Admission and Retraction of Statement in Survey & Search Cases

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Synopsis

1. Cases on search authorisation / Issue of authorisation held invalid:

1.1 In **H.L. Sibal v. CIT [1975] 101 ITR 112 (P&H), it was held that power under section 132(1) has to be exercised in an honest manner and search warrants cannot be indiscriminately issued purely as matter of policy. The Commissioner has to record his reasons before issuing search warrant and where there was no information with Commissioner on basis of which he could form requisite belief under section 132(1)(a), (b) or (c) to issue search warrant in respect of search of premises of assessee, warrant issued for conducting aforesaid search and proceedings pending against assessee under section 132(5) were to be quashed.** The High Court also observed at page 138 of the ITR, as follows: "The applicability of Section 165, Criminal Procedure Code, to the searches made under Section 132(1) gives an indication that **this Section is intended to apply in limited circumstances to persons of a particular bent of mind**, who are either not expected to cooperate with the authorities for the production of the relevant books or who are In possession of undisclosed money, bullion and jewellery, etc. Take for instance, a particular assessed who has utilised his undisclosed income in constructing a spacious building His premises cannot be subjected to a search under this Section on this score

alone. A search would be authorised only if information is given to the CIT that such a person Is keeping money, bullion, jewellery, etc., in this building or elsewhere. Further, if an assessee has been regularly producing his books of account before the assessing authorities who have been accepting these books as having been maintained in proper course of business, it would be somewhat unjustified use of power on the part of the CIT to issue a search warrant for the production of these books of account unless of course there is information to the effect that he has been keeping some secret account books also. He has to arrive at a decision in the background of the mental make up of an individual or individuals jointly interested in a transaction or a venture. A blanket condemnation of persons of diverse activities unconnected with each other on the odd chance that if their premises are searched some incriminating material might be found is wholly outside the scope of Section 165, Criminal Procedure Code. This power has to be exercised in an honest manner and search warrants cannot be indiscriminately issued purely as a matter of policy."

1.2 In **Dr. Nand Lal Tahiliani v. CIT** [1988] 39 Taxman 127 (Allahabad)/[1988] 170 ITR 592 (Allahabad) , the Allahabad High Court held that the condition precedent for an action under Section 132 was possession of the Information mentioned in the said Section. If either of the conditions was missing or not adhered to then the authority was precluded from invoking the provisions of Section 132. In order that averment "of information must be in a good faith and not a mere pretence, it was necessary that information in consequence of which it was formed must be valid and linked with the ingredients mentioned in this Section. There must be a rational connection between the information or material and the belief about undisclosed income. While quashing the authorisation which had been issued, the Court referred to the note of satisfaction which had been recorded and observed that the reputation of roaring practice or rumour of charging high rate of fee could not be regarded as tangible material on the basis of which an opinion could be formed as contemplated by Section 132 of the Act. The satisfaction of the authorities under Section 132 may be subjective but it must be arrived at objectively and on material which is available.

1.3 In **Balwant Singh and others v. R.D. Shah, Director of Inspection, [1969] 71 ITR 550 (Del.)**, the Division Bench held that the **High Court could not test the adequacy of the grounds leading to the satisfaction which was recorded** under Section 132 of the Act. It was, however, observed that the Director of Inspection or the Commissioner ought not to lightly or arbitrarily invade the privacy of a subject. If the grounds on which the belief is founded are non-existent or are irrelevant or are such on which no reasonable person can come to that belief, the exercise of the power would be bad, but short of that, the Court cannot interfere with the belief bona fide arrived at by the Director of Inspection. **It is, however, for the Court to examine whether the reasons for the belief have a rational connection or relevant bearing to the formation of the belief.** It was further observed, that **search authorisation could not be issued merely with a view to making a roving or fishing enquiry, but could be issued only when their existed a good ground for believing that further proceedings may have to be taken**.

1.4 In **Moti Lal v. Preventive Intelligence Office, 80 ITR 418 (All.),** the Division Bench of the Allahabad High Court observed while interpreting the provisions of Section 132, in the language of Justice R.S. Pathak, as follows : "In my opinion the power conferred under Section 132(1) is contemplated in relation to those cases where the precise, location of the article or thing is not known to the Income Tax Department and, therefore, a search

must be made for it, and where it will not be ordinarily yielded over by the person having possession of it and, therefore, it is necessary to seize it.....I am unable to accept the contention on behalf of the Income Tax Department that Section 132(3) will Include a case where the location of the article or thing is known and where ordinarily the person holding the custody of it will readily deliver it up to Income Tax Department, such article or thing. I think, it requires neither search nor seizure." The said decision was approved by the Supreme Court in the case of **CIT v. Tarsem Kumar, 161 ITR 595 (SC)**.

1.5 In **Jignesh Farshubhai Kakkad v. DIT (Inv) [2003] 132 Taxman 350 (Gujarat)/[2003] 264 ITR 87 (Gujarat)**, during the course of search in case of members of 'A' Group under section 132, the premises of one 'P' had been searched by the respondent- authorities and certain sum was found which according to 'P' belonged to his firm 'J' of which he was a partner after disassociating himself from the 'A' Group. The High Court held that from the perusal of the satisfaction note submitted by the respondent No. 2 and the satisfaction recorded by the respondent No. 1, it was clear that there was no justifiable reason for having search under the provisions of section 132 at the residence of the petitioners. The condition precedent referred to in section 132 had not been satisfied. No justifiable reason had been recorded for having search either by respondent No. 2 or by respondent No. 1 regarding his satisfaction. Simply because certain sum was found at the residence of 'P' and simply because 'P' was one of the partners of 'J', **there was no justifiable reason to issue authorization by respondent No. 1 in favour of respondent No. 2 for having search at the residence of the petitioners. The condition precedent for having search under the provisions of section 132 did not exist**. [Para 11] It was held that in the circumstances, the said satisfaction was arrived at in a mechanical manner and without any application of mind. The impugned orders of issuing athorization were quashed and set aside.

2. Recording of Statement under Section 132(4) and Presumption under sec. 292C:

Section 132 (4) of Income Tax Act deals with recording of statements on oath. The same reads as under:

The authorised officer may, during the course of the search or seizure, examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing and any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Income-tax Act.

Explanation : For the removal of doubts it is hereby declared that the examination of any person under this sub-section may be not merely in respect of any books of account, other documents or assets found as a result of the search, but also in respect of all matters relevant for the purposes of any investigation connected with any proceeding under the Income tax Act.

Recording of statements of the assessee and/ or other persons connected with the search, found in place of search and whom the authorized officer deems fit for recording a

statement, is a common practice during such proceedings. It may be noted that the statement is recorded not for questioning simpliciter. and is taken on oath, its sanctity is quite high in the eyes of law and therefore, cannot be allowed to be retracted easily.

The words **'may be used in evidence in any proceedings'** appearing in section 132(4) are of great significance. The judicial views with regard to use of a Statement recorded under section 132(4) and circumstances in which such person can retract the Statement as also **necessity for revenue to corroborate the admission,** are analysed hereinafter.

Presumption under Section 292C : Section 292C has been inserted by the Finance Act, 2007 with retrospective effect from 1-10-1975 **allowing presumption as to assets, books of account, etc. found during search under section 132 and requisition under section 132A**.

Later on by the Finance Act, 2008 the ambit of section 292C **has been enlarged by including presumption in case of survey proceedings under section 133A with retrospective effect from 1-6-2002.**

3. **CBDT Instruction dated March 23, 2003:** In the light of the statements recorded followed by retractions on the ground of coercion and threat in the course of search and survey operations, the Board issued the Instructions F.No. 286/2/2003 - IT (Inv.) dated March 23, 2003 stating as follows:

> **"Instances have come to the notice of the Board where assessees have claimed that they have been forced to confess undisclosed income during the course of the search and seizure and survey operation. Such confession, if not based on credible evidence, are retracted by the concerned assessees while filing return of income. In these circumstances, confession during the search and seizure and survey operation do not serve any useful purpose. It is, therefore, advised that there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income-tax department. Similarly, while recording statement during the course of search and seizure operation, no attempt should be made to obtain confession as to the undisclosed income."**

4. **Admissions**:
Admissions as in Evidence Act: **Statements recorded during Search and under various provisions of the Income-tax Act, are vital tool in the hands of the income-tax authorities in their quest to establish certain factual and legal positions**. Written Statements are used as evidence in various proceedings under the Income tax Act.
The word "Statement" is neither defined in the Income-tax Act and, hence, it assumes its dictionary meaning of **'something that is stated'**. **Section 17 of the Indian Evidence Act, 1872** defines **admission as an oral or documentary Statement which suggests any inference as to any fact in issue or relevant fact.**
Admissions are Statements by a party of the existence of a fact which is relevant to an issue in dispute. It may be noted that **the Statement may be either admission or denial of a fact**.

An Admission is a Statement, oral or documentary, which suggests an inference as to any fact in issue or relevant fact and which is made by a party or by a person concerned with him in any of the ways as described under sections 18 to 23 of the Indian Evidence Act, 1872.

5. **Admissions are not conclusive proof**:

Admission, though sometimes strong evidence, are, however, not conclusive proof of the facts admitted. But what a party himself admits to be true, may reasonably be presumed to be so, **unless it is satisfactorily explained or successfully withdrawn**. So long as they do not operate as estoppel, **persons making admissions are at liberty to contradict them or to show that they are untrue or mistaken or made under a misapprehension**. Thus, **the effect of an admission is to shift the burden of proof to the party making the admission.**

Admissions play a very important role in the income-tax proceedings, as they generally bind the maker. **In the absence of any denial or explanation therefor, an admission is almost conclusive regarding the facts contained therein**.

They generally dispense with the requirement of adducing further evidence or proof to support a fact. **Though section 31 of the Indian Evidence Act, 1872 states that admissions are not conclusive proof of the matters admitted, yet admissions in the absence of rebuttal may conclude an issue.**

Under the Income-tax Act also **admissions** bind the maker **if these are not properly rebutted or retracted**. Some important judgments of the Supreme Court explain the concepts and relevance of **admission** and rebuttal or retraction of admitted facts, are discussed hereinafter.

As per **section 31** of the Indian Evidence Act, **admissions are not conclusive proof** of the matters admitted, **but they may operate as estoppel** under the provisions of the law as contained.

6. **Retraction of Statement:**

A statement given on oath under section 132(4) may be retracted depending on the facts and circumstances of the case. When a person intends to retract his or her statement, the same should be done without undue delay and by giving cogent reasons for doing so along with other evidences to corroborate the reasons given for retraction.

It is settled law that a statement which is recorded under coercion or threat may be retracted and even statements which were given under mistaken facts or mistaken position of law, may be retracted, as soon as possible, giving cogent reasons explaining the mistake. **Even if an admission is made in a statement, the same cannot be held to be conclusive in every case especially when the assessee or any other person whose statement has been recorded under section 132(4) seeks to retract it and shows some genuine concrete reason.**

However, retraction of statements made, is viewed adversely by the Income Tax Department, in most cases. Article 20(3) of the Constitution says that no person accused of any offence shall be compelled to be a witness against himself. This is based upon a legal maxim which means that no man is bound to accuse himself.

7. **Decisions where Retraction of Statement was held VALID:**

7.1 **Pullangode Rubber Produce Co. Ltd. v. State of Kerala [1973] 91 ITR 18 (SC)** : Their Lordships while observing that **admission is an extremely important piece of evidence, held that, it cannot be said to be conclusive and the maker can show that it was incorrect.** [Also refer S. **Arjun Singh v. CWT [1989] 175 ITR 91/[1988] 41 Taxman 272 (Delhi)]**.

