provisions in the Income-tax Act where a specific reference is mentioned about the Evidence Act, CPC and Criminal Procedure Code ("Cr.P.C."}. It is in this connection that various angles of evidence and CPC are examined in this article.

2. Presumption and Probable Consequences

2.1 One of the important issues of prime importance in connection with the Law of Evidence and Cr.P.C. as well as CPC is to examine the import and meaning of the words "presumption" and "probable consequences".

2.2 In Black's Law Dictionary it has been defined to mean 'to believe or accept upon probable evidence'. In Shorter Oxford English Dictionary it has been mentioned in law 'presume' means 'to take as proved until evidence to the contrary is forthcoming', Stroud's Legal Dictionary has quoted in this context a certain judgment according to which 'A presumption is a probable consequence drawn from facts {either certain, or proved by direct testimony} as to the truth of a fact alleged'. In Law Lexicon by P. Ramanath Aiyer the same quotation finds place at p. 1007 of 1987 Edn.

The aforesaid shows that if on the basis of materials on record, a court could come co the conclusion that commission of the offence is a probable consequence.

2.3 Section 132(4A) lays down a rule of "presumption". It is presumed that whatever is found during the search, the ownership is that of the "occupant".

This rule of presumption is intended with the sole purpose that the raiding party would seize the assets where there is no proper explanation forthcoming.

2.4 This does not mean that what is good at the time of search would also be through for the purposes of assessment. Assessment proceedings are different from action and enquiry at the time of search. In an assessment proceedings, necessary enquiry is required to be made. The presumption raised in Section 132(4A) would be an important piece of evidence, but that *ipso facto* would not justify an addition in the assessment without reference to a proper enquiry as to the nature of the transaction. Thus, in an assessment proceeding, it is essential that the presumption is rebutable and fresh light could be thrown on the same.

Thus, the proposition which emerges is that presumption is total and absolute so far as Section 132(4A) r.w. Section 132(5) is concerned, but so far as assessment proceedings are concerned, it is only a "rebuttable presumption".

2.5.1 It is necessary at this stage to analyse the scheme of Section 132 regarding search and seizure. Section 132(1) deals with issue of summons, power to enter and search premises, to break open lock, door, safe, box where keys are not available. It also provides for power to seize books of account, documents, money, bullion, jewellery or other valuable articles or things found on the premises.

Section 132(2) provides for requisition of any Police Officer or officer of the Central Government, or both for the purpose of search and seizure action. Section 132(3) provides that where the documents or articles cannot be removed then a direction or order is issued not to remove or part with or otherwise deal with the same. Section 132(4) provides for recording statement and the same can be used as evidence in any proceedings under the Act. The explanation gives a wide scope that the examination is connected with any matter of investigation connected with any proceedings. Section 132(4A) provides a rule of presumption with regard to accounts, documents, money, bullion, jewellery, etc. found and are in control and possession of any person. It also provides for a legal presumption regarding the truthfulness of documents, books of account and signatures. Section 132(5) provides for an order being passed under the Act.

2.5.2 The object of Section 132 is to unearth undisclosed income of an assessee and to levy tax thereon. Search and seizure is one of the recognised methods therefore adopted for bringing to tax the undisclosed income of the assessee. On a conjoint reading of sub-section (4) and sub-section 4A) of Section 132, it appears that the restriction as to presumption is not restricted only to action connected with search and seizure, but the same may have application to other provisions of the Act.

2.5.3 Thus a proposition which could be agitated is that the presumptive value is total so far as Section 132(5) is concerned, but for other proceedings it has a persuasive value and the same is a rebuttable presumption.

2.5.4 Section 132(4A) was introduced by the Taxation Laws (Amendment) Act, 1975, w.e.£ 1-10-1975. It raises a presumption in respect of the contents of books of account and other documents. This presumption is linked with what is found at the time of search and seizure.

Sections 132A and 132B provides an integrated scheme laying down the procedure for search and seizure along with the powers of confiscation of assets.

Thus, it could be argued that the presumption must be held to be applicable only in relation to adjudication as per Section 132(5).

2.6 At this stage, it is necessary to examine the said Section 132 in the light of Section 106 of the Evidence Act. As per Section 106 of the Evidence Act, the Department is deemed to have discharged its burden if it adduces only so much evidence, circumstantial and direct, as is sufficient to raise a presumption in its favour as regards the existence of particular articles and things found at the time of search.

This can be illustrated by way of two examples, quoted from the decision of the Supreme Court in *Collector of Customs v. D. Bhoormal, AIR 1974 SC 859.* Once it is shown that the accused was travelling without a ticket, a *prima facie* case against him is proved. If he once had such a ticket and lost it, it will be for him to prove this fact within his special knowledge. Similarly, if a person is proved to be in recent possession of stolen goods, the prosecution will be deemed to have established the charge that he was either the Chief or had received those stolen goods known them to be stolen. If his possession was innocent and lacked the requisite incriminating knowledge, then it will be for him to explain or establish those facts within his peculiar knowledge, failing which the prosecution will be entitled to take advantage of the presumption of fact arising against him, in discharging its burden of proof.

Attention is invited to the decision of *Chuharmal v. CIT (1988) 172 !TR 250 (SC)* where it was held that the Evidence Act does not apply to proceedings under the Income-tax Act. The Supreme Court pointed out that the rigours of rule of evidence contained in the Evidence Act were not applicable to the Income-tax Act, but on first principles and on general law, the principles of Evidence Act can be applied to proceedings under the Income-tax Act.

2.7 However, there is one exception that the presumption in terms of Section 132(4A) is not applicable in cases of prosecution under Section 276C and 277. The Supreme Court in *Prem Dass v. ITO (1999) 236 ITR 683 (SC)* held that the presumption laid down in Section 132(4A) cannot be applied to criminal proceedings in view of the specific language mentioned in Sections 276C and 277 of the Income-tax Act. Section 276C requires that it must be established that there is wilful attempt to evade any tax and hence rhe doctrine of *mens rea* is still required to be proved by the prosecution. Thus in matters of prosecution u/ss. 276 and 277 of the Income-tax Act, the rule of presumption would not operate, but the doctrine of *mens rea* would still prevail.

2.8.1 In juxtaposition with Section 132(4A), it is also necessary to analyse the provisions of Section 68 of the Act. Section 68 requires that where any sum is found credited in the books of an assessee for any previous year, and the assessee offers no explanation about the nature and source or offers explanation which in the opinion of the Assessing Officer is not satisfactory, then the sum so credited may be charged to income tax as the income of the assessee for that previous year.

2.8.2 Section 68 is of general application and applies to all cases of regular assessment. The presumption in Section 132(4A) that, "the contents of such books of account and other documents are true" applies only in relation to the provisions contemplated under the said

Section and the Order passed under Section 132(5). Section 68 operates in a different field and, therefore, the requirements of Section 68 are required to be fulfilled, even where cash credits are found in the books seized under Section 132(4A).

2.8.3 The rule of evidence prescribed in Section 132(4A) raises a presumption that the contents in books of account and documents are "true" and that the documents in the handwriting of the person can be presumed to be of such person. Thus where there are entries or borrowings reflected in the books in the assessee's own handwriting, a presumption can be raised as to the genuineness by the Department without any further claim to support the same. However, Section 68 would still require an explanation as to the nature and source of every cash credit. Thus the presumption cannot be operated automatically. It would also imply that Section 132(4A) does not override Section 68.

It applies that there are two conflicting rules of evidence in Section 132(4A) and Section 68 and that there is a need to reconcile the same, more particularly with reference to genuineness of the same.

The issue that would arise is (a) that the handwriting in which the amounts are wtitten is presumed to be of the assessee and that (b) there is no reason why an assessee should make false entries in his books. However, while Section 132(4A) may give rise to presumptions, Section 68 would still give a chance and an opportunity to an assessee to rebut the same, explain the nature, the source and surrounding circumstances of such writings.

2.9 As to whether Section 132(4A) would apply or not, would all depend upon the facts of each case.

The question which therefore arises is whether it could be said that a question of law arises?

The Tribunal is the final fact-finding authority. A decision on fact can be gone into by the High Court, only if a question has been referred co it, stating that the finding of the Tribunal on facts is perverse. In *K. Ravindranathan Nair v. CIT (2001) 247/TR 178 (SC),* the Supreme Court held chat when a finding of fact made by the Tribunal is challenged as being perverse, a question of law can be said to arise. In *Omar Salay Mohammed Sait v. CIT (1959) 37 /TR 151 (SC),* it was held that a question of law arises if the Tribunal has improperly rejected the evidence. Rejection of evidence, which is material converts a question of fact into a question of law. Where the Tribunal has relied upon partly relevant and partly irrelevant materials and it is not possible to find out what influenced the mind of the Tribunal, the finding is vitiated because of use of irrelevant materials, which give rise to the question of law: *Dhirajlal Giridharilal v. CIT (1954) 26 ITR 736 (SC)* and *CIT v. Daulat Ram Rawatmull (1973) 87 ITR 349 (SC).* Where the Tribunal has ignored essential matters and evidence a question of law arises, *CIT v. Radha Kishan Nandlal (1875) 99 ITR 143 (SC).*

Thus, in such circumstances, a question of law can still arise based on the above parameters even though the entire matter may be essentially factual.

3. Presumption however strong cannot take place of evidence rule of estimation is no substitute for evidence

3.1 In *D.N. Kamani (HUF) v. DCIT (2000) 241 !TR 85 (Trib) (Patna),* there was a search on the assessee who was a property developer. The raiding party came to the conclusion that the

assessee had received on-money on sale on certain transactions which was recorded.

3.2 The Assessing Officer estimated the income on the basis of other sale instances of property.

3.3 The assessee's case was that there is no cogent proof of receipt of on-money and that the A.O. has no power "to estimate" income under Block Assessment. That the power of estimation is restricted only to Section 145 and is not available in Block Assessments. There was difference of opinion between the two Members of the Tribunal. Thus the matter was referred to a Third Member.

3.4 In this case, it was held that in absence of any evidence of receipt of on-money, it is not possible to make an addition merely on the basis of "doubt". That the assessee may have received some on-money.

The Tribunal further held that Sections 68, 69, 69A, 69B and 69C have a mention under Block Assessment, while there is no reference to Section 145 under Block Assessment. In view of the above, the Tribunal held that the question of estimation cannot arise in Block Assessments.

The Tribunal further held that presumption, however, strong, cannot be a substitute, nor can it rake the place of evidence.

3.5 This issue can also be approached from the angle that the assessee in sale transactions of property has received amounts over and above the apparent consideration.

3.6 In *Indore Construction Pvt. Ltd. v. ACIT (1999) 71 ITD 128 (Ind.)*, it was held that where the A.O. had referred the matter to Valuation Cell to ascertain the investments made by the assessee and thereafter applied Section 69 and added the amount as unexplained investments, the action of rhe A.O. was treated as beyond the scope of Section 158BB.

