

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
DELHI BENCH: 'D' NEW DELHI**

**BEFORE SHRI O.P. KANT, ACCOUNTANT MEMBER  
AND  
SHRI K.N. CHARY, JUDICIAL MEMBER  
[Through Video Conferencing]**

ITA No.4223/Del./2018  
Assessment Year: 2009-10

**And**

ITA No.4225/Del./2018  
Assessment Year: 2011-12

**And**

ITA No.4226/Del./2018  
Assessment Year: 2013-14

ACIT, Central Circle-30, New Delhi	<b>Vs.</b>	M/s. Kuber Khadyan Pvt. Ltd., 1/8, West Patel Nagar, New Delhi
<b>PAN :AABCK0600L</b>		
<b>(Appellant)</b>		<b>(Respondent)</b>

Appellant by	Ms. Aashna Paul, CIT(DR)
Respondent by	Shri P.C. Yadav, Adv.

Date of hearing	15.03.2021
Date of pronouncement	26.03.2021

**ORDER**

**PER O.P. KANT, AM:**

These appeals by Revenue are directed against three separate orders, all dated 22/03/2018, passed by the Learned Commissioner of Income Tax(Appeals)-30, New Delhi [in short "the Ld. CIT(A)"] for assessment years 2009-10, 2011-12 and

2013-14 respectively. In these appeals, a common dispute is involved and therefore, these appeals were heard together and disposed off by way of this consolidated order for convenience.

**ITA No.4223/Del./2018 for AY : 2009-10**

**2.** First, we take up the appeal of the Revenue (ITA No. 4223/Del/2018) for assessment year 2009-10. The grounds raised in the appeal are reproduced as under:

1. *On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in holding that no additions could be made u/s 153A on the basis of statement recorded u/s 132(4) and the power of the AO to assess or reassess total income u/s 153 A is restricted to the material found during search.*
2. *On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in relying upon the decision of Hon'ble Supreme Court in the case of CIT vs. Singhad Technical Education Society when the facts and circumstances of the instant case are different from that case.*
3. *On the facts and in the circumstances of the case, the Ld. CIT(A) has erred by ignoring the fact that the assessee during the assessment proceedings failed to produce the Directors of the company that gave accommodation entries to the assessee company and thereby failed to prove the genuineness and creditworthiness of the credits received in their books of account.*
4. *On the facts and in the circumstances of the case, the Ld. CIT(A) has erred by not appreciating the fact that the statement of Sh. Mulchand Malu was provided to the assessee during the post search as well as assessment proceedings. During his statement, he being the promoter of the assessee company had admitted the unexplained credits in the assessee's books of account.*
5. *On the facts and in the circumstances of the case, the Ld. CIT(A) has erred by not appreciating the fact that it was humanly not possible for the persons operating paper/jamakharchi companies, to be present for oral cross examination in all the cases where the magnitude of the case is not less than a scam.*
6. *That the grounds of appeal are without prejudice to each other.*
7. *That the appellant craves leave to add, amend, alter or forgo any ground(s) of appeal either before or at the time hearing of the appeal.*

**3.** Briefly stated facts of the case are that for the year under consideration, the assessee filed original return of income on 30/09/2009, declaring total income as nil. The return was processed under section 143(1) of the Income-tax Act, 1961 (in short 'the Act') in order dated 09/02/2011 at an income of ₹ 1,89,72,710/-. Subsequently, a search and seizure action under section 132 of the Act was conducted on 09/10/2014 at various premises of the assessee along with premises of the Directors etc. In view of search action, proceedings under section 153A of the Act were commenced by way of issue of notice dated 15/12/2015. The assessee filed return of income on 17/01/2016 declaring nil income. The assessment under section 153A was completed on 28/12/2016 after making an addition of Rs.2,47,00,000/- on account of unexplained credit under section 68 of the Act. On further appeal, the Ld. CIT(A) allowed the appeal of the assessee on legal ground following the decision of the Hon'ble Delhi High Court in the case of **Kabul Chawla, 380 ITR 573**. Aggrieved, the Revenue is in appeal raising the grounds as reproduced above.