7.2 In **Commissioner of Income Tax, Central-III v Lavanya Land Pvt. Ltd. and Others [2017] 397 ITR 246 (Bom.)**, the Hon'ble Bombay High Court dismissed an appeal filed by the revenue against the order of the ITAT, Mumbai and upheld the order of the ITAT in which it had set aside the additions made by the revenue based on the statement made by person who was searched but which was later retracted by him. In this case, a search was conducted at the premises of one of handlers of the assessee company and his statement was recorded which showed an admission that a large sum of money was received by him to purchase lands in the name of the assessee company. The said statement was retracted by him after a period of two and a half months. However, the department proceeded to issue a notice to the assessee under section 153C of the Act on the basis of the statement of the person searched and without taking into account the retraction, an addition was made under section 69. The CIT(A) upheld the addition made. On appeal, the ITAT Mumbai set aside the addition made. A***dverting to the fact that the concerned person (Dilip Dherai) has retracted his statement, the Tribunal arrived at the conclusion that merely on the strength of the alleged admission in the statement, the additions could not be made as*** *the essential ingredients of Section 69C of the IT Act enabling the additions were not satisfied. This was not a case of 'no explanation'. Rather, the Tribunal concluded that* ***the allegations made by the authorities are not supported by actual cash passing hands***. Against the order of the ITAT, the revenue filed an appeal to the Hon'ble Bombay High Court, which held while dismissing the appeal of the revenue, in para 22 of its Order, as under:

"It is not possible for us to reappraise and re-appreciate the factual findings. The finding that Section 153C was not attracted and its invocation was bad in law is not based just on an interpretation of Section I53C but after holding that the ingredients of the same were not satisfied in the present case. That is an exercise carried out by the Tribunal as a last fact finding authority. Therefore, the finding is a mixed one. There is no substantial question of law arising from such an order and which alternatively considers the merits of the case as well."

7.3 **Retraction of statements recorded at odd hours:** The admissibility of retraction of **statements which were given in an exhausted state and at odd hours was allowed** by the Hon'ble Gujarat High Court in **Kailashben Manharlcil Choksi v CIT [2010] 320 ITR 411 (Guj,)**. It was held that a statement which has been recorded u/s 132(4) at odd hours is not a voluntary statement if it is subsequently retracted. The Hon'ble High Court observed that t*he main grievance of the A.O. was that* ***the statement was not retracted immediately and it was done after two months. It was an afterthought and made under legal advise.*** *However, if such retraction is to be viewed in light of the evidence furnished along with the affidavit, it would immediately be clear that the assessee has given proper explanation for all the items under which disclosure was sought to be obtained from the assessee. The High Court held that the explanation seems to be more convincing, has not been considered by the authorities below and additions were made and/or confirmed merely on the basis of statement recorded under Section 132(4) of the Act. Despite the fact that the said statement was later on retracted no evidence has been led by the*

Revenue authority. ***Merely on the basis of admission the assessee could not have been subjected to such additions unless and until, some corroborative evidence is found in support of such admission. The High Court also held*** *that* ***the statement recorded at such odd hours cannot be considered to be a voluntary statement, if it is subsequently retracted and necessary evidence is led contrary to such admission.***

7.4 Principal CIT, Central III v. Krutika Land (P.) Ltd. [2019] 103 taxmann.com 9 (SC): During search certain incriminating documents were found in possession of one DD, managing and handling land acquisition on behalf of assessee-company and his statement was recorded. He stated that there were amounts disbursed for purchase of lands and a certain amount of cash had also been received by him to purchase lands. However, later he had retracted his statement. A.O. issued notice under section 153C and initiated proceedings against assessee and made additions under section 69C. High Court held that since seized documents did not belong to assessee but were seized from residential premises of one Mr. DD who had later retracted his statement, no action under section 153C could be undertaken in case of assessee. It further held that since entire decision was based on seized documents and there was no material to conclusively show that huge amounts revealed from seized documents were actually transferred from one side to another, additions under section 69C were not sustainable. SLP of Revenue was dismissed.

7.5 Satinder Kumar (HUF) v. CIT [1977] 106 ITR 64 (HP): It was held that it is true that an admission made by an assessee constitutes a relevant piece of evidence but **if the assessee contends that in making the admission he had proceeded on a mistaken understanding or on misconception of facts or on untrue facts** such an admission cannot be relied upon **without first considering the aforesaid contention**.

7.6 Asstt. CIT v. Jorawar Singh M. Rathod [2005] 148 Taxman 35 (Ahd. - Trib.) (Mag.) : In this case, the assessee stated in retraction that **during recording of statement he was under constant threat of penalty and prosecution and was confused about various questions asked by the search party about documents, papers, etc., of other persons found from his premises**. **He declared the sum under pressure which was evident from the fact that no such corroborative evidence, asset or valuables were found in form of immovable or movable properties from his residence** in support of the amount of disclosure which was later on retracted but not accepted by the department. **The Tribunal observed:** "...It is true that simple denial cannot be considered as a denial in the eyes of law but at the same time it is also to be seen (that) the material and valuables and other assets are found at the time of search. **The evidence ought to have been collected by the revenue during the search in support of the disclosure statement**.

7.7 S.R. Koshti v. CIT [2005] 193 CTR (Guj.) 518: If an assessee under a mistake, misconception or on not being properly instructed, is over assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected. The decision in **CIT v. Durga Prasad More [1973] CTR (SC) 500,** was followed i.e., **test of human probabilities**. The High Court said "**We do not find any material on record on which basis it can be said that the disclosure of the assessee of Rs. 16 lakhs is in accordance with law** or in spirit of section 132(4)...". (p. 872)

7.8 Surinder Pal Verma v. Asstt. CIT [2004] 89 ITD 129 (Chd.) (TM)- The Chandigarh Bench of the Tribunal took a realistic view of the facts and circumstances in which disclosure is generally made in search and seizure proceedings. It was observed: **"It is well known fact that the confessional statements made during the search are often vulnerable on the ground that the person giving such statements remain under great mental strain and stress. They also do not have the availability of relevant**

details, documents and books of account at the time of giving such statements in the absence of which precise information relating to the mode of utilization of such income and the year of such investment cannot be correctly furnished. The assessees are, therefore, entitled to modify/clarify the statements after verifying the necessary details from the relevant records at later point of time." (p. 24)

7.9 Asstt. CIT v. Rameshchandra R. Patel [2004] 89 ITD 203 (Ahd.) (TM) - It was accepted that **the assessee had a right to retract but that has to be based on evidence brought on record to the contrary and there must be justifiable reason and material accepting retraction i.e., cogent and sufficient material have to be placed on record for acceptance or retraction.** All that has to be done by the assessee if he is to **retract** the **statement** which was recorded in the presence of witnesses unless there is evidence of pressure or coercion. The facts of each case have to be considered to reach the conclusion whether **retraction** was possible or not as there can be no universal rule. **Further corroboration of retracted statement is necessary** where the assessee established **at the earliest possible opportunity by leading reliable evidence and proving thereby the erroneous or incorrect nature of the facts admitted or confessed** and also where the evidence available on record is inconsistent with the confessional statement.

7.10 Asstt. CIT v. Anoop Kumar [2005] 147 Taxman 26 (Asr.) (Mag.): The A.O. worked out the income on the basis of seized material which was less than the income declared in statement under section 132(4). The assessment was, however, made on the income confessed in the statement. **The Tribunal observed:** "...It is also a fact that total income so computed by the Assessing Officer falls below the income disclosed under section 132(4). **It is not the case of the department that the difference in the income assessed and income disclosed under section 132(4) represents some other concealed income.** Therefore, it is clear that there is **no material available with the department to justify the addition so far as the difference between the income computed by the Assessing Officer and income disclosed under section 132(4)**. In other words, **the so-called disclosure under section 132(4) is bald and has no legs to stand and in such a case retraction is justified**... (p. 292)

7.11 Avadh Kishore Das v. Ram Gopal AIR 1979 SC 861: The Supreme Court held that **evidentiary admissions are not conclusive proof of the facts admitted and may be explained or shown to be wrong, but they do raise an estoppel and shift the burden of proof on to the person making them**. The Supreme Court further held that **unless shown or explained to be wrong, they are an efficacious proof of the facts admitted.**

7.12 Gyan Chand Jain v. ITO [2001] 73 TTJ (Jodh.) 859 - Held that, it is not the position of law that no addition can be made on the basis of an **admission** at all, but **the position of law is that the person making an admission is not always bound by it and sometimes can get out of its binding purview if that person can explain concisely with supportive evidence/material or otherwise that the admission made by him earlier is not correct or contains a wrong statement or that the true state of affairs is different from that represented therein and so, the same should not be acted upon for fastening tax liability** which should rather be fixed on the basis of correct/true facts, as ascertained from material on record. Unless it is explained as stated above, the **admission** does retain its binding nature for the person who makes the **admission** and the same may, if considered reasonable in view of other facts on record and following the principles of **preponderance of probability**, form the basis of fastening liability. The ITAT allowed part relief to assessee.

7.13 Hotel Kiran v. Asstt. CIT [2002] 82 ITD 453 (Pune) - It is settled law

that **admission by a person is a good piece of evidence though not conclusive and the same can be used against the person who makes it**. The reason behind this is, **a person making a statement stops the opposite party from making further investigation.** This principle is also embedded in the provisions of the Evidence Act. But the **statement recorded under section 132(4) is on a different footing**. The Legislature in its wisdom has provided that such a **statement may be used** as evidence in any proceedings under the Act. However, **there are exceptions to such admission where the assessee can retract from such statement/admission**. **The first exception exists where such statement is made involuntarily, i.e., obtained under coercion, threat, duress, undue influence, etc.** But the burden lies on the person making such allegation to prove that the **statement** was obtained by the aforesaid means. **The second exception** is where the **statement** has been given under **some mistaken belief either of fact or of law**. If he can show that the **statement** has been made on mistaken belief of facts, than the facts on the basis of which **admission** was made were incorrect.

7.14 CIT (LTU) v. Reliance Industries Ltd. [2019] 102 taxmann.com 372 (Bombay)/[2019] 261 Taxman 358 (Bombay)/[2020] 421 ITR 686 (Bombay) [SLP granted in [2020] 114 taxmann.com 320 (SC)], the **Appellate Authorities allowed payments made to 'S', a consultant holding that there was sufficient evidence justifying payments made to 'S' and Assessing Officer other than relying upon statement of 'S' recorded in search had no independent material to make disallowance.** The CIT (Appeal) and Tribunal concurrently held that 'S' retracted his statement within a short time by filing an affidavit. Subsequently his further statement was recorded in which he also reiterated the stand taken in affidavit. **The High Court slammed AO for making disallowance of payment merely relying on statement of payer recorded during search, which said that 'S' had not rendered any service to assessee so as to receive such payments. The allowance of payments made to 'S'**, a consultant, was allowed as business expenditure**.** The assessee had set up a captive power generating unit and provided electricity to its another unit. It claimed deduction u/s 80-IA in respect of the profits arising out of such activity. It contended before the Assessing Officer that the valuation of electricity provided to the another unit should be at the rate at which the electricity distribution companies were allowed to supply electricity to the consumers. The issue at hand had been examined by the Bombay High Court on earlier occasion in Income Tax Appeal No. 2180 of 2011 and the view taken by the Tribunal in similar circumstances was upheld. A similar issue came up for consideration before the Chhattisgarh High Court in the case of CIT v. Godawari Power & Ispat Ltd. [2014] 42 taxmann.com 551/223 Taxman 234 (Chhattisgarh), in which the Court had upheld the claim of the assessee. The Gujarat High Court in the case of Pr.CIT v. Gujarat Alkalies & Chemicals Ltd. [2017] 395 ITR 247/88 taxmann.com 722 (Gujarat) also had occasion to examine such an issue and allowed the expenditure.