3.7 That the Department normally presumes chat no purchase of flats is made in city like Mumbai, without payment of on-money. Such suspicion is of no avail and in the absence of evidence to establish such on-money payment no addition can be made purely on estimation and suspicion: *Ramakant Umashankar Khetan v. ACIT (2000) 66 TT] 378 (Nag.).*

Similarly, the A.O. cannot estimate and place a higher sale consideration based only on estimation and suspicion. In absence of cogent evidence arbitrarily taking and guessing larger apparent consideration is unsustainable in law: *Pankaj Dayabhai Patel (HUF) v. ACIT (1999) 63 TT] 790 (Ahd.).*

3.8 Thus, estimation has no place in Block Assessment and even in regular assessment, mere presumptions and suspicions cannot hold good. Participants may discuss to what extent estimation theory is valid in regular assessments.

4. Evidence Act and Criminal Procedure Code with reference to penalty

4.1 The fundamental principle for the levy of penalty is that the penal proceedings are quasi-criminal in nature. They are distinct, separate and independent of the assessment proceedings. So far as penalty is concerned, the rules of natural justice and the issues for consideration of facts and circumstances and the relevant evidences collected have to be taken into consideration.

4.2 Every person against whom penal action is sought to be proceeded with has as in criminal

and civil law an inherent right to explain the facts and circumstances of the case "to prove his innocence" and consequencly the tax authorities are bound to consider the evidences in the circumstances which are placed before the tax authorities which are required to be exercised judiciously.

4.3 As in criminal law, in absence of any "incriminating material" found in the course of search and seizure operation, no income can be assessed under the provisions of Chapter XIV-B.

4.4 The concept of *mens rea* is peculiar and applicable strictly in criminal law but the same cannot be strictly imported under the Income- tax Act more particularly with reference to levy of penalty. The theory of onus is both on the revenue as well as on the assessee. The onus is not on the revenue either to prove the guilty mind or the sufficient cause on the part of the assessee. The onus is entirely on the assessee to prove his bonafides on the basis of facts and circumstances of the case. If the assessee can discharge such onus, then there can be no levy of penalty : *Gujarat Travancore Agency v. CIT (1989) 177 ITR 455 (SC).*

5. Where certain parts are deleted in a complaint, can fresh complaint be filed

5.1 Issue for examination is that where certain parts in a complaint are quashed and certain offences are also quashed, whether a complaint is required to be withdrawn and a new complaint is required to be filed after deleting the portions which are struck off and whether fresh evidence is required to be let in?

5.2 The issue is that when a prosecution is launched which has a number of sections contained in the Indian Penal Code and the Criminal Procedure Code and its certain sections and charges are brought at a preliminary stage. If complaint is required to be filed and what would be the position of the evidence already collected.

5.3 In *Kumudini Subhan v. Chief Commissioner (Administration) (1992) 198 ITR 390 (Mad. HC),* it was held that there is no need to withdraw the complaint and file a fresh complaint at all. Thus here the provisions of the Criminal Procedure Code were taken into consideration and followed and applied in a prosecution case launched under the I.T. Act.

6. Primary facts and material evidence with reference to reassessment

The ambit and the scope of primary facts with reference to reassessment was explained by the Supreme Court in *Phool Chand Bajarang Lal v. ITO (1993) 203 ITR 456 (SC).*

"One of the purposes of Section 147 appears to us to ensure that a party cannot get away by wilfully making a false or untrue statements at the time of original assessment and when that falsity comes to notice to turn around and say 'you accepted my lie... now your hands are tied and you can do nothing'. It would be a travesty of justice to allow the assessee that latitude."

6.2 Income-tax Act is a taxing statute. The provisions of the Act had to be construed strictly. The Assessing Officer can assume jurisdiction to reopen completed assessment under Sections 147 and 148 only if there is material evidence and *"reason to believe"* that there is suppression of primary facts.

6.3 The expression *"reason to believe"* relates to a process of entertaining an opinion which is subjective in nature, and is not liable to be scrutinised by the objective test of judicial scrutiny

in Appeal. It is only when the subjective satisfaction is wrongly and arbitrarily exercised that the Court would interfere in reassessment proceedings.

6.4 In *Barium Chemicals Ltd. v. Company Law Board (1966) 36 Company Cases 639*, it was observed, "If it is shown that the circumstances do not exist or that they are such that it is impossible for any one to form an opinion, therefrom suggestive of the aforesaid things, the opinion is challengeable on the ground of non-application of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute.

6.5 The Supreme Court in *Calcutta Discount Co. Ltd. v. ITO (1961) 41 ITR 191 (SC)*, laid down that it is a duty of the assessee to disclose all primary facts, the duty to find inferential facts from primary facts disclosed and the duty to draw inferences of law from such facts is the duty of the Assessing Officer. The assessee is only bound and required to disclose all the facts fully and truly.

6.6 In *ITO v. Lakhmani Mewef Das (1976) 103 JTR 137 (SC)*, the Supreme Court observed that all that the assessee is required is to make true and full disclosure of primary facts at the time of original assessment. Production of account books and other evidence from which material could be with due diligence be discovered by the A.O. does not amount to disclosure contemplated by law. The duty of the assessee does not extend beyond making full disclosure of primary facts. Once this is done, his duty ends and it is for the A.O. to draw correct inference from primary facts. Question arises whether such inferences drawn from facts would amount to presumption, conjectures and surmise on the basis of which re opening can be justified? Question further arises is that all the primary facts are disclosed and material evidence is produced, can the Assessing Officer draw adverse inference so as to reopen completed assessment based on such evidence produced by the assessee?

6.7 In *Ganga Saran and Sons Pvt. Ltd. vs ITO (1991) 130 ITR 1 (SC)*, the Supreme Court observed that the words "reason to believe 'are stronger than the words reason to be satisfied". Since the words used are reason to believe the satisfaction theory would not apply but the belief must be reasonable and based on relevant materials.

6.8 In *Indian Oil Corporation v. ITO (1986) 159 ITR 956 (SC)*, the ratio can be summed up as: 1) there is obligation for the assessee to disclose all primary facts; 2) those facts should be relevant and material; 3) there must be full disclosure and it must be proved; 4) what facts are material
and necessary will depend on the facts of each case; 5) it is the duty of the assessee to disclose all facts so that the A.O. can come to a conclusion, or form a belief 6) based on those facts the A.O. has to draw inference and form a belief whether reopening could be justified.

6.9 Issues for discussions would therefore be:

(a) Subjective versus objective satisfaction;

(b) What is primary facts;

(c) What are relevant documents and material evidence;

(d) Whether inference drawn from facts could constitute a belief for reopening;

(e) What is the rest to be applied for the belief; and whether reasons are to be given;

(f) To what extent there is falsity for non-disclosure;

(g) Whether the non-disclosure was intentional or deliberate;

(h) Whether events and situation arising subsequent to the filing of the return can be regarded as material evidence for reopening, since at the time of filing the return all primary facts were disclosed.

7. Should secret and confidential documents relied on by the department be furnished to the assessee

7.1 Section ll9(2)(a) provides that the CBDT can issue directions or instructions and guidelines regarding assessment, collection of revenue, initiations of proceedings, penalty and such other orders as is necessary in public interest. Rule 111B of the LT. Rules, 1962 further provides that the Board may publish the instructions and send necessary copies to organisations. The instructions which are published are regarded as "Circular". But sometimes certain "instructions" are issued only for Departmental officers.

The issue which arises is can the Department rely upon such instructions without disclosing the same to the assessee?

7.2 In *Capricorn Shopping Complex v. ITO (1996) 218 ITR 721 (Ker.),* the valuation of the building was done according to secret instruction No. 671 issued by the Board. The assessee was not furnished with the copy of the instructions on the ground that it was secret and not meant for public.

The Kerala High Court in *(1996) 218 ITR 721* at page 723, observed "that if some document is relied on against an assessee to assess him to a high rate of tax, the documents shall be disclosed to him. It cannot be withheld".

7.3 Based on the above case law, can an assessee insist on instructions, documents, valuation report or other evidences on which reliance is placed by the Department? If such documents are not furnished, what would be the remedy of the assessee?

7.4 In this connection, attention is invited where an admission is made by a person, then the document which is sought to be used against the assessee, must be furnished and explained. Further, a right of cross-examination should also be provided. The Supreme Court laid down that admission is to be proved in accordance with the provisions of Evidence Act and due opportunity must be given for explanation, cross-examination and verification of documents : AIR 1977 SC 1712.

7.5 In *Pooran Mal v. Director of Investigation 93 ITR 505 (SC)* it was held that even when search and seizure was held to be illegal, yet documents and other papers seized would have "evidential value". However, the Supreme Court in *Pratap Singh v. Director of Enforcement 155 !TR 166 (SC)* held that the illegality in the method, manner or initiation of search, does not necessarily mean that anything seized during the search has to be returned.

7.6 In the light of two judgments of the Supreme Court where the search itself is illegal, would documents seized be of any relevance? If the search is *per se* held to be not in accordance with the provisions of Law, then the entire operation should be regarded as an act of an illegality and hence everything found or relied upon cannot be considered, but ought to, be

returned forthwith.

7.7 In this connection, it may be useful to refer to the decision of the Supreme Court in *CIT v. Vindhya Metal Corporation 224 ITR 614* where it was held that presumption under Section 132(4A) would also apply to documents requisitioned and assets found. However, the fact that an asset is seized is not enough, it must further be shown that it was not disclosed for tax purposes. It is necessary to reconcile this decision with the ratio of the above two judgments.

8. Retraction of statements recorded and affidavits

8.1 Very often statements recorded at the time of search and seizure are retracted claiming that the statement has been obtained under pressure and duress or mistaken impression. An Affidavit in this connection is filed with the Department. An attempt is made to find out the evidentiary value of such retraction by an Affidavit.

8.2 Under the Evidence Act, admissions are treated as admitted fact, they may not be conclusive proof of the matter, but they may operate as "estoppel in further proceedings" – Section 31 of Evidence Act.

8.3 Admissions give rise to rebuttable presumptions and can be rebutted on the grounds that the confession was made by inducement, threat or promise – Section 24 of the Evidence Act.

8.4 The Bombay High Court in *R.R. Gavit v. Sherbanu Hassan Daya (1986) 161 ITR 793* held that the power to interrogate on oath under Section 132(4) is limited only with respect to explanation of documents, articles or things found during search. However, the effect of this decision seems to be nullified by insertion of Explanation to the Section w.e.f 1st April, 1989.

8.5 The rule of rebutable presumption of the Evidence Act is itself embodied in Section 132(4) by the words "may thereafter be used in evidence in any proceedings". This would mean that the statement recorded is a piece of evidence which can be used against the assessee, but the assessee has got a right to rebut the admission made by him. This is further supported by the fact that admission though regarded as a piece of evidence, is not conclusive proof by itself.

S. Arjtm Singh v. CWT (1989) 175 ITR 91 (Del.).

8.6 In *Pullanagade Rubber Produce Ltd. v. State of Kerala (1973) 91 ITR 18,* it was held that retraction is permissible in law and it is for the assessee to show that the statement recorded is incorrect. Further, in *Satinder Kumar v. CIT (1977) 106 ITR 64 (HP)*, retraction is possible where the assessee states that he was under a mistaken understanding of the true position and state of affairs.

8.7 However, reliance is placed on the decision of *Deepchand and Co. v. ACIT (1995) 51 TT] 421 (Bom.)* where it was held that where the search continued for unduly long period, statements made can be retracted on the grounds that the statements were recorded under pressure and force. This authority is of particular significance since very often search and seizure actions continue throughout the night, any confessional statements are thereafter recorded under pressure. It is essential, therefore, that CBDT should come out with Circulars or instructions that no search shall continue after sunset and this rule must be strictly enforced. The assessee can argue that statements recorded late at night was not given in a proper frame of mind and that the statements were given under mistaken belief of law and fact.

8.8 Retraction when made on an Affidavit should have value and must be considered as an important piece of 'evidence'. Sworn Affidavits which are duly notarised would therefore

retract the statement and a plea could be made to once again record fresh evidence thereafter.

8.9 In this connection a question would arise that if during the course of search the assessee agrees to make a disclosure and based on that disclosure, the raiding party stops further action. Subsequently, the assessee retracts his statement. Can the Department make an addition on the statement made by the assessee which is retracted and at the same time, no further search and investigation was done based on such admission?

8.10 Would it make a difference if retraction statement in the form of an Affidavit is not given immediately (may be, because of fear) but such Affidavit is submitted for the first time at assessment? Distinction should be made between retraction made immediately after search and retraction at the time of assessment which is after lapse of considerable time.

8.11 Attention is invited to the case of *Monga Metals Pvt. Ltd. v. ACIT 67 TT] 247 (All.)* where Block Assessment made by placing reliance on evidence of third party, without giving assessee an opportunity to cross-examine the third party is a nullity.

9. Cross-examination

9.1 It is necessary in the interest of justice that all relevant evidence must be submitted, the party must be informed on the evidence on which reliance is placed and to allow witnesses to be questioned and to allow evidence and cross--examination on the same.

9.2 Any statement which is recorded by the Department, an assessee is entitled to get the copy of the statement so recorded, using evidence behind the back of the assessee is against the principles of natural justice. Also where copies of reports or documents or statement of third party is relied upon for making an addition, it is the duty of the Department to allow the assessee not only to examine such documents but also to cross-examine the party.

9.3 In *State of Kerala v. K T. Shaduli Yusuf (1977) 39 STC 478,* the Supreme Court held that not only it is the duty of the Department to provide copies of statements or reports, but the assessee is entitled to seek right of cross-examination.

9.4 The Supreme Court in *Kishan Chand Chellaram v. CIT (1980) 125 ITR 713 (SC)* held that evidence which is used against the assessee must be provided to the assessee and also an opportunity to confront the same should be given permitting cross-examination,

9.5 The right of cross-examination is an inherent right and the assessee has also got a right to have his Advocate present at the time of cross--examination.

9.6 Sometimes it appears that the assessee has made a statement based on ignorance. However, such a statement turns out to be false at a subsequent stage. It may be noted that when the statement was recorded originally, it was made to the best of his knowledge and on ignorance of facts in such circumstances, since there is no *mens rea* penalty cannot be levied. In *Union of India & Others v. Ganesh Das Bhojraj (2000) 244 ITR 691 (SC],* the assessee imported consignment of pulses and claimed clearance of goods free of customs duty on the ground of notification which was issued earlier. It appears that on the date of import, a new Notification came whereby basic duty at 25% was imposed. The assessee pleaded that he was not aware of the Notification and that the Notification was not made available to the public on that day. The Supreme Court in this case held that if the Notification is published on a particular date, it is presumed to have been known to the Public. However, it was pointed out that non-availability of Gazette is a defence plea of ignorance where *mens rea* is an ingredient of an

offence which calls for leniency in punishment. This case lays down the proposition that if an assessee has acted in ignorance based on set of circumstances and facts at a particular point of time, when the plea was recorded, in absence of *mens rea* he cannot be necessarily held guilty or be prosecuted.

9.7 In *CIT v. L.KS. Ganee (2001) 244 ITR 130 (Mad.)*, in this case the Tribunal judicially noticed the features of Lottery business and came to the conclusion that in Lottery business, it is not possible to have proper accounts as there are large number of hawkers and petty traders.

9.8 The Madras High Court while relying upon Section 56 of the Indian Evidence Act, 1872 which prescribed facts judicially noticeable need not be proved and Section 157 which provides the necessary and requisite facts of which Courts must take judicial notice came to the conclusion that the Tribunal had acted arbitrarily.

9.9 This authority is quoted for the proposition that in view of Sections 56 and 57 of the Indian Evidence Act, facts which are judicially noticeable need not be proved and there is no need for any examination or cross-examination on proved facts.

9.10 This is further based on the facts that once an admission is made by the assessee, that certain amounts be added to his income and that the same is concealed income, if this be the accepted position, then by virtue of Section 58 of the Indian Evidence Act such admitted facts need not be proved.

9.11 It is only where facts are disputed and reliance is made on certain documents or statements of third party are controverted that there is a need to submit the document and cross-examine the parties.

10. Evidence Act and onus – section 110 of the Evidence Act and section 69 of the Income-tax Act

10.1 Section 110 of the Evidence Act assumes importance with reference to Section 69A of the Income-tax Act. In *CIT v. K T.M.S. Mohamood (1997) 228 ITR 113 (Mad) at p. 119*, the issue was whether currency recovered from the premises of the assessee belonged to the assessee or not. Issue was also whether the Department has to establish that the assessee is the owner of cash fund. It was the contention of the assessee that this cash fund did not belong to him. The Madras High Court relied upon Section 110 of the Evidence Act and came to the conclusion that the onus is on the person who is in possession of money to show that he is not the owner of the same. The Court held that the burden is not on the Department but it is on the assessee who is the owner of the amount found in possession at the time when the currency was recovered. Thus, in this case, the Court relied upon the provisions of Section 110 of the Evidence Act.

10.2 In *Chuharmal v. CIT (1988) 172 ITR 250 (SC)*, wrist watches were seized from the bedroom of the assessee. It was the case of the Department that the assessee was the owner of the watches which was denied by the assessee. In this case, the Supreme Court relying upon Section 110 of the Evidence Act came to the conclusion that the tests laid down in Section 110 that when the question is whether any person is the owner of anything of which he is shown to be in possession, the onus of proving that he is not the owner is on the person who affirms that he is not the owner. At page 255, the Supreme Court applied the provisions of the Evidence Act to Section 69 and came to the conclusion that the onus to prove is on the assessee based on the

criteria laid down in the Evidence Act.

10.3 Thus, under these circumstances, it is absolutely essential that the provisions of Evidence Act will have to be considered. In this connection, attention is also invited to the recent decision of Sukh Ram vs ACJT (2006) 285 ITR 256. In this case, pursuant to search and seizure cash was found in possession of the assessee. Burden of proof was on the assessee to prove that he is not the owner of the currency. Assessee stated that the cash found belonged to political party but made no efforts to substantiate the statement. The President and Treasurer of the party denied any connection with the cash found nor was there any entry noted in the books of account of the political party. Based on the above, it was held that the assessee has not been able to rebut the presumption and therefore, the addition under Section 69A was justified.

11. Application of Evidence Act to Income-tax Act

11.1 The general rule is that the provisions of the Evidence Act do not apply to assessment proceedings, when the authorities are called upon to consider the effect of terms of documents, then in interpreting certain terms of the document and the effect of the document, the relevant sections viz., Sections 91, 92 and 94 of the Evidence Act would be required to be considered. In other words, as laid down in *A.V.N. Jagga Row v. CIT (1987) 166 ITR 862 (AP)*, the court came to the conclusion that with regard to the effect of the terms of the document and the validity, the provisions of the Evidence Act is required to be considered.

11.2 The A.O. is a quasi-judicial authority, but he is not fettered by technical rules of evidence and pleadings and he is entitled to act on materials which may not be accepted as evidence in a court of law. In other words, the A.O. while making an assessment is not bound by the parameters laid down in the Civil Procedure Code. This view was laid down in *Dhakeshwari Cotton Mills Ltd v. CIT (1954) 26 ITR 775 (SC).*

11.3 Like in criminal law, the A.O. is required to take into consideration "circumstantial evidence" and he is also required to take into consideration "totality of the circumstances" before coming to a determinative question as to whether a particular item of income or expenditure is proved or not. This rule of evidence in circumstantial probability was considered in *CIT v. Rameshwar Prasad Bagla (1968) 68 ITR 653 (All).*

11.4 Besides that the A.O. can go beyond the parameters laid down in Civil, Criminal and Evidence Act and look into the surrounding circumstances and even issue summons and examine witnesses and other people who he suspects would have given the loans or entered into agreements in order to find out the reality of the situation as was laid down in *CIT v. Durga Prasad More (1971) 82 ITR 540 (SC).*

12. Application of Section 34 of the Evidence Act – V. C. Shukla's case

12.1 In *Central Bureau of Investigation v. V.C. Shukla (1998) 3 SCC 410*, the provisions of Section 34 of the Evidence Act, was considered for the purposes of the expression "entries in books of account", "books of account".

12.2 In this case, which is also known as *'Jain Hawala Diaries* case", the Supreme Court came to conclusion that entries in notebooks are admissible evidence u/s. 34 of the Evidence Act but loose sheets of papers are not *"books"* and hence entries in loose sheets of papers are not admissible evidence at all. The Court further came to the conclusion that entries in books of

accounts has *"probative value"* and *"corroborative evidence"*, the court on the facts came to the conclusion that entries made in Jain Hawala Diaries though admissible u/s. 34, but truthfulness thereof was not proved by any independent evidence.

12.3 The point that I am trying to emphasise that certain papers which are maintained would have relevance at the time of assessment. However, loose papers or notings cannot be considered as independent evidence for the purposes of making additions.

12.4 It is interesting to note that sometime. "statements and admissions" are made by a person. The position regarding "statements and admissions" are governed by Sections 17 to 21 of the Evidence Act. Hence, those rules would apply to statements and admissions made by the assessee.

13. Gifts

13.1 Very often question arises when gifts are received from abroad. The Assessing Officer disbelieves the gifts and tries to add the same on the grounds that the alleged gifts are treated as unexplained cash credits u/s. 68.

13.2 In order to examine this problems from all angles concerning burden of proof, evidence, onus of proving the genuineness of the gift and penalty, the following analysis is made.

13.3 Stand of the Department: The following details/explanations are normally required:

1. Details and proof of friendship or relationship;
2. Evidence that donor had capacity to make the gift;
3. Details about status, occupation, address of donor;
4 Details of gift given by donor to assessee;
5. Cheques how delivered and details of Bank;
6. Address of donor in India and abroad.

13.4 Evidences adduced by assessee: Normally the following evidences are submitted :

1. Confirmation of the gift;
2. Explanation of the relationship;
3. Address of the donor;
4. Affidavit regarding confirmation of the gift;
5. Issue of cheques and details of NRE Account.

Problems : The A.O., in spite of all the details is not prepared to believe that the donor is a friend who is a man of success. He further contends that the assessee has not explained how the balance in NRE Account was made up at the time when gift was made. Further that the donor is only a friend and is not directly related and no evidence is filed about the proof of friendship.

The contention of A.O. is that it is against human probability that it is only a one-way traffic and the gifts are therefore not accepted as genuine.