7.15 In **CIT v. Uttamchand Jain [2009] 182 Taxman 343 (Bom) / [2010] 320 ITR 554 (Bombay),** the Assessee, a dealer in diamonds, had declared certain diamond jewellery under Voluntary Disclosure of Income Scheme, 1997 - Said declaration was accepted by department and a certificate was issued to assessee - In his return of income for relevant assessment year, assessee claimed to have sold said jewellery to one T on 20-1-1999. Return was processed u/s 143(1)(a), but later, on basis of statement of T recorded during course of survey conducted upon him wherein he had stated that he was not actually doing business of diamonds and transactions reflected in his books of account were merely accommodation entries. The A.O. reopened assessment and made addition of entire sale amount as undisclosed income of assessee. The Tribunal, relying upon retracted statement made by T, deleted impugned addition. Since existence of diamond

jewellery with assessee prior to sale was evidenced by VDIS, 1997 certificate and on sale of said jewellery assessee had received consideration which was duly accounted for, mere fact that jewellery sold by assessee was not found with purchaser 'T' could not be a ground to hold that transaction was bogus and consideration received by assessee was his undisclosed income. The Court held that **retraction statement of Mr. Trivedi is corroborated by the pay-in-slips/cash deposits in the bank account of Mr. Trivedi and the non-availability of the jewellery claimed to have been sold by the assessee to Mr. Trivedi, is a reasonable and possible view**. Therefore, the High Court upheld the decision of the Tribunal in deleting impugned addition.

7.16 In CIT v. Rakesh Ramani [2018] 94 taxmann.com 461 (Bom.)/ [2018] 256 Taxman 299 (Bom.) / 168 DTR 356 (Bom.)(HC), in course of block assessment, assessee brought on record various documents to establish that jewellery seized from him actually belonged to his employer, impugned addition made in respect thereof merely on ground that assessee in course of statement made u/s 132, had admitted that said jewellery belonged to him, could not be sustained. It was also held that there is no requirement in law that evidence in support of its case must be produced by assessee only at time when seizure has been made and not during assessment proceedings. Besides, the entire basis of the revenue's case is the statement made on the date of the seizure. The voluminous evidence filed by the respondent during the course of the assessment proceedings has been completely ignored on the ground that the same was not produced when the seizure was made. The High Court held that there is no requirement in law that evidence in support of its case must be produced by assessee only at the time when the seizure has been made and not during the assessment proceedings. The basis of the decision was the evidence led by the respondent during the assessment proceedings which established that the jewellery belonged to his employer 'P' Jewellers. **Therefore, the Bombay High Court held that the view taken by the two Authorities namely the Commissioner (Appeals) as well as the Tribunal is a possible view on the facts as existing. Therefore, the Court held that the question of law does not arise to any substantial question of law and the appeal of the Revenue was dismissed.**

8. Retraction partly accepted

In **Pranav Construction Co v. ACIT (1998) 61 TTJ 145 (Mum) (Trib) (dt 12 -11-1997),** the AO was of the view that whereas in the statement recorded under s. 132(4) the partner of the assessee-firm had disclosed an income of Rs. 70 lakhs, **in the return there has been retraction of the said statement inasmuch as the assessee had declared only Rs. 10,53,680 on account of undisclosed income**. The assessee had retracted from the statement in respect of two issues, the first being the undisclosed receipts, which were reduced from Rs. 70 lakhs to Rs. 52,68,400 and the second being the claim of expenses amounting to Rs. 42,14,720. The assessee explained that "The aforesaid statement was recorded by the ADIT at 2.30 A.M. in the early morning, though it was mentioned at 11.45 P.M. The assessee pleaded that he was totally tired and was under tremendous pressure and not in a proper state of mind to understand the implications as to what is stated in the said statement. He stated before the ADI during search that the aforesaid amount of Rs. 80 lakhs is the gross receipts, but as a builder, the assessee are required to incur lot of expenditure, which is unaccounted for. The A.O. felt that it cannot be postulated that the assessee had effected the payments out of the moneys received by it earlier in respect of the flats, offices and shops and recorded in the books. With regard to the admission, the learned D.R. had argued that there is no scope for allowing any

expenditure because the statement of the assessees partner u/s 132(4) relates to disclosure of income, which means net income. The Tribunal observed ***"We are of the view that the admission cannot be read as an Act of Parliament and that it has to be read in the context fairly and reasonably. We have already adverted to this aspect. The burden can be discharged either by direct evidence or if such evidence is not available the assessee can always point out to circumstantial evidence supporting the claim. In the present case in respect of the payment of Rs. 9 lakhs there is direct evidence and in respect of the payment of protection money to the extent of Rs. 20 lakhs to Shellar and Padmakar Choudhary, there is circumstantial evidence, to which we have already referred. The further deduction of Rs. 1 lakh which we have allowed is also based only on the circumstantial evidence such as newspaper cuttings, reports, etc."*** The Tribunal considered total on-money receipts @ Rs. 100 per sq. ft. for 73,371 sq. ft. 73,37,100 and allowed deduction for payments as protection money, for vacating hawkers, tapories, etc. Rs.30 Lacs and Pooja expenses of Rs.14,720 and thus the addition was reduced to Rs. 43,22,380.

9. Leakage to media will jeopardise investigation, such tendency should be curbed

In Rajendran Chingaravlelu (Mr) v. R. K. Mishra, Addl. CIT [2010] 186 Taxman 305 (SC)/[2010] 320 ITR 1 (SC), **When a bona fide passenger is carrying an unusually large sum, and his claims regarding source and legitimacy have to be verified, some delay and inconvenience is inevitable and, in such a situation, rights of passenger will have to yield to public interest. Intelligence officers are entitled to satisfy themselves not only that money is from a legitimate source, but also that such a large amount is being carried for a legitimate purpose and, therefore, even if carrier is not guilty of any offence in carrying money, verification or seized amount may be warranted to ensure that money is not intended for commission of a crime or an offence.** *There is a growing tendency among investigating officers (either police or other departments) to inform the media, even before the completion of investigation, that they have caught a criminal or an offender. Such crude attempts to claim credit for imaginary investigational breakthroughs should be curbed. Premature disclosures or 'leakage' to the media in a pending investigation will not only jeopardise and impede further investigation, but many a time, allow the real culprit to escape from law.*

10. Decisions where Retraction of Statement was NOT ACCEPTED:

10.1 Ms. Priyanka Chopra v. Deputy CIT, Central Circle-1(3), Mumbai* [2018] 89 taxmann.com 287 (Mumbai - Trib.) : A search was carried out in case of assessee in course of which various incriminating documents were seized. In said proceedings, assessee as well as her mother admitted certain undisclosed investment towards purchase of assets. Subsequently, assessee's mother retracted her statement. A.O. however, added amount admitted to assessee's taxable income. It was noted that it was only with reference to search and seizure material that assessee's mother had given a specific amount to various heads wherein undisclosed income had been utilized. Furthermore, so-called retraction was by mother of assessee and there was no retraction whatsoever by assessee. Impugned addition was based upon incriminating material found or searched and, thus, same was confirmed. [Para 8]

10.2 Bannalal Jat Constructions (P.) Ltd. v. Assistant Commissioner of Income-tax

[2019] 106 taxmann.com 128 (SC): A search was carried out at business premises of assessee-company - In course of search proceedings, statement of director of assessee-company was recorded under section 132(4) admitting certain undisclosed income. In course of assessment, A.O. made addition to assessee's income on basis of statement given by its director. Subsequently, director of assessee-company retracted said statement. Tribunal, however, finding that statement had been recorded in presence of independent witness, confirmed addition made by Assessing Officer. High Court also opined that mere fact that director of assessee-company retracted statement at later point of time, could not make said statement unacceptable. It was further opined that burden lay on assessee to show that admission made by director in his statement was wrong and such retraction had to be supported by a strong evidence showing that earlier statement was recorded under duress and coercion. High Court finding that assessee failed to discharge said burden, confirmed order passed by Tribunal. - Whether, on facts, SLP filed against decision of High Court was to be dismissed - [Para 2]

10.3 Thiru S. Shyam Kumar v. Assistant CIT, Central Circle-III(3), Chennai* [2018] 99 taxmann.com 39 (Madras): A search was conducted in business premises of assessee wherein certain loose slips were recovered, which showed several entries pertaining to cash and cheque transactions in respect of purchase of a property. Assessee accepted in his statement that slip represented on-money payment made for purchase of property in question. Later on, assessee retracted from his statement and claimed that loose slips were only dumb slips - Tribunal however, rejected claim of assessee and confirmed addition under sec. 69. Since notings in loose slips were clear, retraction made by assessee after period of two years was rightly rejected as an afterthought. [Paras 8 and 11]

10.4 Narayan Bhagwantrao Gosavi, Balajiwale v. Gopal Vinayak Gosavi AIR 1960 SC 100: The Hon'ble Supreme Court held that an **admission is the best evidence that an opposite party can rely upon and, though not conclusive, yet could be decisive of the matter unless successfully withdrawn or proved erroneous.**

10.5 Fakir Mohmed Haji Hasan v. CIT [2002] 120 Taxman 11/[2001] 247 ITR 290 (Guj), Gujarat High Court upheld the department's action of treating the amount as deemed income.

10.6 Manharlal Kasturchand Chokshi v. Asstt. CIT [1997] 61 ITD 55 (Ahd.) - Proof of threat or coercion is necessary for valid retraction. The allegation that the assessee was tortured and harassed by the search team and was forced to make an admission is not enough.

10.7 Param Anand Builders (P.) Ltd. v. ITO [1996] 59 ITD 29 (ITAT- Mum), It was held by ITAT, Mumbai that **allegations of torture and harassment were unacceptable when independent witnesses were present at the time of search**. **Mere filing of a letter retracting the statement was not held to be rebuttal of the presumption that what is admitted is true**. The Tribunal's observations were also based on the fact that the **'Panchas' had not brought any harassment to the notice of the higher authorities**.

10.8 Video Master v Joint CIT [2002] 83 ITD 102 (Mum) ITAT, Mumbai dealt with a case where aseessee retracted statement made claiming it to have been made **under duress and coercion. During search, D, who was partner of assessee-firm, made voluntary disclosure of Rs. 3 crores comprising earnings from two films and income on account of discrepancy in books of account. The retraction made by 'D' later on, after a gap of one month of recording statement, was immaterial as it could not be said that D's statement under section 132(4) was recorded under duress. It was held**

that since statement recorded in present case under section 132(4) was fully supported with documents seized during course of search, additions made by Assessing Officer of Rs. 1.83 crores treating same as undisclosed income of assessee from share of profits from two films was justified.

10.9 Hotel Kiran v ACIT [2002] 82 ITD 453 (Pune), **Addition of Rs. 4.5 lakhs was made by Assessing Officer on account of 'on-money' alleged to have been paid by assessee-firm for purchase of flat and plot for partner. During search partner of assessee itself had admitted that amount was paid before agreement out of suppressed profits of firm. It could be said that there was a direct nexus between payment of 'on-money' and suppressed profits of assessee-firm. Since source of payment of Rs. 4 lakhs was suppressed profits of assessee-firm, assessee was entitled to set off this amount against suppressed business profits of firm relating to year concerned to the extent addition was ultimately sustained because a person cannot be taxed twice over same income. Where statement under section 132(4) was voluntarily made and there was no coercion or threat whatsoever and contents of statement were clear and unambiguous, same would be binding on assessee even if it was subsequently retracted.**

10.10 The Bombay High Court in the case of **T. Lakhamshi Ladha & Co. v CIT [2016] 386 ITR 245 (Bom)**, held that in case there is a statement by a senior partner of an assessee firm, **statement cannot be retracted by another partner of that firm in absence of any allegation of pressure and coercion by the department and there being no evidence to prove that original statement was incorrect.**

10.11 In **Dhunjibhoy Stud & Agricultural Farm v DCIT, [2002] 82 ITD 18 (Pune)**, ITAT, Pune Bench held that where a retraction of a statement was made on an affidavit **after a lapse of three years**, the same should not be considered and the admissions made earlier were held to be admissible evidences.