13.5 Decisions on which Revenue may rely upon : That though the gifts amount are credited in assessee's account, the assessees is duty bound to discharge the initial burden of proof to establish the capacity of the donor to give the gift and as regards his creditworthiness and genuineness of the gift transaction. The gift is liable to be treated as unexplained cash credit u/s. 68 of the I. T. Act based on *Shanker Industries 114 ITR 689 (Cal.), United Commercial & Industries Co. Pvt. Ltd. 187 ITR 796 (Cal.), Xorlay Trading Co. Pvt. Ltd. 232 ITR 820 (Cal.), K.M. Sadhukhan & Sons (1999) 239 ITR 77 (Cal.).*

13.6 Reference is also made to an unreported judgment of the Hon'ble Mumbai ITAT OCI Bench in LT.A. Nos. 571-574/ Bom/80 in the case of Shri Bharat Narain and Others where the gifts were liable to be assessed as unexplained cash credit even though the identity of donor was established and gifts were given by cheques, but the Tribunal came to the conclusion that the capacity of the donor and genuineness of the gift was not proved.

13.7 Burden of Proof : In *Pradipkumar Loyalka (1997) 63 ITD 87 (Patna) (TM) (Trib.)* it was held that even though the burden of proof lies upon the assessee to prove the source of income of each of the donors, the assessee failed to furnish any evidence worth the name to establish their creditworthiness.. The evidence produced by him order to prove their creditworthiness was either scanty or negligible or did not a instill any confidence whatsoever or was against human probabilities. Therefore, the amounts were correctly disallowed by the Lower Authorities and they were correctly added in the hands of the assessee as his unexplained income.

In *Sanjeev Batra (1969) 69 ITR 23 (Delhi)* it was held that considering the facts and circumstances of this case and the evidence on record. we are of the view that the onus that lay on the assessee to establish the creditworthiness of the donors and genuineness of the gifts has not been discharged. The A.O. in such circumstances was justified in invoking Section 68 in deeming the receipts as income of the assessee from undisclosed sources.

13.8 Affidavits : Sometimes an Affidavit is also filed stating that the gifts have been made and indicating capacity of the party and credibility to show the genuineness of the gift having been made from the Bank Account of the donor.

13.9 Assessee's stand: That the original burden of proof which laid on the assessee has been discharged by filing necessary confirmation of the gift. Also, if relationship is mentioned, it would amount to discharging the burden of proof and if a Bank Statement coupled with Affidavit is given, then the capacity is also established. In such circumstances, the burden would then shift on the Department to prove the same. The assessee could argue the matter from the following angles:

13.9.1 That where Affidavit of donor is given the assessee has discharged his initial onus and offered satisfactory explanation with reference to NRI gifts received by him.

13.9.2 The NRI gifts have been made out of NRE Accounts.

13.9.3 That elements of close relationship and occasion relate to "realm of human probability" are in the nature of circumstantial evidence. The question of proving friendship is a matter of evidence coupled with human nature, for a person may develop fancy for a friend or a neighbour. In this connection reliance is placed on the decision of *R. K Syal v. ACIT (2000) 66 TT] 656 (Chad).*

13.9.4 That gifts through cheques and confirmed by the NRI and duly supported by Affidavit is to be considered genuine: *Jaikishan R. Agrawal v. ACIT (2000) 66 TT] 704 (Pune).*

13.9.5 That where name and address of the donor is submitted, the identity is established, creditworthiness is evidenced and the genuineness of the transaction is proved, Where documentary evidence of gift and fact of payment by cheque and Affidavit is submitted, the gifted money cannot be treated as unexplained cash credit.

13.9.6 The onus to prove that "apparent is not real is on the revenue". Once if necessary evidence is given, the burden of proof shifts on the Department and it is for the Department thereafter to prove that the gifted money belonged to the assessees : *Elite Developers v. DCIT (2000) 73 ITD 379 (Nag).*

13.9.7 That where the assessee has disclosed primary facts, then the original burden of proof is discharged and it would be for the Department thereafter to prove that the gift is not genuine : *Parekh Foods Ltd. v. DCIT (1998) 64 ITD 396 (Pune).*

13.9.8 That where the assessee has submitted relevant evidence, documents and materials and the same are authentic. reliable and verifiable, there cannot be any ground to disbelieve the same on the basis of surmise, conjecture or probability. In *Jaya S. Shetty v. ACIT (1999) 69 ITD 336 (Mum.)* the Tribunal made it clear that additions based on conjecture, surmise. estimates and presumptions which are not supported by any document or evidence cannot be treated as undisclosed income.

13.10 Controversy : Where gift is received from NRI and the Assessing Officer is doubting since the quantum of the gift is huge amount. Say Rs 50 lakhs, he has questioned the genuineness of the gift. At the same time, the assessee has furnished various evidences and proofs including Affidavit. Thus the assessee discharged the initial burden of proof, the onus is now shifted on the Department to prove that the evidence which is furnished is false. This must be substantiated by some cogent evidence and cannot be on the basis of mere preponderance of probability or on human nature. It is very difficult for the Department to establish what friendship is?"

13.11 The case of the Department could be that the gift is colourable devise and is a mode to transfer funds out of India and to channelise them back to India. Participants are requested to analyse such situations in the light of (a) the requirement of proof which the Department would require; (b) the evidences furnished by the assessee and (c) on the basis of the caselaws which have been cited, the validity of the gift will have to be examined since this is very often a burning problem when gift are received of large amounts from foreign countries.

14. Statement of assessee as part of evidence and law of retraction

14.1 Statements are made by the assessee at the time of search and these statements become part of the record. Once a statement is made in the presence of witnesses and signature is taken, it becomes "piece of evidence". However, it is quite likely that thereafter, the assessee files an affidavit retracting his statement.

14.2 The general rule is that admissions give rise to "rebuttable presumption". Admissions are not conclusive proof and they may operate as estoppel in further proceedings as laid down in Section 31 of the Evidence Act. However, there is a right of rebuttal on the ground that the

confession or admission was induced by threat, promise and hence, it is irrelevant – Section 24 of the Evidence Acc.

14.3 It can also be argued that the statement made was for a limited purpose of seeking explanation in respect of documents, articles or things found during the search : *R.C. Gavit v. Smt. Sherbano Hassan Daya – (1986) 161 ITR 793 (Bom.).*

14.4 A confession even if inculpatory should be corroborated by independence evidence. It is quite likely that statements recorded during search continue for an unduly long period and therefore, cannot be considered to be free, fearless and voluntary. Hence, such statements can be retracted on the ground that the same were recorded under pressure and force : *Deepchand and Co. v. ACIT (1995) 51 TT] 421 (Bom.).*

15. Analysis of Section 293 of the Income-tax Act

15.1 Section 293 of the Income-tax Act, 1961, bars any civil suit "to set aside or modify any proceedings or order made under the Act". It is true that bar against civil actions within the jurisdiction of a civil court under Section 9 of the Civil Procedure Code, 1908, will not be lightly or readily inferred.

15.2 The philosophy of Section 293 is that the section bars suit to section aside or modify an assessment, even where an assessment is erroneous or wrong. Thus, no suit can be brought in any civil court to set aside or modify an assessment.

15.3 Issue is whether a tax proceedings can await till the outcome of a pending civil dispute. In *U.S. Nayak v. CWT (1968) 68 ITR 171 (Mysore),* a suit was pending in the civil court concerning transfer of the property. In the meantime, the value of the property had appreciated and the assessee was called upon to pay tax on rhe enhanced value which is the fair market value ignoring the amount invested. The argument of the assessee was that the title in the suit is being disputed. The High Court in this case came to the conclusion that a dispute pending would not affect the valuation of the property which according to the Wealth Tax Act is required to be made at a fair marker value.

15.4 ln *CWT v. H.H. Smt. Rajkuverva (1972) 86 ITR 783 (Mysore),* here the dispute was regarding ownership of certain shares and debentures and for which the matter was pending final adjudication in the Court. In this case, the Court made a distinction between "classes of assets" and came to rhe conclusion that in respect of chose cases which are subject matter of dispute, valuation could be made at a much lower rate.

15.5 In *Durga Prasad Ramniwas Podar v. WTO (1985) 153 ITR 76 (Bom.),* there was dispute regarding property and the final outcome of the civil dispute was that the assessee lost title to the property. In this case, che court came to the conclusion that since ultimately the assessee was not the owner of the property, therefore, wealth tax on the same cannot be paid and the notice for reassessment was quashed. In this case, the court recognised subsequent events after the date of filing of the Return as well as the impact of civil disputes on a particular assessment.

15.6 In *Mrs. Korshedshapoor Chenai v. Asst. CED (1980) 122 ITR 21 (SC),* a right even though in dispute was regarded as a valuable right for the purposes of estate duty. The Supreme Court held that a right to enhanced compensation was property and hence, liable for inclusion on the death of the person for the purposes of estate duty.

15.7 In *CIT v. Hindustan Housing and Land Development Trust Ltd. (1986) 161 ITR 524 (SC),* there was a dispute regarding additional compensation awarded by the lower court. The matter of compensation was in dispute and the court came to the conclusion that the same is not assessable since the decree on the same is yet to be delivered by the court.

16. Evidence collected from illegal search

16.1 It may be noted "that right of privacy" has been accepted implicitly with right to life and liberty guaranteed by Article 21 of the Constitution. It is in this connection that reference is made to the law on admissibility of evidence obtained in an illegal search u/s. 132 of the LT. Act and the decision in *Pooran Mall v. Director of Inspection (Investigation) (1974) 93 ITR 505 (SC).*

16.2 The English Rule of evidence is that the test to be applied, both in civil and criminal cases, in considering whether evidence is admissible is whether it is relevant to the matter in issue or not.

If it is, admissible the court is not concerned how the same is obtained. This proposition was laid down in *England in Kuruma v. Queen (1955) AC 197 (PC)* as well as in the United States in *Olmstead v. United States (1928) 277 US 438.*

16.3 Thus, taking the law from England and America, the real test of admissibility of evidence lies in its relevancy. Thus, the use of material obtained in an illegal search can also be used against the assessee. It would not be opened to contend that the information obtained as a result of illegal search is violative of right to privacy. The result is that evidence obtained as a result of illegal search or seizure can be used against the assessee.

17. Attachment – Schedule II of the I.T. Act and application of various provisions of civil procedure code

17.1 So far as the provisions contained for attachment and sale of property, there are various provisions of the Civil Procedure Code which are imported in the Income-tax Act. They are summarised and listed as follows :

(a) Notice to defaulter requiring payment – Rule 2 of Schedule II;

(b) Execution of money decree – Rule 16 of Schedule II;

(c) Attachment of immovable property of defaulter after notice is served – Rule 51 of Schedule II;

(d) Proclamation of sale – Rules 52, 53 and 55 of Schedule II;

(e) Rules to set aside sale on grounds of irregularity – Rule 61 of Schedule II;

(f) Orders confirming the sale are appealable – Rule 86 of Schedule II;

(g) Right of arrest and detention of defaulting assessee – Rules 73 to 81 of Schedule II;

(h) If the claim of the party is one where a dispute arises as to ownership of the property which is attached then the matter could be referred to a civil court by virtue of Rule 16 of Schedule II.