10.12 In **Manmohansingh Vig v Deputy Commissioner of Income Tax, Circle 1(1), [2006] 6 SOT 18 (Mum)**, the ITAT while coming to a conclusion as to the admissibility of a retraction made on an affidavit by the assessee, laid out **certain reasoning for not admitting the same**. The conclusions drawn by the Tribunal would be useful for us and gives us an insight to ascertain as to what the Courts have regard to, while dealing with retractions and how a retraction should be framed. The relevant extract is given hereunder:

a) What was retracted subsequently was only a denial. **No material evidence was furnished so as to discharge onus cast on the assessee** by virtue of statement recorded under sections 132(4) and 131(1A),

b) **Presumption raised under section 132(4A) is not rebutted** by the assessee by submitting cogent evidence. Hence, the statement given under sections 132(4) and 131 (1A) hold their evidentiary value.

c) **No material has been submitted to show that any pressure or coercion was exercised** while recording the statements under sections 132(4) and 131(1A). **No complaint was filed immediately after search or recording of statement under section 131 (1A) to show that there was any pressure or coercion.** Statement under section 132(4) was recorded before witnesses. Hence, there is a presumption that there was no pressure/coercion unless proved.

d) **Disclosure was enhanced during statement under section 131(1A)** as compared to the statement given under section 132(4). Hence, the theory of pressure or coercion applied during recording of statement under section 132(4) is not acceptable.

e) **The assessee is silent for about 11 months**. No letter/correspondence was sent immediately after recording of statement under section 132(4). **Hence, theory of**

pressure or coercion is only an afterthought.

f) **Disclosure of several items were based on documents found in the search**. These documents were explained under sections 132(4) and 131(1A). **Hence, there is a strong reason to believe that statement under sections 132(4)/l31(1A) reveal correct state of affairs and retraction has to be ignored.**

The ITAT held that the retraction or rather denial is not established by any material/evidence and hence the same cannot be substituted for admission made by the assessee under sections 132(4) and 131(1A) and supported by documentary evidence found in the search. Hence, the additions made were confirmed.

10.13 In **Asst. CIT v Expresso Investments [2006] 8 SOT 287 (Mum)** the retraction made was held to be incomplete and the contents thereof were inconclusive. In the said case **neither did the content of the retraction show any coercion or duress exerted** and **neither did it have any conclusive and corroborative evidences by witness in the affidavit of retraction** submitted by the assessee. The ITAT referred to the celebrated book titled 'Administrative Law' by Sir William Wade (eighth edition by Wade and Forsyth - Oxford University Press), in which the legal position has been explained at p. 242 as under :

"The basic principle of estoppel is that a person who by some statement or representation of fact causes another to act to his detriment in reliance on the truth of it is not allowed to deny it later, even though it is wrong. Justice here prevails over truth. Estoppel is often described as a rule of evidence, but more correctly it is a principle of law. As a principle of common law it applies only to representations about past or present facts".

The ITAT also held that discretion is vested with assessing officer, to use statement under section 132(4) as evidence. However it is not incumbent on him to make addition solely on the basis of such statement. Even otherwise, in our opinion, mere admission, without any corroboration, is not enough for making addition. In the statement under section 132(4), the assessee merely stated that some of the cash creditors may not be genuine. It is on the basis of such doubt that addition was made. In these circumstances of cash creditors, the assessing officer should not come in the way of assessee. In the present case, assessing officer merely got restricted himself to the statement under section 132(4). He had chosen to make enquiries regarding genuineness of the cash creditors by asking the assessee to prove the genuineness of such cash credits. Having done so, he could not make addition on the basis of statement under section 132(4) alone. Rather, he should have dealt with each credit with reference to the materials on the record. Accordingly, the order of Commissioner (Appeals) was set aside and matter was restored to the file of assessing officer for fresh adjudication after giving reasonable opportunity of being heard.

10.14 **Sidhharth Shankar Roy v. Commissioner of Customs, Mumbai 2013 (291) ELT 244 (Tri.) (Mumbai)** (Order dated 30-8-2011), it was held that retraction of a confessional statement should be addressed to the same officer to whom the confessional statement was given u/s 108 of the Customs Act. In this case, the retraction was made before the Judicial Magistrate and not before the concerned officer of Customs (AIU). Moreover, though the officer of Customs who was alleged to have beaten/manhandled the appellants challenged their retractions before the ACMM, he was not cross-examined by any of the appellants. The Tribunal found that the appellants have not been able to establish that the said statements were extorted from them by the officers of AIU by threat, coercion, force or assault. The submissions made by them before the Judicial

Magistrate and those made before this Tribunal in this regard are inconsistent and incoherent. The Medical Reports relied on by the appellants also do not support their allegation that they were assaulted by any officer of Customs. The medical reports, on the other hand, refer to assault by the police. The Tribunal held that the Commissioner rightly rejected the retractions.

10.15 In **Hiralal Maganlal & Co. v DCIT [2005] 96 ITD 113 (Mum)** the assessee took a complete turn around and alleged that the statements of the aforesaid persons were forcibly recorded and that the seized sheets were mere estimates of goods to be purchased. The ITAT held that the somersault taken by the assessee several months after search was, as held by the Assessing Officer, was an afterthought and the events following thereafter were simply a device to frustrate the efforts of the Department to sniff off the unaccounted income of the assessee which it had unambiguously and voluntarily declared and offered for taxation at the time of search. **The ITAT also laid down some useful principles as under in para 35**:

a) **Statements in the nature of declarations covered by the provisions of section 115 of the Evidence Act, are binding on the declarant. They can neither he retracted nor do they require any corroboration.** Such declarations can form the sole basis for assessment. The declaration made by partner in the assessee-firm through his statement recorded under section 132(4) falls squarely within the ambit of section 115 of the Evidence Act and hence the same was neither open to retraction nor required any further corroboration. The assessing officer could, therefore, base the impugned addition on the said declaration.

b) Statements which are not in the nature of declarations under section 115 of the Evidence Act are also binding and can form the sole basis for assessment **if they are not effectively retracted**. **Effective retraction is possible in two situations. First situation is where it is not voluntarily made. A statement, however, cannot he said to be involuntarily made merely because it is subsequently sought to be retracted.** It is also to be remembered that the law of evidence presumes regularity and correctness of the official actions unless proved otherwise and hence the said principle will also govern the statement recorded by a public official. The provisions of section 132(4) also create rebuttable presumption in favour of the statements recorded there under and authorize their use in evidence in any proceeding under the Income Tax Act. **The burden is, therefore, squarely on the person who alleges that the statement was not made voluntarily to prove that it was involuntarily made or made under coercion or undue influence or that it was made under mistaken belief or was obtained by fraud or misrepresentation.** Mere allegation will not suffice. **Second situation** is **where the person seeking to retract proves, by leading cogent and reliable evidence, the erroneous or incorrect nature of the facts stated or confessed at the earliest possible opportunity**. In the case before us, it has been held above that the **assessee has squarely failed to satisfactorily discharge the burden that the confessional statement made by partner under section 132(4) was involuntarily made or made under coercion or undue influence or was made under mistaken belief or obtained by fraud or misrepresentation.** Rather, the evidence available on record shows that it was **voluntarily made by Shri Sanghvi with due care and caution and after necessary consultations with all concerned**. Besides, there has been **inordinate delay, which has not been substantiated, on the part of the assessee to retract from the confessional statement**. **Retraction is also not supported by any independent or reliable evidence to prove the incorrect nature of the facts**

confessed in the statement. The confessional statement of the partner is also corroborated by other evidence. For these reasons also, **the assessing officer, was therefore, in our view, justified in basing the impugned addition on the basis of confessional statement made at the time of search**.

c) A confessional statement, which is not in the nature of declaration under section 115 of the Evidence Act, continues to have evidentiary value even after its retraction. **However, such retracted confession/statement needs corroboration if it has been successfully retracted**.

11. Relevant Points in case a Statement is RETRACTED:

8.1 The Retraction must be made without delay: Kantilal C. Shah v ACIT [2011] 133 ITD 57 (Ahd) held that **retraction of statement made u/s 132(4) will not be permissible if the retraction has been made after a lapse of ample time and not done immediately**. In this case, a search was conducted on 12/12/1995 and on that very day a statement u/s. 132(4) of the Act was recorded, however, after a lapse of around nine and a half months, i.e., 01/10/1996 a retraction was made through an Affidavit. The said retraction was not immediately submitted before the AO but it was submitted through a covering letter dated 19/11/1996. This was pointed out by Id. D.R. that the retraction in the form of an Affidavit dated 1/10/1996 was kept with the assessee for one and a half months and on 19/11/1996 it was submitted before the AO. According to his pleadings the said delay thus demonstrated that the assessee was not confident about filing of the retraction. **There must be some convincing and effective evidence in the hands of the assessee through which he could demonstrate that the said statement was factually incorrect.** An assessee is under strict obligation to demonstrate that the statement recorded earlier was incorrect, therefore, on the basis of those specific evidences later on retracted. Further there should also be some strong evidence to demonstrate that the earlier statement recorded was under coercion. **In the present case, the retraction is general in nature and lacking any supportive evidence. Rather assessee took several months to retract the initial statement, which by itself created a serious doubt.**

8.2 In **Council of Institute of Chartered Accountants of India v Mukesh R. Shah,[2004] 134 Taxman 265 (Guj)** the Hon'ble Gujarat High Court, held that **it goes without saying that a retraction made after a considerable length of time, would not have the same efficacy in law as a retraction made at the earliest point of time from the day of admission. A belated retraction would fall in the category of afterthought instead of being retraction.... "**

8.3 Evidences to corroborate reasons for retraction

Sudharshan P. Amin v. Asst. CIT [2013] 35 taxmann.com 370 (Gujarat)/[2013] 217 Taxaman 37 (Guj.): In search, assessee had disclosed a sum as undeclared income - Assessee again admitted same in his confessional statement. However, during assessment proceedings, assessee retracted from his statement. Assessee's CA who was present at time of confessional statements did not suggest any undue pressure or allurement by department. Further, assessee had not offered any explanation as to why he repeated confessional statement even after search. It was held that retraction made by assessee could not be accepted and addition should be made to his income as undeclared investment. When retracting a statement made on oath under section 132(4), it should always be supported by effective evidence which shows that the statement which was earlier recorded was incorrect on facts or was taken under inter alia coercion and intimidation. **Merely mentioning that the statement was recorded using undue influence, threat or coercion, or that there was a mistake of facts or law. may not be enough. What has to be seen is how clearly the same is spelt out and what evidence, has been attached to demonstrate the same**.

8.4 **Intimation of retraction to higher authorities**

In **Principal CIT v Roshan Lai Sancheti [2019] 306 CTR (Raj) 140**, the Rajasthan High Court held in para 19 that *"Statement recorded under sec. 132(4) and later confirmed in statement recorded under sec. 131, cannot be discarded simply by observing that the assessee has retracted the same because* ***such retraction ought to have been generally made within reasonable time or by filing complaint to superior authorities or otherwise brought to notice of the higher officials by filing duly sworn affidavit or statement supported by convincing evidence****. Such a statement when recorded at two stages cannot be discarded summarily in cryptic manner by observing that the assessee in a belatedly filed affidavit has retracted from his statement.* ***Such retraction is required to be made as soon as possible or immediately after the statement of the assessee was recorded.*** *Duration of time when such retraction is made assumes significance and in the present case* ***retraction has been made by the assessee after almost eight months*** *to be precise, 237 days.*

8.5 Statements made involuntarily i.e. obtained under coercion, threat, duress, undue influence etc.

In **Deepchand & Co v ACIT [1995] 51 TTJ (Bom.) 421,** the ITAT, Mumbai held that there is no supporting evidence to confirm the additions except the statements of two partners recorded at the time of search. It would not be out of context to mention here that **the statements recorded by the search party during the search of more than two days and two nights cannot be considered to be free, fearless and voluntary**. There is a considerable substance in the assessee's contention that the **statements were recorded under pressure and force.** The Tribunal had held that retraction should be allowed if it is based on proper principles and evidence. In the ordinary course no assessee would say that he had much concealed unaccounted money as mentioned in the statements herein. At the most what was expected to say was that certain income from the business was not disclosed, but putting in the mouth of the assessee that so much amount was unaccounted and concealed would itself indicate that the admission was forcible and not voluntary.

8.6 Retraction after obtaining copy of Statement on ground of mistaken belief either of fact or law

a) In **Jyotichand Bhaichand Saraf & Sons (P.) Ltd. v Deputy Commissioner of Income-tax, Circle 11(1) (ITAT Pune) [2012] 139 ITD 10 (Pune)**, a search and seizure action was taken under section 132. During the course of search action, statement of the Director of the assessee was recorded under section 132(4) on 6th November 2001. **The assessee was given copies of the statement recorded under section 132(4) of the I.T. Act, 1961 on 20th May 2002.** On receipt of the copy of the statement the assessee realized that there was a mistake in the declaration of income. The assessee submitted a letter clarifying the mistake on 21st June 2002 to the Assessing Officer and retracted the statement made under mistake of fact. The assessment order was accordingly issued and was set aside by the CIT under sec. 263 stating that the same was prejudicial to the interest of the revenue and was made by the assessing officer without application of mind. On appeal, the Ld. 1TAT held that t*he department has not brought on record any* ***corroborative evidence*** *so as to establish undisclosed income having been invested in agricultural land.* ***Statement of the assessee cannot he sole basis without any cogent and corroborative evidence.*** *This is the reason that the mistake in the statement is immediately clarified on the receipt of the statement by the appellant as stated above. Moreover, no material/evidence was found during the course of search action indicating on-money payment or any undisclosed investment in agricultural land at Malad.* ***The assessee has clarified the mistake in the statement immediately on receipt of the***

statement. Thus the statement has been retracted on realization of the mistake. *The* ***statement was given under mistaken belief of law*** *that the suppressed sale is unaccounted/undisclosed income instead of correct legal position that* ***the gross profit arising from unaccounted sale is the undisclosed income****. It is a settled position that admission made by the assessee u/s 132(4) is an important piece of evidence but the same is not conclusive. It is open to the assessee who made the admission to show that it is incorrect and the same is given under mistaken belief of fact or law. Statement of Director indicate that* ***he was not mentally composed at relevant point of time.*** *There is nothing on record to suggest that said undisclosed income declared on behalf of assessee has nexus with undisclosed investment in the said agricultural land.*

b) Amritsar ITAT Bench in ***Asstt. CIT v Janak Raj Chciuhan [2006] 102 TTJ 316*** *(Asr.), observed that admission made at the time of search action is an important piece of evidence, but the same is not conclusive. It is open to the assessee who made the admission to show that it is incorrect and same was made under mistaken belief of law and fact.*

8.7 Principles of Natural Justice

ITAT, Jodhpur Bench in **Maheshwari Industries v Asstt. CIT [2005] 148 Taxman 74 (Jodh) (Mag.)** has held that additions should be considered on merits rather than on the basis of the fact that the amount was surrendered by the assessee. It is settled legal position that unless the. provision of statute warrant **or there is a necessary implication on reading of section that the principles of natural justice are excluded, the provision of section should be construed in manner incorporating principles of natural justice** and quasi-judicial bodies **should generally read in the provision relevant section a requirement of giving a reasonable opportunity of being heard before an order is made which will have adverse civil consequences for parties effected**.

12. Mode and Manner of Retraction:

Retraction of a statement later on, which was made during the search operation is not an easy way to escape the tax implications and **requires corroborative evidence and documents to support the retraction and show the circumstances as to why the person is retracting his statement made earlier**. The person has to go through minute scrutiny by the tax authorities and the courts later on at different stages if the need be. The following aspects should be kept in mind:

- **a) Affidavit** - A retraction should be made on an affidavit along with supporting evidences, if any,
- **b) Affidavit of witnesses** - Additional affidavit of the witnesses present during search or seizure may also be filed. The statement of the witnesses present holds good value and may aid the assessee in getting relief.
- **c) Elaborate** - It must clearly lay down the facts of the case and detail the evidences showing inter alia use of force, coercion, intimidation or any mistake of fact/law, whatever may be the case.
- **d) Highlight Error** - In case of a mistake of fact or law, *it* must clearly lay down as to what statement was recorded, what mistake took place in making such a statement, the reason for the same and the actual correct position. Evidences in support of the correct facts must also be attached.
- **e) Inform Senior Officers** - In addition to the A.O., Authorised Officer {who conducted the Search), a retraction which is made on affidavit or otherwise should also be communicated to higher authorities.
- **f) Earlier the better** - Any retraction should be done at the earliest without any delay. A

retraction made immediately may strengthen the case of the assessee whereas a belated retraction will in most cases will have no value and would be seen as an afterthought.

13. Burden of Proof lies on the assessee:

10.1 In case the assessee wishes to retract the statement earlier made whether voluntarily or involuntarily, the burden to prove that the said statement was derived by exerting force or intimidation or was given due to mistake of fact or law, lies upon the assessee. Merely an onus to disprove the already existing and supposedly incorrect statement does not lie, but an entirely new burden arises on filing of an affidavit and that burden has to be shifted by the assessee at the earliest.

This position was enunciated in **CIT v. O. Abdul Razak [2013] 350 ITR 71 (Ker)**, wherein the Hon'ble Kerala High Court made the following observations in para 9, on the statement recorded under section 132(4) of the Act and its retraction by the assessee:

Section 132 of the Income-tax Act deals with search and seizure and sub-section (4) of section 132 empowers the authorised officer during the course of the search and seizure to examine on oath any person who is found to be in possession or control of any books of account, documents, money or valuable articles or things, etc., and record a statement made by such person which can be used in evidence in any proceedings under the Income-tax Act. The **Explanation** appended to clause (4) also makes it clear that such examination can be in respect of any matters relevant for the purpose of **any investigation** and **need not be confined to matters pertaining to the material found as a result of the search**. A plain reading of section 132(4) would clearly show that what was intended by empowering an officer conducting the search to take a statement on oath was to record evidence as contemplated in any adjudication especially since section 131 confers on all officers empowered therein with the same powers as vested in a court under the Code of Criminal Procedure, 1973, for the purpose of the Income-tax Act.

It was further observed in para 11, that

"Admission as has been often held is the best evidence on a point in issue and though not conclusive is decisive of the matter unless successfully withdrawn or proved erroneous. Any retraction of a clear admission made has to be on the ground of it being either erroneous or factually incorrect or one made under threat or coercion…"

And finally adverting to the issue of **burden of proof in case of retraction**, the Hon'ble court held in para 13, as under:

In the instant case, on the **clear admission of the assessee corroborated by the documents**, the burden on the Department ceases to exist. **On the retraction being filed by the assessee, there is a burden cast on the assessee to prove the detraction or rather disprove the admissions made.** It is not a shifting of the onus but a **new burden cast on the assessee to disprove the earlier admissions having evidentiary value**. As noticed earlier, retraction made by the assessee can only be considered as a **self-serving after thought** and no reliance can he placed on the same to disbelieve the clear admissions made in the statement recorded under section 132(4). Deletion of the additions vis-a- vis the property transactions on the reasoning that the Department cannot do so on the basis of the admission made under section 132(4) and on the premise that the Department ought to have proved retraction to be untrue cannot be countenanced in view of the specific words employed in section 132(4).

10.2 In **CIT, Bikaner v Ravi Mathur [2017] (1) WLC (Raj.) 387**, the Hon'ble Rajasthan High Court held that the **burden to prove the retracted statement lies on the assessee.** The High Court held that the statements recorded under Section 132(4) have great evidentiary

value and it cannot be discarded as in the instant case by the Tribunal in a summary or in a cryptic manner. **Statements recorded under Section 132(4) cannot be discarded by simply observing that the assessee retracted the statements.** One has to come to a definite finding as to **the manner in which retraction takes place**. On perusal of the facts noticed hereinbefore, we have noticed that while the statements were recorded at the time of search on 9.11.1995 and onwards but retraction, is almost after an year and that too when the assessment proceedings were being taken up in November 1996.

We may observe that retraction should be made as soon as possible and immediately after such a statement has been recorded, either by filing a complaint to the higher officials or otherwise brought to the notice of the higher officials, either by way of a duly sworn affidavit or statements supported by convincing evidence through which an assessee could demonstrate that the statements initially recorded were under pressure/coercion and factually incorrect. In our view, **retraction after a sufficient long gap or point of time, as in the instant case, looses its significance and is an afterthought**. Once statements have been recorded on oath, duly signed, it has a great evidentiary value and it is normally presumed that whatever stated at the time of recording of statements under Section 132(4), are true and correct and brings out the correct picture, as by that time the assessee is uninfluenced by external agencies. Thus, whenever an assessee pleads that the statements have been obtained forcefully or by coercion or undue influence without material/contrary to the material, then it should be supported by strong evidence which we have observed hereinbefore. Once a statement is recorded under Section 132(4), such a statement can be used as a strong evidence against the assessee in assessing the income, **the burden lies on the assessee to establish that the admission made in the statements are incorrect/wrong and that burden has to be discharged by an assessee at the earliest point of time**

10.3 In **S.C. Gupta v CIT [2001] 248 ITR 782 (All)**, the Allahabad High Court held that a statement made voluntarily by the assessee could form the basis of assessment. **The mere fact that the assessee retracted the statement could not make the statement unacceptable. The burden lay on the assessee to establish that the admission made in the statement at the time of survey was wrong and in fact there was no additional income. This burden does not even seem to have been attempted to be discharged.**

14. Case laws about head of income under which disclosed income to be considered:

14.1 Dev Raj Hi-Tech Machines Ltd. v. Dy. CIT [2017] 83 taxmann.com 15 (ITAT-Amritsar): The ITAT, Amritsar held that **where additional income surrendered by assessee-company in search proceedings was declared as business income and same was accepted by Assessing Officer after considering reply of assessee, revision proceedings initiated under section 263 by Commissioner on basis that such income should be taxed as deemed income under section 69A was not sustainable. The ITAT also held that the wordings of surrender letter are very important as it can save the assessee from the clutches of section 115BBE. It must be clearly stated whether the income is business income or any unexplained income or investment.**

14.2 Abdul Qayume v. CIT [1990] 184 ITR 404/ 50 Taxman 171 (All.) : The Allahabad High Court opined that **an admission or an acquiescence cannot be the foundation for an assessment where the income was returned under an erroneous impression or misconception of law.** It is always open to an assessee to demonstrate and satisfy the authority concerned that **a particular income was not taxable in his hands and that it was returned under an erroneous impression of law. The principle can be applied in a case where the disclosure made under section 132(4) did not match with the material collected in search and seizure operation.** In this case, during the course of survey under section 133A the **assessee surrendered an additional income over and**

above the normal income for the year under consideration. In return of income, the assessee declared such surrendered income as business income. And it was **held that from the surrender letter it was apparent that the assessee had made surrender as additional income over and above the normal profits of the concern and since the income has been declared as business income**, the same has to be assessed under the head business income **and not as deemed income under the provisions of section 69A.**

14.3 Kim Pharma (P.) Ltd. v. CIT [2013] 35 taxmann.com 456/216 Taxman 153 (Punj. & Har.) where the court came to the conclusion that **the amount surrendered during survey was not reflected in books of account and no source from where it was derived was declared by assessee, it was assessable as deemed income of assessee under section 69A and not business income**. The court further observed that the opening words of s. 14 **'save as otherwise provided by this Act' clearly leave scope for 'deemed income' of the nature covered under the scheme of ss. 69, 69A, 69B and 69C being treated separately**, because such deemed income is not income from salary, house property, profits and gains of business or profession, or capital gains, nor is it income from 'other sources' because the provisions of ss. 69, 69A, 69B and 69C **treat unexplained investments, unexplained money, bullion etc. and unexplained expenditure as deemed income** where the nature and source of investment, acquisition or expenditure, as the case may be, **have not been explained or not satisfactorily explained.** Therefore, in these cases, the source not being known, **such deemed income will not fall even under the head 'Income from other sources'**.