17.2 The rules contained in Civil Procedure Code apply to Part II of Second Schedule concerning attachment of sale of movable property. Rule 23 deals with attachment of movable

property and Rule 26 prescribes the procedure for attachment of debt not secured by a negotiable instrument and shares of a company. As per Rule 32, if the property to be attached consists of interest of defaulter in partnership property, the same shall also be attached by the IT. Department.

17.3 One important point which needs to be highlighted is that as per Rule 35 of the Second Schedule, attachment of assets by seizure shall be made only after sunrise and before sunset and not otherwise. References is also invited to Rule 36, however, it may be pointed out that these Rules are being flouted.

17.4 Part III of Second Schedule contains Rules governing attachment and sale of immovable property. These Rules are all encompassed and embodied in the provisions of Sections 222, 276 and 281B of the I.T. Act. All these sections are in tune with the provisions of various orders of Civil Procedure Code which would apply to the present case.

18. Issue for condonation of delay – Section 253 Limitation Act and Code of Civil Procedure

18.1 Section 253 of the Income-tax Act gives power to Tribunal to condone delay. Judicial bodies are empowered to condone delay if a litigant satisfies the court that there were sufficient reasons for availing remedy after expiry of limitation. The words occurring in the section are "sufficient cause" – Section 253(5). They should be liberally construed so as to advance substantial justice. Like in Civil Procedure Code, the length of delay is immaterial and acceptability of explanation is the main criteria for condonation of delay.

18.2 Recently, in *Sterlite Industries v. ACIT (2006) 6 SOT 497 (Mum.)*, it was held that the expression "sufficient cause or reason" used in Section 253(5) is in identical position with the Limitation Act, 1963 and CPC and therefore the various circumstances for sufficient cause should receive a liberal construction provided the explanation given by the assessee does not smack of *mala fide* or dilatory strategy.

18.3 Similarly, in *Earthmetal Electricals (P) Ltd. v. ITO (2005) 4 SOT 484 (Mum),* the Tribunal held that courts and quasi-judicial bodies are empowered to condone delay if a litigant satisfies the court that there were sufficient reasons for availing remedy after the expiry of the period of limitation. Here also, the rules of Evidence Act and Civil Procedure Code were considered by the Tribunal.

19. Doctrine of *Res Judicata*

19.1 The doctrine of res judicata is pronounced in Section 9 of the CPC The same has limited application in the Income-tax Act. This is- qualified by the proposition that the A.O. is not bound by the rule of *res judicata* or estoppel, since he can reopen or agitate on a question previously decided in a particular way but can deviate from the same since fresh facts have come to light.

19.2 The principle of *res judicata* does not apply in Income-tax Act since the earlier decision if it had a mistake deserves to be rectified or from the assessee's point of view, the Department cannot depart from an earlier decision since such departure would result in injustice to the assessee. On same facts, the same position should continue by virtue of "doctrine of precedence".

19.3 Issue for consideration is whether an admission made by the assessee in an assessment proceeding can be used as an evidence against him in a subsequent year? Similarly, a decision of civil court whether it could operate as a *res judicata* or an estoppel to bind the department? If the High Court grants probate or letters of administration in respect of the Will, can the department still say that the Will is sham and not binding on the Department?

19.4 The Government is bound by its promise based on "doctrine of promissory estoppel". Issue-for examination and consideration is can an undertaking given on the floor of the Parliament or a speech made by the Finance Minister or an circular issued by CBDT bind the Government?

20. Conclusion

In *A. K. Gopalan v. State of Madras, AIR 1950 SC 27,* the Supreme Court held that "the courts are not at liberty to declare an Act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in words ... It is difficult upon any general principles to limit the omnipotence of the sovereign legislative power by judicial interposition, except so far as the express words of a written constitution give that authority".

21. Table of cases

1.	Amar Natvarlal Shah	68 TTJ 51G (All)	Additions on the basis of loose papers not sustainable.
2.	V. V. S. Alloys Ltd.	68 TTJ 51G (All)	Additions on the basis of diary not sustainable.
3.	Jaya Sherry	69 ITD 336 (Mum)	Addition on the basis of dumb diary not sustainable.
4.	Pooja Bhatt	73 ITD 205 (Mum)	Addition based on rough notes not sustainable.
5.	T. S. Venkateshan	74 ITD 298 (Cal)	Writings on loose papers found with the third party cannot be added as income of the assessee.
6.	Monga Metals Pvt. Ltd.	67 TT] 247 (All)	Burden of proof and onus on the revenue to prove that figures on the loose papers are assessee's undisclosed income.
7.	Satinder Kumar	(2001) 250 ITR 484 (P&H)	Revenue relied upon impounded diary of property dealer recording transactions, but information did not relate to the very property under consideration and there was wide discrepancy in value. Court did not rely upon

			noting in diary.
8.	Arul Kumar Jain	(1999) 64 TTJ 786 (Del)	Additions on the basis of loose papers cannot be sustained, unless there is corroborative material evidence.
9.	Urmila Chandak v. ACIT	60 TTJ 758 (Mad)	Review / re-examination not possible.
10.	Harak Chand N. Jain v. ACIT	(1998) 61 TTJ 223 (Mum)	AO cannot make roving enquiries without fresh evidence. He has no powers to override the rules of evidence.
11.	Alok Agarwal v. DCIT	(2000) 67 TTJ 109 (Del)	AO not permitted to go beyond materials discovered and has to restrict to what is found at the time of search and cannot make roving enquiries on unconnected matters.
12.	Rameshwar Lal Ahuja v. ACIT	(2000) 67 TTJ 441 (Chad)	Re-appreciation of evidence can be done only where fresh material is discovered.
13.	Sunder Agencies v. DCIT	(1997) 63 ITD 245 (Mum)	Sec. l58BA does not provide a licence to the revenue for making roving enquiry.
14.	Indore Constructions Pvt. Ltd. v. ACIT	(1999) 71 ITD 128 (Ind)	Re-examination of original assessment not possible in Block Assessment.
15.	Essem Indra-Post Services v. ACIT	(2000) 72 ITD 228 (Hyd)	Should not amount to review of order.
16.	Sheela Aggarwal v. DCIT	(1999) 106 Taxman 227 (Mag) (Delhi)	AO cannot make roving enquiries and investigations about already completed assessments.
17.	Davind Dhavan vs. ACIT	(1999) 71 ITD 1 (Mum)	No roving enquiry to be made on completed assessments.

According to Section 34 of the Indian Evidence Act, 1872, entries in books of account regularly kept in the course of business, are relevant whenever they refer to a matter into which the court has to enquire but such statements shall not alone be sufficient evidence to charge any person with liability. From a plain reading of Section 34 it is manifest that to make an enquiry relevant thereunder it must be shown that it has been made in a book, that book is a book of account, and that book of account has been regularly kept in the course of business. From this it is also understood that even if the requirements are fulfilled and the entry becomes admissible as a

relevant evidence still the statement made therein alone shall not be sufficient evidence to charge any person with liability. From the above it is seen that the first part of the Section speaks of relevancy of evidence and the second part speaks in a negative way of its evidentiary value for charging a person with liability. *(C.B.I. v. V.C. Shukla (1998) 3 sec 410 at 425).*

It cannot be gainsaid that words "account", "books of account", "business", "regularly kept" appearing in Section 34 are of general import. Necessarily, therefore, such words must receive a general construction unless there is something in the Act itself such as the subject matter with which the Act is dealing or the context in which the words are used and to show the intention of the legislature that they must be given a restrictive meaning. *(C.B.I. v. V.C. Shukla (1998) 3 SCC 410 at 425).*

"Book" ordinarily means a collection of sheets of paper or other material, blank, written, or printed, fastened or bound together so as to form a material whole. Loose sheets or scraps of paper cannot be termed as book for they can be easily detached and replaced. Thus, spiral notebooks and spiral pads can be regarded as "books" within the meaning of Section 34 of the Indian Evidence Act, but not the loose sheets of paper contained in the files. Further to ascertain that the books of account has been regularly kept, the nature of occupation is an eminent factor to be considered. In order to charge any person with liability it is not enough merely to prove that the books have been regularly kept in the course of business and the entries therein are correct. It is also necessary for the person relying upon those entries to prove that they were in accordance with facts. In other words even correct and authentic entries in books of account cannot without independent evidence of their trustworthiness fix a liability upon a person. (*C.B.I. v. V.C. Shukla 1998 3 Sec 410* at 425).

As per the decision of the Bombay High Court in *CIT v. Bhaichand H. Gandhi (1983) 141 · ITR 67, 69 (Bom)* a passbook supplied by the bank to the assessee cannot be regarded as the "book' of the assessee, that is a book maintained by the assessee, or under his instructions.

c) AFFIDAVIT

As per the Blacks Law Dictionary 6th Edition, the term "affidavit" means - "a voluntary declaration of facts written down and sworn to by the declarant before an officer authorised to administer oaths, such as a notary public". As per Section 3(3) of the General Clauses Act affidavit is defined as:

"Affidavit" shall include affirmation and declaration in the case of person by law allowed to affirm or declare instead of swearing.

If an affidavit is filed by an assessee and he is neither cross-examined on that point nor is he called upon by the department to produce any ' t documentary evidence, the assessee may assume that the Income tax authorities are satisfied with the affidavit as sufficient proof on that point in question. (*L. Sohan Lal Gupta v. CIT (1958) 33 lTR 786 at I 791(All))*. This is so because the rejection of an affidavit filed by an assessee is not justified unless the deponent has either been discredited in cross-examination or has failed to produce other supporting evidence when called upon to do so. [*Mehta Parikh & Co. v. CIT (1956) 30 ITR 181* at *187 (SC), Sri Krishna v. CIT (1983) 142 ITR 618 (All), Dilip Kumar Roy v. CIT (1974) 94 ITR 1 {Bom.)}.*

For instance where a clear intention to waive the separate rights of the assessee to the properties standing in his name is established by an affidavit, the Income-tax authorities should come to the

conclusion that the properties in question belong to the family and not to the assessee (Laxmi Narayan Gadodia & Co. (1943) 11 ITR 491 (Lah.)

The Mehta Parikh and Co. Case 30 ITR 181 cannot be construed to lay down the proposition that unless the deponent is cross-examined, the affidavit cannot be rejected. That decision lays down that if there is no material whatsoever on record for doubting the veracity of the statements made in the affidavit and if the deponent has also not been cross-examined for bringing out the falsity of his statements, then the tribunal will not be justified in doubting the correctness of the statements made by the deponent in the affidavit.

A finding given by the appellate Tribunal without considering the affidavit concerning a material evidence may not be sustainable at law even though the Tribunal had considered other material on record. This is so because an affidavit is a valid piece of evidence *(Hanutram Ram Prasad v. CIT (1978) 114 ITR 19,26 (Gauh).*

Affidavits are either affirmed as true to knowledge, or from information received provided the source of information is disclosed or as to what the deponent belief to be true provided the grounds for such believe are stated. If an affidavit lacks verification, it is of no use *(Sundar Industries v. General Engineering Works, AIR 1982 Del. 220, 223).* In other words, if an affidavit not properly verified it cannot be admitted in evidence *(A. K. K. Nambiar v. Union of India, ITR 1970 SC 652, 654)* as it is no affidavit in the eyes of Law *(State of Rajasthan v. Sindhi Film Exchange AIR 1974 Raj 31, 33).* The importance of verification is to test the genuineness and authenticity of statements and also to make the deponent responsible for such statements *(Narendra Kumar Saklecha v. Jagjivan Ram AlR 174 SC 1957).*

In *Smt. Sudha Devi v. MP. Narayanan AIR 1988 SC 1381, 1383* the plaintiff was not allowed to fill up the lacuna in the evidence by filing an affidavit belatedly at the Supreme Court stage.

In the above case it was also said that affidavits are not included in the definition of evidence in Section 3 of the Indian Evidence Act, 1872 and can be used in evidence only if the court permits it to be used for sufficient reasons.

d) Noting in diary, loose paper, dumb paper

In the case of *Central Bureau of Investigation v. V. C. Shukla & Ors. 1998 3 SCC 410* popularly known as Jain Hawala Case where Section 34 of the Evidence Act, 1872 has been explained. In this case it is held that entries in Jain Notebooks held on facts admissible under Section 34, but file containing loose sheets of papers are not "book" and hence entries therein not admissible under Section 34. Further it was also held in this case that entries in books of account shall not alone be sufficient evidence to charge any person with liability. Entries even if relevant are only corroborative evidence. Independent evidence as to trustworthiness of those entries is necessary to fasten the liability. In view of these facts it was held by the Honourable Supreme Court, that entries made in the Jain Hawala diaries are under Section 34, but truthfulness thereof not proved by any independent evidence. It was also held in this case that "books" ordinarily mean a collection of sheets of paper or other material, blank, written, printed, fastened or bound together so as to form a material whole. Loose sheets or scraps of paper cannot be termed as "book" for they can be easily detached and replaced. The Supreme Court further went on to state that even correct and authentic entries in books of account cannot without independent evidence of their trustworthiness fix a liability upon a person.

The Hon'ble Tribunal in the case of *S. P. Goyal v. Dy. CIT (2002) 82 ITD 85 (TM)* has held that

mere entry on loose sheet of paper not supported by actual cash cannot be considered to be sufficient evidence to treat the same as Cash credits under Sec. 68. This decision has been arrived at by considering the Supreme Court decision in the case of *CBI v. V.C. Shukla,* popularly known as the Jain Hawala Case.

In the case of *Satnam Singh Chhabra v. Deputy CIT (2002) 74 TTJ (Luc) 976* held that loose paper cannot be construed as books and therefore Section 34 of the Evidence Act would not apply and therefore it cannot be a basis for addition. It was also held in this case that the loose paper found in the premises of the assessee during search of which, the asseessee categorically denied the authorship and the transaction noted therein, cannot be considered as sufficient evidence. In the case of *S. K. Gupta v. DCIT (1999) 63 TTJ (Del.) 532* also held that addition made on the basis of loose sheet and torn papers found during the search were unwarranted. The case of P*rarthana Construction (P) Ltd. v. DCIT (2001) 70 ITJ (Ahd.) 122* also states that addition on the basis of loose papers without any corroborating evidence cannot be the basis for addition.

In the case of *Ashwani Kumar v. ITO (1991) 39 ITD 183* held that "document" which was found at the time of search and which did not indicate whether the figures referred to quantities of money or to quantities of goods, was a "dumb" document and no addition could be made on the basis of such document. In this decision it was also held no addition could be made on the basis of sample analysis report which showed that assessee sold adulterated cement.

e) Written and oral statements

Written and Oral Statements are normally termed as admissions and these provisions are found in Sections 17 to 31 of the Indian Evidence Act, 1872. However as far as Income Tax Provisions are concerned, admissions are normally in terms of written statements and the evidentiary value of the same could best be explained by the following case laws:

An admission or acquiescence cannot be the foundation for an assessment, were the income is returned under an erroneous impression or misconception of law *(Abdul Qayume v. CIT (1990) 184 ITR 404 (All.) & Absalom v. Talbot (1944) 26 Tax cases 166 at 192.* What is admitted by a party to be true must be presumed to be true unless the contrary is shown *(Nathoo Lal v. Durga Prasad AIR 1954 SC 355, 358).* Thus an admission is not conclusive proof of the matter admitted, though it may, in certain circumstances, operate as estoppel *(K. S. Srinivasan v. Union of India, AIR 1958 SC 419, 427).*

In the case of *ACIT v. Anoop Kumar (2005) 94 TTJ (Asr) 288,* it is held that addition could not be made merely by relying on the statement recorded under section 132(4) as there was no supportive material to justify such addition.

In the case of *DCIT v. M.L. Jain (2005) 96 TTJ (Jd) 362* it is held that no addition can be merely based on the statement recorded during search under Section 132(4) of the assessee, for such a statement recorded does not tantamount to any, money, bullion and jewellery or other valuable articles found during the course of search.

From the above case laws the principle that emerges is that mere statement/ admission has no evidentiary value unless supported by corroborative evidence leading to tangible assets.

f) Statement u/s. 133A r.w.s. 131:

The statement elicited during the survey operation had no evidentiary value as held by the Kerala

High Court in *Paul Matthews and Sons v. CIT 263 ITR 101 (Ker).* It is because Section 133A does not empower the AO to examine any person on oath. Thus in contradistinction to the power u/s. 133A, Section 132(4) of the IT Act enables the authorised officer to examine a person on oath and any statement made by such person during such examination can also be used in evidence under the Income-tax Act. On the other hand whatever statement recorded u/s. 133A of the Income-tax Act is not given an evidentiary value (263 ITR 101). Therefore a mere admission or an aquiescence cannot be a foundation for an assessment and that any statement given during survey has no effect as an "admission" nor can it be a statement on oath. U/s. 131 there must be pendency of proceedings before the concerned authority for invoking the provisions of Section 131 as held by the Bombay High Court in the case of *G. M. Breweries Ltd. v. Union of India (2000) 108 Taxman 547 (Bom).* It was held by the Supreme Court in the case of *Shrimati Amiya Bala Paul v. CIT (2003) 262 ITR 407 (SC)* that assessing officer cannot refer to valuation officer in exercise of powers u/s. 55A by using Sections 131 or 133.

The Bombay High Court in the case of *R. R. Gavit v. Sherbanoo Hasan Daya (1986) 161 ITR 793 (Bom)* held that the purpose of examination on oath u/s. 132(4) is limited to seeking explanation or information in connection with search and is not authorised to put questions in general.

g) Electronic Records

As per Section 2(1)(t) "electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or microfilm or computer generated microfiche.

Evidence in this form can be both oral and documentary and electronic records can be produced as evidence. The provisions relating to admissibility of such evidence can be found in Section 65B of the Indian Evidence Act. As per this provision any information contained in an electronic record which is printed in a paper, stored, recorded, or copied in optical or magnetic media produced by a computer (computer output put) shall be deemed to be also any document and shall be admissible in any proceedings without further proof or production of the original, as evidence of title of the contents of the original or any facts stated therein of which direct evidence would be admissible. This is subject to satisfaction of certain conditions stipulated in sub-section 2 of Section 65B. Further that evidence, even in criminal matters, can also be by way of electronic records. This would include video conferencing *(State of Maharashtra v. Praful B. Desai 2003 Cri. J 2033 (SC)).*

v) Presumption and Presume

A presumption is an inference of fact drawn from other known or proved facts. It is a rule of law under which courts are authorised to draw a particular inference from a particular fact.

Section 4 of the Evidence Act defines the terms "May presume", "Shall presume", "Conclusive proof". The definitions are as under:

"May presume"- Whenever it is provided by this act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

"Shall presume"- Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

"Conclusive proof"- When one fact is declared by this act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

In this regard it must be clearly noted that a presumption is not in itself evidence but only makes a *prima facie* case for a party in whose favour it exists. It indicates the person on whom the burden of proof lies. When the presumption is conclusive it obviates the production of any other evidence to dislodge the conclusion to be drawn on proof of certain facts. Here it must also be noted that all presumptions can be rebutted by evidence.

The above three expressions have been considered and analysed by the Supreme Court in a very recent case of *P.R. Metrani v. CIT (2006) 287 ITR 209 (SC)* wherein it has been held in the following terms: Section 132(4A) of the Income-tax Act, 1961, enables an assessing authority to raise a rebuttable presumption that books of account, money, bullion, etc. found in the possession of any person during a search, belong to such person and that the contents of such books of account and other documents are true, and that the signatures and every part of such books of account and other documents are signed by such person or are in the handwriting of that particular person. Further in this case it has also been held that the presumption under Section 132(4A) would not be available for the purposes of framing a regular assessment.

On presumptions the following decisions may also be referred to :

a) Satnam Singh Chhabra v. DCIT (2002) 74 TTJ (Luck.) 976;

b) DCIT v. M.L. Jain (2005) 96 TTJ (Jodh.) 362;

c) Atul Kumar Jain v. DCIT (1999) 64 TTJ (Del.) 786;

d) Prarthana Construction (P) Ltd. v. DCIT (2001) 70 TTJ (Ahd.) 122;

e) S. K. Gupta v. DCIT (1999) 63 TTJ (Del.) 532;

f) S. P. Goyal v. DCIT (2002) 82 ITD 85 (Mum) (TM).

vi) Corroborative Evidence, Substantial Evidence and Circumstantial Evidence :

Circumstantial Evidence

Evidence of some collateral fact from which the existence or non-existence of some fact in question maybe inferred as a probable consequence is termed circumstantial evidence.

For conviction on circumstantial evidence, the following conditions must be fulfilled:

1) The circumstances from which the conclusion of the guilt is to be drawn should be fully established.

2) The facts so established should be considered not only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

3) The circumstances should be of conclusive nature and tendency.

4) They should exclude every possible hypothesis except the one to be proved.

5) There must be chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

(Sharad Birdhichand Sharda v. State; AIR 1984 SC 1622)

(Sudama Pandey v. State; AIR 2002 SC 293)

Corroborative Evidence

Black's Law Dictionary, 8th Edition defines corroborative evidence as evidence that differs from but strengthens or confirms what other evidence shows (esp. that which needs support). Circumstantial evidence is defined as evidence based on inference and not on personal knowledge or observation (also termed indirect evidence; oblique evidence). "Some circumstantial evidence is very strong as when you find a trout in the milk". (Henry David Thoreau-Journal, 11th November 1850). "Evidence of some Collateral fact, from which the existence or non-existence of some fact in question maybe inferred as a probable consequence, is termed Circumstantial evidence" William P. Richardson. The Law of Evidence, 3rd edition at page 68.

Corroboration need not be direct evidence of commission of crime, it may be circumstantial *(Hussain v. Dalip Singhji AIR 1970 SC 45).*

It has been held in England that the Jury is entitled to consider whether silence of accused when charged with the offence is or is not some corroboration *(R v. Felghenbaum, 1919, 1KB 431).*

Substantial Evidence

"Substantial Evidence" means evidence that a reasonable mind could accept as adequate to support a conclusion. Evidence offered to help establish a fact in issue, as opposed to evidence directed to impeach or to support a witness's credibility is also called as Substantial Evidence.