14.4 In **Fakir Mohme Haji Hasan's case CIT [2002] 120 Taxman 11/[2001] 247 ITR 290 (Guj)** it was held **that value of gold in question was liable to be included in assessee's income as deemed income under sec. 69A as source of investment or its acquisition was not explained.**

14.5 Tax under sec. 115BBE: Earlier the assessee was not concerned whether the department is treating it as deemed income or business income **as the income was taxable maximum at the rate of thirty percent**. **But after amendment in section 115BBE from assessment year 2017-18 this matter has become very important and if the department treats surrendered income as deemed income it will be subject to tax at the rate of 60 percent plus 25 per cent surcharge and education cess.**

15. Deductions permitted from undisclosed income declared by assessee

15.1 Sheth Developers [2012] 25 taxmann.com 173 (Bombay)/[2012] 210 Taxman 208 (Bombay)(Mag.), the Bombay High Court held that **Builders receiving undisclosed income in course of its business, is entitled to benefit of deduction under section 80-IB(10). The plea of revenue that in view of section 69A benefit of deduction u/s 80-IB(10) would not be available to assessee was not well founded.**

15.2 **ACIT v. Mahalaxmi Infraprojects Ltd (2018) 63 ITR 671 (Pune) (Trib),** In case of Survey in an Industrial undertaking, additional income was offered as non genuine purchases. Tribunal held that additional income had been assessed in hands of assessee from same nature of business. Hence assessee was eligible to claim deduction u/s 80IA(4) of the Act. Followed Sheth Developers 25 taxmann.com 173 (Bom)(HC) .

16. No Power of confinement or arrest

In **L.R. Gupta And Ors. vs Union Of India And Ors. [1992]194 ITR 32 (Delhi) , t**he Counsel for assessee submitted that the ingredients of Section 132(1) were not satisfied

in the present case and the authorisation which was issued was liable to be quashed. It was further contended by the learned Counsel that the respondents were also in error in passing orders under Section 132(3) in respect of the jewellery. The Court agreed that the respondents had no jurisdiction to prevent the assessee from attending to his work in Court. However his statement could be recorded. The Court held that, in the present case, no reasonable person could have come to the conclusion that the ingredients contained in Clause (a), (b) or (e) of Section 132 were attracted, therefore, the Court issued writ of mandamus quashing the impugned authorisation and also the further action which had been taken by the Income Tax Department pursuant to the said authorisation including the seizure of all documents, cash and jewellery. The department was directed to return the said documents, cash and jewellery, seized by them, to the petitioners within two weeks from the date of Order.

17. **Officers posted in Directorates of Investigation (Investigation Wing) and Commissionerates of TDS, only and exclusively shall act as Income-tax Authority for the purposes of power of survey under section 133A and the survey action has to be resorted to only as a last resort**

The CBDT has issued an **Order in F No. 187/3/2020-ITA-I, Dated 13th August, 2020**, which states that with the launch of the Faceless Assessment Scheme, 2019, the Income-tax Department is moving towards minimal interface with the taxpayers, aiming at significant improvement in delivery of services and greater transparency in the working of the department. The survey action u/s 133A of the Act being an intrusive action, it is expected that the same should be carried out with utmost responsibility and accountability. In furtherance of the above, the Central Board of Direct Taxes, in exercise of powers under section 119 of the Income-tax Act, 1961 hereby directs that the officers posted in Directorates of Investigation (Investigation Wing) and Commissionerates of TDS, only and exclusively shall act as "Income-tax Authority" for the purposes of power of survey under section 133A of the Income-tax Act. Further the competent authority for approval of such survey action u/s 133A of the Act shall henceforth be DGIT (Inv) for investigation wing and Pr.CCIT/CCIT (TDS) for TDS charges, as the case may be. This order shall come into force with effect from the 13th August, 2020.

The CBDT has issued another **Order on 18th September, 2020 for partial modification to the order F. No. 187/3/2020-ITA-I, dated 13th August, 2020** prescribing the "Income-tax Authority" for the purpose of exercise of power of survey u/s 133A of the Act, the CBDT has directed that:-

i) the verification surveys by the International Taxation charges will henceforth be conducted by them with the approval of the CCsIT (International Taxation) concerned and where there is no CCIT (International Taxation), with the approval of CCIT (International Taxation).

ii) the verification surveys by the TDS charges will henceforth be conducted by them with the approval of CCsIT (TDS) and where there is no CCIT(TDS), with the approval of Pr. CCsIT.

iii) any survey action u/s 133A of the Act by the Central charges will be conducted after the approval of CCIT(Central)/DGIT(Investigation) and in collaboration with the investigation wing.

The **Order on 18th September, 2020 also states that** before approving any survey action, Pr. CCsIT/ Pr. DGsIT/CCsIT/DGsIT must ensure that all the other possibilities are exhausted and **the survey action has to be resorted to only as a last resort.**

18. Whether survey be converted into search

In **Vinod Goel (Advocate) v. UOI [2001] 118 Taxman 690 (P&H)/[2001] 252 ITR 29 (P&H)**, it was held that o**n basis of documents collected during search and seizure of premises of RKAK and RKC, authorities felt satisfied that petitioner had nexus with some property dealing and resultantly a survey was conducted at petitioner's premises. Again, on basis of incriminating documents collected during survey,** survey was converted into search and seizure **for which Addl. Director gave authorisation. In view of fact that documents recovered during previous search established nexus between business of RKAK and RKC with petitioners, search and seizure carried out at premises of petitioner should be held to be in continuation of previous search.** When sufficient number of incriminating documents were recovered during survey of petitioner's premises and concerned officer recorded in warrant his satisfaction that required documents would not be produced in case of summons issued under section 131, on ground of mere presence of some defects in warrant, it could not be said that conversion of survey into search and seizure was illegal.

19. Sealing of business premises

In **Shyam Jewellers v. CCIT [1992] 196 ITR 243 (Allahabad)**, it was held that **business premises of assessee cannot be sealed off either under section 133A or section 132. When there was no information before Chief Commissioner at time of passing authorization order that assessee was in possession of undisclosed money, bullion, jewellery or other valuable article, such a vague and general order could not be treated as an authorization order in law and no proceedings on basis of such an order could have taken place. It was held that initiation of search proceedings and passing of assessment order under section 132(5) were invalid and liable to be quashed.**

20. Recording of Telephone conversation/ Statements

20.1 **In S. Pratap Singh v. The State of Punjab AIR 1964 AIR 72 (SC), 1964 SCR (4) 733, it was held that** rendering of the tape recorded conversation can be legal evidence by way of corroborating the statements of a person who deposes that the other speaker and he carried on that conversation or even of the statement of a person who may depose that he overheard the conversation between the two persons and what they actually stated had been tape recorded. How much weight to be given to such evidence will depend on the other factors which may be established in a particular case.

20.2 Other cases on Tape recorded conversation / statement:

a) Yusufali Esmail Nagree v. The State of Maharashtra 1968 AIR 147 (SC)

b) Ram Singh v. Col Ram Singh AIR 1986 SC 3

c) Rama Reddy v. V.V. Giri AIR 1971 SC 1162

d) R.M. Malkani v. State of Maharashtra AIR 1973 SC 157

e) Z.B. Bukhari v. B.R. Mehra AIR 1975 SC 1788 -Tape recorded speeches are documents as defined in section 3 of the Evidence Act.

21. Conclusion :

An admission in statement under section 132(4) is vital and the department may make addition in income based on such statement unless successfully retracted. However, in order it to be effective, the retraction should be made properly and at the earliest possible opportunity and establishing the situation as to how the facts stated in statement mistaken on facts or in law and if necessary to prove that the statement was recorded with coercion and pressure.

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Relevance of Digital Evidence

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1. Introduction:

It may be noted that the Income tax department has started Faceless assessments and Faceless appeals as announced by the Hon'ble Prime Minister. Already lost of the taxpayers are required to furnish their Income Tax Return as well as Tax Audit Reports electronically. The appeal before the CIT (Appeals) is also required to be e-filed. The Notices are issued by Income Tax Department by email and such Notices are considered as valid service of Notice. In Income tax Search also gathering of Digital evidence is becoming powerful tool for the Income Tax Department in its efforts against tax-evasion.

Digital evidence help to lay hands on past activity & transactions and also help in gathering evidence of illegal and unlawful activity. However the steps should be taken to maintain integrity of the data so that digital evidence collected may be admissible in Courts. Digital evidence, which is ephemeral, also poses problems in course of survey, search and seizure. Problems are posed in recovery of deleted data are the challenges which law enforcement agencies tackle with help of experts. Digital evidence are credible evidences similar to paper documents/evidences. As these are of diverse and hi-tech nature and available in different form of software and programmed form, these are generally stored in various digital storage devices like Harddisks, CD & DVD Media, USB Pen-drives, Flash drives, USB i-Pods, USB MP3 players, Floppy Media, Mobile SIM cards, Memory Card as well as internal memory of devices.

2. What is Digital Evidence:

Digital evidence or Electronic Evidence is any probative information stored or transmitted in digital form that may be used before the Income-tax authorities and Courts. Section 79A of the Information Technology (Amendment) Act 2008 defines electronic form of evidence as **"any information of probative value that is either stored or transmitted in electronic form and includes computer evidence, digital audio, digital video, cell phones, digital fax machines"** The main characteristics of the digital evidences are:

a) It is latent as fingerprints and DNA
b) Can transcend national borders with ease and speed
c) Highly fragile and can be easily altered, damaged or destroyed and also time sensitive. For these reasons, special precautions should be taken to collect, preserve and examine such evidence.

3. Relevance of Digital Evidence for the purpose of Income Tax:

As far as Income-tax Act, 1961 is concerned, it has been amended thrice by way of Finance Act, 2001, Finance Act, 2002 and Finance Act, 2009 respectively. By way of first amendment by the Finance Act, 2001, provisions of **section 2(12A)** was inserted **to give legal recognition to the books of account maintained on computer** and **section 2(22A) was inserted to provide definition of 'document' which now includes- electronic record as defined under Information Technology Act 2000.**

4. Digital Devices:

Sources for Digital Evidences The use of digital devices in day to day life has increased tremendously. Accordingly, we may come across a wide range of the digital evidence which include E-mail word processing documents, data base tables, files saved from accounting programmes, digital photographs, ATM transaction logs, instant message histories, internet browser histories, the contents of computer memory, computer back-up, global positioning system tracks, digital video or sound files, data stored in mobile telephones and the data stored in all types memory storage devices.