From the above it can be seen that substantial evidence has more persuasive value than the other two. However, all the three, corroborative, circumstantial and substantial evidence have its own value based on the particular situation in which that evidence is used and also based on the law in which the Court is deciding. There is no any hard and fast rule that the particular evidence is more valuable in the matters of Taxation Laws. All these evidences have its own persuasive value in the proceedings, which is before an assessing authority.

The word "evidence" as used in Section 143(3) of the Income-tax Act, 1961 and obviously cannot be confined to direct evidence. The word comprehensive enough to cover circumstantial evidence *(Paras Dass Munna Lal v. CIT (1937) 5 ITR 523 at 526 (Lahore).* The word evidence has been used in that section in a wider sense (CIT v. Khemchand Ramdas (1940) 8 TIR 159, 176 (Sind) or the generic sense, and not in the arrested sense as to be either oral or documentary or both *(CIT v. Metal Products of India (1984) 150 ITR 714, 717 (Punj).* The use of the word "material" or "material gathered" in section 143(3) shows that the Assessing Officer not being a Court can rely upon material, which may not strictly be evidence admissible under the Indian Evidence Act for the purpose of making an assessment order. Thus not only in respect of the relevancy but also in respect of proof the material, which can be taken into consideration by the assessing officer and other authorities under the IT Act is far wider than the evidence which is strictly relevant under the Evidence Act *(Addl. CIT v. Jay Engineering Works Ltd. (1978) 113 ITR 389, 391 (Del. HC).*

Material or evidence on which taxing authorities may rely under the IT Act is not confined to direct testimony in the shape of statements made by witnesses. All relevant circumstances which have a bearing in this issue which are revealed in the course of assessment would be covered by the expression material or evidence on which the Income Tax officer could rely *(Mangalchand Gobardhan Das v. CIT (1954) 26 ITR 706, 710, 711 (Assam).* The material on which reliance may be placed by the assessing officer may be within his own knowledge and might have been derived by him from hearsay or from information of a most authentic character. However the

assessing officer should bring this evidences to the attention of the assessee and the Rules of Natural Justice are not to be violated. *(Seth Gurmukh Singh v. CIT (1944) 12 ITR 393, 425 (Lah).* At the same time material gathered in the assessment proceedings of one person is not legal evidence in the assessment of another person *(N. S. Choodamani v. CIT (1959) 35 ITR 676 (Ker)).* Similarly evidence brought on record without the knowledge of the assessee and used against him without giving him an opportunity to rebut it offends the principle of natural justice *(MO Thomakutty v. CIT (1958) 34 ITR 50l (Ker)).*

vii) Proved, Disproved, Not Proved

Section 3 of the Indian Evidence Act defines the terms 'Proved', 'Disproved' and 'Not Proved' as follows:

'Proved' - A fact is said to be proved when, after considering the matter before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

'Disproved' - A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

'Not Proved' - A fact is said to be Not Proved when it is neither proved nor disproved.

viii) Burden of Proof and Onus of Proof

"Burden of proof" really means two different things. It means sometimes that a party is required to prove an allegation before judgement can be given in its favour; it also means that on a contested issue, one of the two contending parties has to introduce evidence. The burden of proof is of importance only where by reason of not discharging the burden, which was put upon it, a party must eventually fail. Where, however parties have joined issue and have led evidence and the conflicting evidence can be weighed to determine which way the issue can be decided, the abstract question of burden of proof becomes academic *(Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi AIR 1960 SC 100, 105).*

The question of *onus probandi* is certainly important in the early stages of a case. It may also assume importance where no evidence at all is led on the question in dispute by either side; in such a contingency the party on whom the onus lies to prove a certain fact must fail. Where, however, evidence has been led by the contesting parties on the question in issue, abstract considerations of onus are out of place; the truth or otherwise of the case must always be adjudged on the evidence led by the parties *(Kalwa Devadattam v. UOI (1963) 49 ITR 165, 175 (SC)).* In other words onus as a determining factor comes into play when there is either no evidence on either side or where it is actually worthless or equally balanced.

Initial onus is on the Department to prove each item, which is liable to be taxed as revenue receipt, but the extent of the burden always depends upon the nature of the income and the circumstances in which it was made. Once the assessee gives an explanation which in the opinion of the Income Tax Department is not true and which could not reasonably be true, the burden is on him to prove that what he has stated is true and whatever burden is on the department stands shifted thereafter *Juggilal Kamlapat v. CIT (1964) 52 I1R 811, 822(All)).* In all cases in which a receipt is sought to be taxed as income, the burden lies upon the department to prove that it is within the taxing

provision. Where, however, a receipt is of the nature of income, the burden of proving that it is not taxable because it falls within an exemption provided by the Act lies upon the assessee. *(Parimisetti Seetharamamma v. CIT (1965) 57 ITR 532, 536 (SC)).*

There is an essential distinction between "burden of proof" and "onus of proof". Burden of proof lies on the person who has to prove a fact and it never shifts, but the onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. *(A. Raghavamma v. A. Chenchamma AIR 1964 SC 136, 143).*

Onus of proof in the case of an assessment is the same as what is stated herein above. However in the case of Cash Credits, unexplained investments etc. which is deeming provision and here it is the assessee who has to explain the credit or investments and hence the onus lies on the (assessee not only to say that it is correct but also to prove that it is correct. When a cash credit entry appears in the assesseee's books of account, the assessee has a legal obligation to explain the nature and source of such credit *(Sreelekha Banerjee v. CIT (1963) 49 ITR 112, 117 (SC).* If the assessee offers an explanation about the cash credit, the Income Tax department can put the assessee to proof of his explanation and if the assessee fails to tender evidence or avoid an enquiry, then the assessing officer is justified in rejecting the explanation and holding that the income is from an undisclosed source. The assessing officer is not required to specify or prove what that source is, which from the nature of the case must be known only to the assessee. *(Seth Kalekhan Md. Hanif v. CIT (1958) 34 ITR 669 at 674 affirmed in (1963) 50 ITR 1 (SC).* The Supreme Court modified the above decision later in the case of Parimisetti *Seetharamamma v. CIT (1965) 57 ITR 532, 537 (SC).* In this case it was laid down that the burden of proof held in the earlier two cases to be upon the assessee to prove the source, nature and character of the credit would not apply to a case, where the source of the receipt is disclosed by the assessee and there is no dispute about the truth of that disclosure and in such event, the income tax authorities would not be entitled to raise an inference that the receipt is assessable to Income- tax on the ground that the assessee had failed to lead all the evidence in support of his contention that it is not within taxing provision. *(Ganesh Prasad v. CIT (1968) 67 ITR 344, 348 (All)).*

Onus when discharged or shifted

It has consistently been laid down that when assessee claims that he had borrowed money from a third party, the initial onus lies on the assessee to establish - a) the identity of the third party, b) the ability of the third party to advance money; and *prima facie* that the loan is a genuine one. The mere production of a confirmation letter is not sufficient to prove that the alleged loan is genuine *(Bharati (P) Ltd. v. CIT (1978) 111 ITR 951 (Cal).* If the assessee establishes the aforesaid three pre-conditions, it wou*ld be for the department to disprove the same (CIT v. Baishnab Charan Mohanty (1995) 212 ITR 199 (Orissa).*

Burden of proof in the case of Search and Seizure

In Search and Seizure cases the burden of proof is on the assessee in view of the presumptions provided under section 132 (4A) of the IT Act. However it should be noted that such e presumption is rebuttable. Moreover the presumption envisaged is only a factual presumption. The burden of proof to explain the ownership of assets is on the assessee in respect of assets found in assessee's possession. But where the property is in joint possession with wife, who also doing business and has disclosed the assets found during search in assessees premises and such income has also been taxed in wife's hands, the burden of proof on the accused stand discharged

(District Superintendent of Police, Chennai v. Inbasagaran K (2006) 282 ITR 435 (SC). While there is a presumption that the documents found belongs to assessee, there is no further resumption that such document is also in the handwriting of the assessee. The burden of proof that the investment in the asset not recorded in the books of account is on the revenue. *(Ushakant Patel v. CIT (2006) 282 ITR 553 (Guj)).*

In respect of cash found, the burden to explain the source is on the assessee. Where the explanation is not supported, the inference that this undisclosed income follows. In the case of *Vikhram v. ACIT (2006) 285 ITR 256 (Del.),* the assessee found in possession of large amount of cash explained the amount as belonging to Congress I Party, of which he was a member but both President and Secretary of the party denied any concern with the cash found in the possession of the assessee. The High Court confirmed the addition on the basis of the Law on Burden of Proof under Section 110 of the Indian Evidence Act and the requirement of Section 69A of the Income-tax Act, besides the law laid down by the Supreme Court in *Chuharmal v. CIT [1988] 172 ITR 250 (SC)* as regards burden of proof in respect of assets found in assessee's possession.

ix) Examination-in-Chief

U/s. 137 of the Evidence Act Examinations are as under:

Examination-in-Chief – The examination of a witness by a party who calls him shall be called his Examination-in-Chief.

Cross-Examination – The examination of a witness by the adverse party shall be called his cross examination.

Re-Examination – The examination of a witness, subsequent to the cross-examination, by the party who called him, shall be called his re-examination.

Section 138 says the order of examinations and it also directs that the examination and cross--Examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his Examination-in-Chief.

David Paul Brown of the Philadelphia Bar has laid down certain rules for Examination-in- chief and cross-examination and they are acknowledged by competent authorities to be safe guides. They are reproduced below:

Paul Brown's "Golden Rules" for Examination-in-Chief

1) If they are bold, and may injure your cause by pertness or forwardness, observe a gravity and ceremony of manner towards them which may be calculated to repress their assurance.

2) If they are alarmed or diffident, and their thoughts are evidently scattered, commence your examination with matters of a familiar character, remotely connected with the subject of their alarm, or the matter in issue as, for assistance – Where do you live? Do you know the parties? How long have you known them? and the like. And when you have restored them to their composure, and the mind has regained its equilibrium, proceed to the more essential feature of the case, being careful to be mild and distinct in your approaches, lest you again trouble the fountain from which you are to drink.

3) If the evidence of your witnesses be unfavourable to you (which should always be careful guarded against), exhibit no want of composure; for there are many minds that form opinions of the nature or character of testimony chiefly from the effect which it may produce upon the counsel.

4) If you perceive that the mind of the witness is imbued with prejudices against your client, hope but little from such quarter – unless there be some facts which are essential to your client's protection, and which that witness alone can prove; either do not call him, or get rid of him as soon as possible. If the opposite counsel perceive the bias to which I have referred, he may employ it to your own ruin. In judicial inquiries, of all possible evils, the worst and the hardest to resist is an enemy in the disguise of a friend. You cannot impeach him you cannot cross-examine him – you cannot disarm him – you cannot indirectly, even, assail him; and if you exercise the only privilege that is left to you and call other witnesses for the purposes of explanation, you must bear in mind that instead of carrying the war into the enemy's country, the struggle is still between sections of your own forces, and in the very heart, perhaps of your own camp. Avoid this by all means.

5) Never call a witness whom your adversary will be compelled to call. This will afford you the privilege of cross-examination – take from your opponent the same privilege it thus gives to you- and, in addition thereto not only render everything unfavourable said by the witness doubly operative against the party calling him, but also deprive that party of the power of counteracting the effect of the testimony.

6) Never ask a question without an object nor without being able to connect that object with the case, if objected to as irrelevant.

7) Be careful not to put your question in such a shape that, if opposed for informality, you cannot sustain it, or, at all events, produce strong reason in its support. Frequent failures in the discussion of points of evidence enfeeble your strength in the estimation of the jury, and greatly impair your hopes in the final result.

8) Never object to a question from your adversary without being able and disposed to enforce the objection. Nothing is so monstrous as to be constantly making and withdrawing objections; it either indicates a want of correct perception in making them, or a deficiency of real or of moral courage in *not making them good.*

9) Speak to your witness clearly and distinctly as if you were awake and engaged in a matter of interest and make him also speak distinctly and to your question. How can it be supposed that the court and jury will be inclined to listen, when the only struggle seems to be whether the counsel or the witness shall first go to sleep?

10) Modulate your voice as circumstances may direct. "Inspire the fearful and repress the bold".

11) Never begin before you are ready and always finish when you have done. In other words, do not question for question's sake, but for an answer.

Common causes v. UOI (Sahara Diaries case). itatonline.org

Entries in loose papers/ sheets are irrelevant and inadmissible as evidence. Such loose papers are not "books of account" and the entries therein are not sufficient to charge a person with liability. Even if books of account are regularly kept in the ordinary course of business, the entries therein shall not alone be sufficient evidence to charge any person with liability. It is incumbent upon the person relying upon those entries to prove that they are in accordance with facts.

Entries in books of account are not by themselves sufficient to charge any person with liability,

the reason being that a man cannot be allowed to make evidence for himself by what he chooses to write in his own books behind the back of the parties. There must be independent evidence of the transaction to which the entries relate and in absence of such evidence no relief can be given to the party who relies upon such entries to support his claim against another.

The supreme court laid down the following principles.

(i) Entries in loose papers/sheets are irrelevant and not admissible under Section 34 of the Evidence Act. It is only where the entries are in the books of account regularly kept, depending on the nature of occupation, that those are admissible;

(ii) As to the value of entries in the books of account, such statement shall not alone be sufficient evidence to charge any person with liability, even if they are relevant and admissible, and that they are only corroborative evidence. Even then independent evidence is necessary as to trustworthiness of those entries which is a requirement to fasten the liability;

(iii) The meaning of account book would be spiral note book/pad but not loose sheets;

(iv) Entries in books of account are not by themselves sufficient to charge any person with liability, the reason being that a man cannot be allowed to make evidence for himself by what he chooses to write in his own books behind the back of the parties. There must be independent evidence of the transaction to which the entries relate and in absence of such evidence no relief can be given to the party who relies upon such entries to support his claim against another;

(v) Even if books of account are regularly kept in the ordinary course of business, the entries therein shall not alone be sufficient evidence to charge any person with liability. It is not enough merely to prove that the books have been regularly kept in the course of business and the entries therein are correct. It is further incumbent upon the person relying upon those entries to prove that they were in accordance with facts;

(vi) The Court has to be on guard while ordering investigation against any important Constitutional functionary, officers or any person in the absence of some cogent legally cognizable material. When the material on the basis of which investigation is sought is itself irrelevant to constitute evidence it is not admissible in evidence.

It is essential to appreciate Section 34 of the Indian Evidence Act, 1872 which reads as follows:

Entries in books of account, including those maintained in an electronic form when relevant- Entries in books of account, including those maintained in an electronic form regularly kept in the course of business are relevant whenever they refer to a matter in to which the Court has to enquire, but such statements shall not alone be sufficient evidence to charge any person with liability .

Illustration – A sues B for Rs. 1,000/- and shows entries in his account – books showing be to be indebted to him to this amount. the entries are relevant but are not sufficient, without other evidence, to prove the debt.

Admissibility – Entries in books of account regularly kept in the course of business are admissible though they by themselves cannot create any liability:- *Ishwar Dass v. Sohan Lal AIR 2000 SC 426.* Unbound sheets of paper are not books of account and cannot be relied upon. *Dharam Chand Joshi v. Satya Narayan Bazaz AIR 1993 GAU 35.*

Issues arising in Sahara Diaries case.

1. If entries in loose papers/ sheets are irrelevant and not admissible as per Section 34 of the Evidence Act, then loose papers/ sheets found at the time of **search and seizure** could be taken into account? In a number of search cases additions are made on the basis of writings and entries on loose sheets. Thus based on the SC judgment whether asseesee can argue that these writings have no evidentiary value, more particularly when they are on loose papers and writings not recorded in books of account.
2. Entries are made in books of account and certain expenditure is recorded depending on nature of occupation and work. **Explanation 1 to section 37** refers to expenditure incurred which is an offence or prohibited by law however if the expenditure so incurred in paying bribes and amounts for security then can such an amount be disregarded taking into consideration a holistic view. If a bribe is paid to get the work smoothly and expeditiously done in the light of the above whether the amount would be sustainable or not.
3. Entries in books of account alone are not sufficient evidence but there must be collaborative evidence in this connection **issue of bad debts** arises and the decision to write off the bad debts as an when the assessee thinks that the same has become irrecoverable. In such circumstances the writing off cannot be questioned by the AO based on the rationale of the SC judgment.
4. On conclusiveness it is held that a man cannot be allowed to make evidence for himself by whatever he chooses to write in his own books behind the back of the parties. Here the role of **Confirmation Letters** assumes importance in number of cases even though loans are given confirmation is not available on record. That merely because there are other evidences but no confirmation letters is the amount to be totally disregarded
5. It is also laid down even if books of account are regularly kept the entries therein shall not alone be sufficient evidence to charge any person with liability. On the question of **cash loans or inter-party** transactions the nature of evidence will vary from case-to- case.
6. It is also provided that it is incumbent upon the person relying upon the entries to prove that they were in accordance with facts. The issue arises when there are allegations of **back dated assessment order or notices issued after due date** this is in conjunction with functioning of officers and Government Constitutional functionaries. In practicality it would be almost impossible for an individual assessee to overcome this particular barrier.
7. The judgment notices that it would be in admissible if entries are on random papers at any given point of times. Thus in a search and seizure action random papers and writings including figures of alleged **cost of construction of house or trading in shares or derivative** are found thus on the basis of this judgment it follows that they are inadmissible evidence and cannot be considered in making additions.
8. The judgment also deals with matters done which may have co-relations with random entries. In this connection reference to **undisclosed income of another person in Section 158BD** assumes significance. Issue arises as to how the other person would react and deny the entries in the books of account of the searched person.
9. One of the basis in the judgment refers to fictitious entries in absence of cogent and admissible material on record. This would make **entries recorded in diaries** an issue whether to be admitted or not an evidence which is against the particular person has to be

discharged beyond reasonable doubt and a liability cannot be fastened based on needle of suspicion.

Evidence not produced before IT authorities and Writ Petition

At the time of assessment, the assessee has not given any information or material evidence to the AO by which the entry could be verified. The AO therefore made an addition. The assessee filed a revision petition before the CIT, who recorded that the assessee was given sufficient opportunity to present evidence but he failed to do so. The addition was confirmed. The assessee filed a writ petition claiming that there was sufficient factual material and evidence with him.

In *Charanjit Singh v. CBDT (2016) 388 ITR 469 (P&H) (HC)* it was held that the factual metrix was required to be established by producing material evidence before IT authorities. As the assessee was unable to give evidence or materials neither did the assessee prove that he was prevented from producing evidence, the writ petition cannot be entertained. It was held that the assesse could not be allowed de novo trial under the garb of allowing one more opportunity, that absence of any material on record cannot give assessee a right to file a writ petition the Court relied upon decisions of the SC that wherever disputed questions of fact are raised in writ proceedings, writ was not an appropriate remedy.

Bhaghubai D. Khalasi v. State of Gujarat (2007) 4 SCC 241

Dwarka P. Agarwal v. B.D. Agarwal AIR (2003) SC 2686

Mukesh Kumar Agarwal v. State of UP (2009) 13 SCC 693

Records destroyed resort to RTI

In *Franchise India v. ACIT (2016) 388 ITR 563 (P&H) (HC)* the records were destroyed in fire accident and the assessee had lodged a police complaint. However the records were made available to the assessee under Right to Information Act 2005. In a reopening matter the assessee challenged that there was violation of principles of natural justice. The Court held that when the entire records, as asked for by the assessee, were made available then there was no need to go into the technicalities or the issue of natural justice or prejudice caused.

***Safem and Nexus qua* evidence**

In connection with Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 the legislative object is to ensure that the properties purchased out of smuggling activities or by illegal means in violation of the foreign exchange regulations cannot be permitted to be enjoyed by a convict or detenue or relative holding property as benami.

It is only when link or nexus of the properties with the convict has connection to income from such illegal activity which is established the only properties standing in the name of a relative can be forfeited. In competent authority *SAFEM v. M. Khadar Mouideen (2016) 387 ITR 390 (Mad.) (HC).* The Court laid down a ratio that nexus has to be shown between properties and convict and income from illegal activities and the establishment of material and evidence for such acquisition before forfeiture.

Whether an enquiry where no proceedings are pending by an authority amounts to violation of fundamental rights

Constitutional validity of amendment to Section 133(6) by adding the words “enquiry or” which

granted power to call for information by IT authorities even when no proceedings are pending against an assessee came up for consideration in *Pattambi Service Co-operative Bank Ltd. v. Union of India (2016) 387 ITR 299 (Ker.) (HC).*

It was held that right of privacy should be balanced with larger public and economic interest of the nation and that the right to privacy could not be extended to militate against the right of the State information under its fiscal administration.

IT authorities asked co-operative service banks to give details of transactions of persons having deposit of Rs 5 lakhs and interest income exceeding Rs 10,000/- in service Co-operative Bank. The contention was such an enquiry was a roving and fishing enquiry seeking information even when no proceedings are pending against such persons and that the investigation infringes into the customers private financial affairs and further the relationship between a banker and its customers is fiduciary in nature and thus parting such information is arbitrary and invasion of rights to privacy.

The Division Bench of the Kerala High Court upheld the Constitutional validity on the ground that the avowed object was to get financial transaction which could be associated with black money and the intention was to curb the menace of illegal transactions.

However, when there is a conflict between welfare legislation and tax legislation, the welfare legislation will prevail as laid down in Managing Director *TNSTC Limited v. Chinna Durai (2016) 385 ITR 656 (Mad.) (HC).*

The Motor Vehicles Act, 1988 is an Act for compensating accident victims who have suffered bodily disablement or loss of life. In the compensation, so given TDS sought to be deducted by IT Department. To this effect, a circular was also issued dated 14-10-2011. That TDS is to be deducted on the award amount and interest accrued. The Madras High Court following the decision of Himachal Pradesh High Court concluded that TDS cannot be deducted since the compensation and interest thereon do not fall under the term “income” as defined under the IT Act.

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