For easy understanding, a compilation of various devices and the potential evidences, these devices may contain, is provided below:

a) **Desktop Computer**: The device contains all the files and folders stored including deleted files and information which may not be seen normally. Analysis of key document files like word documents, excel files, email's, tally data may help in unearthing potential evidences. Retrieval of deleted files using Cyber Forensics can help get key evidences that have been destroyed.

b) **Pen Drives**: The pen drive stores many files and may be hidden easily. In many cases the parallel books of accounts maintained as tally data or excel sheets are kept in Pen Drives that can be easily hidden

c) **Hard Drives** The device stores many files and may be hidden easily. Backup of earlier years may be kept and may be easily hidden.

d) Mobile Phones (Smart Phones), Electronic Organizer, IPAD, Personal Digital Assistant and other Handheld Devices: Much information can be obtained from the devices like Address Book, Appointment calendars/information, documents, emails, phone book, messages (Text and Voice), video recording, email passwords etc. Many applications like CHAT, Whatsapp application can store many crucial conversations important for the investigations. Remittances and transactions are done by fund transfer through mobile phone service providers utilizing money deposited with the latter bypassing banking channels. A person may do all his business through a mobile phone without any computer or laptop or warehouse for his inventory – as example, online business platform www.amazon.com maintains huge warehouse at several places in India where online traders can store their merchandise. In such cases the trader may make all transactions through mobile phone and store in small external microchips making detection difficult.

e) **Smart cards, Dongles and Biometric Scanners**: The device itself enables to understand the user level access to various information and places.

f) **Display Monitor (CRT/LCD/TFT etc), Screens of Mobile Phones** (if switched on): All the graphics and files that are open and visible on the screen in the switched on systems can be noted as electronic evidence. This evidence can be captured only in video, photographs and through description to be noted in seizure memos

g) **Answering Machines**: The device can store voice messages and sometimes, the time and date information about when the message was left. It may have details such as last number called, memos, phone numbers and names, caller identification information and also deleted messages.

h) **Local Area Networks (LAN) Card or Network Interface Cards:** The device itself is a digital evidence and may contain crucial evidences.

i) **Modems, Routers, Hubs and Switches**: The device may contain details of IP addresses, where the actual data is stored.

j**) Servers:** These contains crucial data on business related applications like SAP, ERP, CRM, Mail Servers. The device is a potential evidence for pulling out audit logs using forensic analysis. Analysis of emails of key persons from Mail Servers can help in finding crucial evidences required for the case.

k) **Removable storage devices like SD Cards in Mobile phones**: All new generation phones use these and store files in which evidence can be found.

l) **Scanners and Copiers**: The device itself, having the capability to scan may help prove illegal activity like making bogus bills etc. Copiers may also contain stored data which can be used as crucial evidences.

m) **Digital Cameras:** The device can be looked for images, videos, sounds, removable cartridges, time and date stamps.

n) **CD/DVDs** : The device stores many files which may contain the evidence

o) **Fax Machines:** The device stores some documents, phone numbers, send/receive logs that can contain the evidence.

p) **Pagers:** The device can be looked for address information, Text message and phone numbers

q) **Global Positioning Systems (GPS):** The device may provide travel logs, home location, previous destinations etc which may be crucial in finding places where evidences may be stored.

r) **Cloud Data Servers**: The device is available on all smart phones and tablets. The Cloud may be used to store hidden data where crucial evidences may be stored. Some enterprises offer service

for storage of commercial data in servers located in foreign countries and business data are stored there through internet – which can be accessed as per terms and conditions.

From the digital devices, two types of evidences may be gathered, one is persistent evidence and other is volatile evidence:
i) Persistent evidence is the data that is stored on a local hard drive and is preserved when the computer is turned off. For example, Documents (word, slide, sheet, pdf etc.), Images, Chat log, Browser history, Registry, Audio / Video, Application, Email, SMS / MMS, Phone book, Call log etc.
ii) Volatile evidences: It may include any data that is stored in memory, or exists in transit, that will be lost when the computer loses power or is turned off. For example, Memory, Network status and connection, Process running, Time information. It is to be noted that in certain cases, where volatile evidence is crucial, switching off a switched on system may result in destruction of volatile evidence.

5. Digital Forensics and its significance:

Digital forensic is the process of identifying and collecting digital evidence from any medium, while preserving its integrity for examination and reporting. It can be defined as the discipline that combines elements of law and computer science to collect and analyze data from computer systems, networks, wireless communications, and storage devices in a way that is admissible as evidence in a court of law. Digital evidence gathering is becoming an increasingly powerful tool for the department in its fight against tax-evasion. It can be used individually as key evidence or alongside more traditional methods of evidence gathering, where it could serve as a complement to other types of evidence. Furthermore, digital evidence may help in the course of the investigation phase to prepare the next steps. In nutshell, the significance of digital evidence analysis is that it:
a) Helps reconstruct past event or activity or transactions
b) Shows the evidence of illegal activity
c) Ensures the overall integrity of network infrastructure

6. Branch of Digital Forensics:

The branch of Digital forensics can be classified as follows:

a) **Disk Forensics:** It deals with extracting information from storage media in the form of active, deleted files and data from unallocated, slack spaces
b) **Network Forensics** is a branch of Cyber forensics dealing with monitoring and analysis of computer network traffic for the purposes of information gathering, legal evidence or intrusion detection
c) **Database Forensics:** It is a branch of digital forensic science relating to forensic study of databases and their related meta data. This may be of help in understanding the time stamp of the database data created to see whether any manipulations were done in the original database
d) **Mobile device forensics:** It deals with examining and analyzing mobile devices to retrieve call logs, SMS/MMS, videos, audios, photos etc.
e) **Email Forensics:** It deals with recovery and analysis of emails including deleted emails, calendars and contacts 6. GPS Forensics deals with examining and analyzing GPS devices to retrieve Track logs, Track points, routes , stored locations, home offices etc

7. Key Elements of Digital Forensics:
The Key Elements of Digital Forensic are as follows:

a) **The identification and acquiring of digital evidence:** Knowing where the digital evidence is present, stored and what are the processes that can be used to retrieve the digital evidences is the first step. It is noticed that usually in big corporations, where huge number of digital devices is present, identification of crucial digital evidences will save time in analysis of digital evidence and also cost. Many a times it is noticed that customized software‘s like ERP/SAP are used and the strategy to retrieve the entire software should be discussed with the system administrator. It is also important to identify the types of information stored and the appropriate technology that can be used to extract it. After the evidence is 15 identified the forensic examiner/investigator should image/clone the hard disk or the storage media

b) **The preservation of digital evidence** should be done in such a manner that there is no possible alteration, damage, data corruption or virus introduction during the process of examination.

c**) The analysis of digital evidences** involves discovering all the files on the subject system. This includes existing normal files, deleted yet remaining in Recycle bin, hidden files, password-protected files and encrypted files. The analysis also includes retrieval of deleted files and also gives accesses to hidden files, temporary files and protected files. In many business specific applications like customized jeweller software/real estate software, may give details of reports required for day to day functioning of the organization.

d) **Report the findings**, means giving the findings, in a simple lucid manner, so that any person can understand. The report should give description of the items, process adapted for analysis, chain of custody on the movement of digital evidence, hard and soft copies of the findings, glossary of terms etc

e) **The presentation and use of digital evidence in assessment order** and presentation of the same in court of the law in matters of appeal involves stating the credibility of the processes employed during analysis for testing the authenticity of the data.

8. What Cyber Forensics can Reveal to Income Tax Department:

Digital Evidence actually has several advantages over other kinds of physical evidence:

a) **It can be duplicated exactly** and a copy can be examined as if it were the original. Importantly, copies made following proper procedures have the same evidentiary value as the original. It is a common practice when dealing with digital evidence, to examine a copy thus avoiding the risk of damaging the original.
b) **With the right tools it is very easy to determine if digital evidence has been modified or tampered with** by comparing with the original.
c) **It is possible to recover and analyze deleted files** that have not been overwritten, as well as carving out portions of files and text from unallocated and slack space
d) **It is possible to do String and Key word searching** for finding key files either present, deleted files etc.
e) **It is possible to do time line analysis** to see when the digital evidence was created, modified, changed, merged with other files etc.
f) **It is possible to know manipulations in data by seeing changes done** by unauthorized persons in the data.

9. The challenges in dealing with Digital Evidence:

a) The digital evidence collected and presented should be admissible in law and steps should be taken to maintain integrity of the data.

b) Digital evidence, which is ephemeral, **may pose problems in case of Survey, Search and Seizure**. However, Income tax department has the expert team to tackle such situations. Even they may access password protected data. The data can be viewed by the Income tax officials after applying proper procedures and processes for collecting evidence.

c) **Problems posed in recovery of deleted data/ evidence** are the challenges which law enforcement agencies are capable to tackle.

d) **It may be difficult to decipher the real information without knowing and getting the password or without having the key to the encryption**. However now a days the Income tax department has got the technical experts to take care of such issues.

10. The Legal Background:

10.1 The Information Technology Act, 2000 was enacted **to provide legal recognition to transactions carried out by means of electronic data interchange and other means of electronic communication**, which involve the use of alternatives to paper-based methods of communication and storage of information. The same enactment has also brought amendments in **a) the Indian Penal Code, 1861, b) the Indian Evidence Act, 1872, c) the Bankers' Books Evidence Act, 1891 and d) the Reserve Bank of India Act, 1934**.

10.2 As far as Income-tax Act, 1961 is concerned, it has been amended thrice by way of Finance Act, 2001, Finance Act, 2002 and Finance Act, 2009 respectively. **a)** By way of first amendment by the Finance Act, 2001, provisions of **sub-section (12A) of section 2 was inserted to give legal recognition to the books of account maintained on computer** and **sub-section (22A) to section 2 was inserted to provide definition of "document" which included electronic record as defined under Information Technology Act 2000.**

Under Information Technology Act 2000 **an electronic record has been defined to include data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro file.** This definition of electronic record is wide enough **to cover person in possession of computer, storage device, server, mobile phone, i-Pod or any such device**. The above amendment has thus specifically given recognition to electronic record as admissible evidence at par with a "document".

Further, **the powers to impound/copy a document during a survey action u/s 133A and power to seize a document during a search and seizure operation u/s 132 has also been automatically extended to electronic records as a result of the amendment.**

b) By way of second amendment by the Finance Act, 2002, **provisions of section 132 (1)(iib) were inserted facilitating access to the electronic devices including computer, containing document or books of accounts in the form of electronic records by making it obligatory for the person under control of such device to afford necessary facility to inspect such records.**

c) By the Finance Act, 2009, **clause (c) was inserted in sub-section (1) of Section 282 providing that service of notice in the form of any electronic record as provided in Chapter IV of the Information Technology Act, 2000 will constitute valid service.**

10.3 Effective changes in Indian Evidence Act:

Under Indian Evidence Act there are several references to documents and records and entries in books of account and their recognition as evidence. By way of the The Second Schedule to the Information Technology Act, the **Amendments to the Indian Evidence Act have been brought in so as to, incorporate reference to Electronic Records along with the document giving recognition to the electronic records as evidence. Further, special provisions as to evidence relating to electronic record have been inserted in the Indian Evidence Act, 1872 in the form of sec. 65A and sec. 65B. These provisions are very important. They govern the integrity of the electronic record as evidence, as well as, the process for creating electronic record.** Importantly, **they recognise faithful output of computer the same evidentiary value as original without further proof or production of original**. Accordingly, while handling any digital evidence, the procedure has to be in consonance of these provisions.

10.4 Under **Indian Penal Code** several acts of omission and commission relating to various documents and records are treated as offences. By way of the THE FIRST SCHEDULE to the Information Technology Act, Amendments to the Indian Penal Code have been brought in, so as to incorporate reference to Electronic Records along with the document.

11. The sanctity and relevance of Digital Evidence:
As in the case of written or oral evidence, digital evidence can also be classified into three main categories:

a) Material evidence: Material evidence is any evidence that speaks for itself without relying on anything else. In digital terms, this could be a log produced by an audit function in a computer system, the books of account maintained on a day-to-day basis on the computer, or any inventory management account maintained on the computer etc., if it can be shown to be free from contamination.

b) Testimonial evidence: Testimonial evidence is **evidence supplied by a witness**. This type of evidence is subject to the perceived reliability of the witness. But **if the witness is considered reliable, testimonial evidence can be almost as powerful as material evidence**. For example, word processor documents written by a witness could be considered testimonial as long as the author is willing to depose that he wrote the same.

c) **Hearsay:** Hearsay is any evidence presented by a person who is not a direct witness. Word processor documents written by someone without direct knowledge of the incident or documents whose authors cannot be traced fall in this category. Except in special circumstances, such evidence is not admissible in court of law. **But even such evidence may constitute material and may be very relevant in Income-tax proceedings, which are not bound by technical rules of evidences.** Otherwise also, they can provide important leads for further investigation. Accordingly, merely gathering electronic evidence is not sufficient. **Efforts have to be made to corroborate the contents therein vis-à-vis other evidence such as material and oral**. Preliminary and detailed statements of the persons in control of computers/ electronic devices are always very important.

12. Importance of standard procedures to deal with Digital Evidences:

From the above discussion on the nature and legality of digital evidence, it is clear that investigation in an automated environment require standard methods and procedures for the following main reasons:

a) **Evidence has to be gathered in such a way that the same would be accepted by a court of law.** This should be easier if standard procedures are formulated and followed. This would also facilitate exchange of evidence in cases having interdepartmental and international ramifications especially if investigators from other departments and countries collect evidence in similar manner. ii. Every care must be taken to avoid doing anything which might corrupt or add to the data, even accidentally or cause any other form of damage. The use of standard methods and procedures would diminish this risk of damage. In some cases, some data may be changed or over-written during the process of examination. Thus, there is need for a thorough understanding of technology which is being used by the investigator for examination and also need for its documentation so that it would be possible to explain the causes/ effects later on in a court of law. iii. Some of the most important reasons for improper evidence collection are poorly written policies, lack of an established incidence response plan, incidence response training and a broken chain of custody.

b) "Chain of custody" is the roadmap that shows how evidence was collected, analyzed and preserved in order to be presented as evidence. Establishing a clear chain of custody is critical because electronic evidence can be easily altered. A clear chain of custody would demonstrate that electronic evidence is trustworthy. Preserving a chain of custody for electronic evidence, at a minimum, requires that;
i) No data has been added, changed, deleted from the seized information evidence.
ii) The seized /information evidence was duplicated exactly and completely.
iii) A reliable and validated duplication process was used.
iv) All media were secure and safe.

13. Search and seizure of Physical Evidence vis a vis Digital Evidence:

a) The search & seizure action u/s 132 of the Income Tax Act is authorized when the designated authorities have reasons to believe that:

i) A person is in possession of **certain books of account/ documents** which are relevant for or useful to any proceedings under the Income-tax Act which the said person has not produced when asked to do so or there is a likelihood of such person not producing these documents/ books of account before Income-tax authorities, or

ii) The person is in **possession of money, bullion, jewellery or other valuable article or thing** (assets) which represent wholly or partly some undisclosed income.

b) In the conventional search of a premises, the search team physically searches for the relevant documents/ books of account and assets in the premises. The relevant assets/ documents are also seized during the course of search. It is very easy to visualize the search operations involving a physical item including an asset or document other than an electronic document. The rules and procedures are also well laid out in respect of search and seizure of physical items. The authorized

officers are also generally very clear about identification of relevant documents and assets which are required to be seized.

c) The widespread use of computers in recent years has led to a new type of situation in searches of data stored on computer hard drives and other storage devices. The question is, how should provisions of section 132 of the Income Tax Act apply to the **retrieval of data from data storage devices**. The dynamics of computer searches turn out to be substantially different from the dynamics of conventional searches. The entire-search, identification of evidence, **dynamic of premises searched is replaced by things like scan, acquisition, search and identification of digital evidence dynamics**. **Computer forensics analysis is typically performed subsequent to a search operation at the Income-tax Office or cyber forensics laboratory.** Weeks or months after the computer has been seized from the target's premises, an analyst may go through the world of information inside the computer and try to find the relevant evidence. The computer search and physical search of a place are similar fundamentally because the search team attempts to find and retrieve relevant evidence hidden inside the computer. Search of a computer is easy as well as difficult for many reasons. There may be thousands of folders. The authorized officer may not know as to in which folder relevant documents/ information is lying. **He can however, acquire/seize entire data if he chooses to.** But identification of specific and relevant data is very time consuming job and possibly cannot be completed in the premise itself in most of the cases. The authorized officer's task, therefore is to first scan various devices to identify the device which may contain relevant evidence and acquire them, instead of acquiring each and every device containing digital evidence. It is required to be done in a manner that proper balance is struck between indiscriminate acquisition/ seizure of huge data which will make task of identification of relevant evidence tougher and at the same time ensuring acquisition of data from device wherever there is a possibility of locating relevant evidence.

The copying procedure adopted by the Income tax department ensures that all relevant as well as irrelevant information stored on computer are acquired. Thus, identification of relevant devices is the key once a device containing relevant data is identified, copy of entire device is generally required to be made.

14. Recoding of Statement:

Statements of the persons in control of computers/ electronic devices (including system administrator) is recorded. In statements information regarding the hardware, operating systems, software and topography of the computers, various users and their roles and passwords are extracted.

15. Some decisions regarding the admissibility of digital evidence:

a) The Supreme Court in the case of **Anvar P.V. v. P.K. Basheer and others, AIR 2015 SC 180,** clarified the law regarding the **admissibility of digital evidence in India**. In this case of departing from its earlier ruling in **State (NCT of Delhi) v. Navjot Sandhu, AIR 2005 SC 3820**, **the importance of Section 65B was recognised. Hence, the Supreme Court observed** that, **"any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B. Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer.** It may be noted that the Section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, **any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-Section (2) are satisfied, without further proof or production of the original.** The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65B(2) of the Indian Evidence Act.

Further the Court points out that, **"only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A – opinion of examiner of electronic evidence"**.

b) In the case of **Abdul Rahman Kunji v. State of West Bengal, in C.R.A. Nos. 454 & 624 of 2009** decided on November 14, 2014, the **Calcutta High Court has dealt with the issue of admissibility of emails as evidence**. The Court pointed out that such evidences in connection with **an email can be admitted as evidence only if it satisfies the conditions mentioned under Section 65B** of Indian Evidence Act, 1872.

c) In the case of **Rakesh Kumar and Ors. v. State, Criminal Appeal No. 19/2007 decided on 27.08.2009**, the Delhi High Court while **appreciating the reliance placed by the prosecution upon the Call Records**, observed that **computer generated electronic records is evidence, admissible at a trial if proved in the manner specified by Section 65B of the Evidence Act.**

d) In the case of **Dharmbir v C.B.I., 148 (2008) DLT 289** before Delhi High Court, the question was **whether a hard disc can be considered as an electronic record or not**. The Court pointed out that, **"While there can be no doubt that a hard disc is an electronic device used for storing information, once a blank hard disc is written upon it is subject to a change and to that extent it becomes an electronic record. Even if the hard disc is restored to its original position of a blank hard disc by erasing what was recorded on it, it would still retain information which indicates that some text or file in any form was recorded on it at one time and subsequently removed. By use of software programmes it is possible to find out the precise time when such changes occurred in the hard disc. Therefore, when Section 65B talks of an electronic record produced by a computer (referred to as the computer output) it would also include a hard disc in which information was stored or was earlier stored or continues to be stored**.

e) The Supreme Court in the case of **Jagjit Singh v. State of Haryana (2006) 11 SCC 1**, **the Speaker of the Legislative Assembly of the State of Haryana disqualified a member for defection**. When hearing the matter, the **Supreme Court considered the digital evidence in the form of interview transcripts from the Zee News television channel**, the Aaj Tak television channel and the Haryana News of Punjab Today television channel. The Court held that, **the electronic evidence placed on record was admissible and upheld the reliance placed by the Speaker on the recorded interview when reaching the conclusion that the voices recorded on the CD were those of the persons taking action.**

f) In the case of **State of Maharashtra v. Dr. Praful B. Desai AIR 2003 SC 2053, the Supreme Court** dealt with the **use of Video Conferencing and the legality of evidence obtained therein** in a criminal case was discussed, the Hon'ble Supreme Court observed that, **"in cases where the attendance of a witness cannot be procured without an amount of delay, expense or inconvenience, the Court could consider issuing a commission to record the evidence by way of video conferencing"**.

g) In the case of **Twentieth Century Fox Film Corporation v. NRI Film Production Associates (P) Ltd., AIR 2003 Kant. 148**, the **Karnataka High Court laid down several safeguards for recording evidence through audio-video Link**. These are:

(i) Before a witness is examined in terms of the Audio-Video Link, **witness is to file an affidavit or an undertaking duly verified before a notary or a Judge that the person who is shown as the witness is the same person as who is going to depose on the screen**. A copy is to be made available to the other side. (Identification affidavit).

(ii) **The person who examines the witness on the screen is also to file an affidavit/undertaking before examining the witness with a copy to the other side** with regard to identification.

(iii) The **witness has to be examined during working hours of Indian Courts**. **Oath is to be administered through the media**.

(iv) The **witness should not plead any inconvenience on account of time different between India and USA.**

(v) **Before examination of the witness, a set of plaint, written statement and other documents must be sent to the witness so that the witness has acquaintance with the documents and an acknowledgement is to be filed before the Court** in this regard.

(vi) Learned **Judge is to record such remarks as is material regarding the demur of the witness while on the screen**.

(vii) Learned **Judge must note the objections raised during recording of witness and to decide the same at the time of arguments**.

(viii) **After recording the evidence, the same is to be sent to the witness and his signature is to be obtained in the presence of a Notary Public** and thereafter it forms part of the record of the suit proceedings.

(ix) **The visual is to be recorded and the record would be at both ends. The witness also is to be alone at the time of visual conference and notary is to certificate to this effect**.

(x) The learned **Judge may also impose such other conditions as are necessary** in a given set of facts.

(xi) The **expenses and the arrangements are to be borne by the applicant who wants this facility**.

h) In the case of **Amitabh Bagchi v. Ena Bagchi AIR 2005 Cal. 11,** the **Calcutta High Court held** that, "it is to be remembered that **by virtue of an amendment and insertion of Sections 65A and 65B of the Evidence Act, a special provision as to evidence relating to electronic record and admissibility of electronic records has been introduced with effect from 17th October, 2000**. Consequential amendments are also made therein. Therefore **there is no bar of examination of witness by way of Video Conferencing being essential part of electronic method"**.

i) In **Bodala Murali Krishna v. Smt. Bodala Prathima 2007 (2) ALD 72**, Andhra Pradesh High Court, dealt with the question of **use of video conferencing in a civil case**. The Court observed that, "When such facility is accorded in criminal cases, there should not be any plausible objection for adopting the same procedure, in civil cases as long as the necessary facilities, with assured accuracy exist".

j) **Arjun Panditrao Khotkar v. Kailash Kusahanrao Goryantal MANU/SC/0521/ 2020 (SC), The Supreme Court held that** the required certificate under Section 65B(4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and/or operated by him. In cases where the "computer" happens to be a part of a "computer system" or "computer network" and it becomes impossible to physically bring such system or network to the Court, then the only means of providing information contained in such electronic record can be in accordance with Section 65B(1), together with the requisite certificate under Section 65B(4). It was observed that Anvar P.V. (supra), is the law declared by this Court on Section 65B of the Evidence Act. The judgment in Tomaso Bruno (supra), being per incuriam, does not lay down the law correctly. Also, the judgment in SLP (Crl.) No. 9431 of 2011 reported as Shafhi Mohammad (supra) and the judgment dated 03.04.2018 reported as (2018) 5 SCC 311, do not lay down the law correctly and are therefore overruled.

16. Conclusion:

Digital frontier is a rapidly changing and it is an evolving environment. Smartphone have achieved saturation in just 10 years. Unlocking the data held on them has increasingly needed to be used as vital evidence. **Further, in order to keep the integrity of data in secured condition, it is essential that no changes should be made while handling digital evidence.** One of the concerns still arising is in cases **where if a secondary electronic record is seized from the accused, the certificate under sec. 65B(4) naturally could not be obtained. Moreover, due to the bar of self-incrimination under Article 20(3) of the Constitution of India, the accused cannot be made a witness against himself. Hence, in such situation the question of admissibility of such electronic record is in peril. It can be envisioned that in future through judicial intervention, our judiciary may find a solution for this dilemma also.**

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