**4.** Before us, the parties appeared through Video Conferencing facility and filed paper-book in physical form as well as electronically.

**5.** In ground No. 1, the Revenue has challenged finding of the Ld. CIT(A) that no addition could be made under section 153A of the Act on the basis of the statement recorded under section 132(4) of the Act as there was no incriminating material found during the course of the search.

**5.1** The facts in brief qua the issue in dispute are that search was conducted at the premises of one Sh. Moolchand Malu along

with the premises of the assessee company. According to the Assessing Officer, Sh. Mool Chand Malu is the promoter of Kuber Group of companies, including the assessee company. In the impugned assessment order, the Assessing Officer has mentioned that Sh. Mool Chand Malu during the course of search action in statement dated 15/12/2014 under section 132(4) of the Act, offered undisclosed income of estimated ₹ 150 crores, including investment in unexplained share capital. The Assessing Officer has further mentioned that, Sh. Mool Chand Malu again reaffirmed his declaration of undisclosed income of Rs.100 crores towards share application money, share premium and unsecured loans. During assessment proceedings under section 153A of the Act, the Assessing Officer observed unsecured loans worth ₹ 2,47,00,000/- from 12 parties, a list of whom mentioned by the Assessing Officer in the impugned assessment order, is reproduced as under:

(i)	M/s. R.K. Investment Pvt. Ltd.	Rs.7,50,000/-
(ii)	M/s. Facor Enterprises Pvt. Ltd.	Rs.20,00,000/-
(iii)	M/s. Modular Enterprises Pvt. Ltd.	Rs.4,00,000/-
(iv)	M/s. Prabhat Management Services Pvt. Ltd.	Rs.20,00,000/-
(v)	M/s. Priti Mercantile Company Ltd.	Rs.35,00,000/-
(vi)	M/s. RAB Marketing Pvt. Ltd.	Rs.15,00,000/-
(vii)	M/s. Rajni Investment Pvt. Ltd.	Rs.22,50,000/-
(viii)	M/s. RRP Management Services Pvt. Ltd.	Rs.20,00,0000/-
(ix)	M/s. R.S. Services Pvt. Ltd.	Rs.30,00,000/-
(x)	M/s. Shreepati Rasayani Udyog Pvt. Ltd.	Rs.10,00,000/-
(xi)	M/s. Suruchi Financiers Pvt. Ltd.	Rs.25,00,000/-
(xii)	M/s. Tarini Enterprises Pvt. Ltd.	Rs.38,00,000/-
	<b>Total</b>	<b>Rs.2,47,00,000/-</b>

**5.2** In post search proceedings, the Income Tax Department carried out surveys under section 133A of the Act at the premises of the few unsecured loan parties and statement of the persons available at those premises were recorded. According to the Assessing Officer, those persons were not aware about the unsecured loan provider parties. Similarly, search action under section 132 of the Act was carried out at the premises of some unsecured loan providers and those entities were not found in existence on the addresses provided. None of the directors/key persons of those companies appeared. The inquiries were also conducted under section 133(6) of the Act in case of few unsecured loan providers. During assessment proceeding, the Assessing Officer also issued Commission to Investigation Directorate, Kolkata for enquiring M/s RK Investment Private Limited and M/s Rajani Investment Private Limited. According to the Assessing Officer, physical existence of those companies was not found at their addresses.

**5.3** During assessment proceeding, all these information were confronted to the assessee. In response, the assessee furnished documents, like ledger accounts, confirmations, bank statements, ITR acknowledgement, annual financial statement of respective unsecured loan providers. The Assessing Officer rejected the contention of the assessee in view of the information gathered by him and concluded that the assessee failed to file documents to prove genuineness of the transaction and creditworthiness of the unsecured loan providers. The Assessing Officer has summarized his finding in para 5.14 to 5.18 as under:

*“5.14 The assessee was asked to produce the persons managing the affairs of the investor companies. The investors in Assessee Company include these closely held private limited companies. Further, in view of these facts, during the course of said hearing, assessee was requested to prove the source of funds obtained in the form of application moneys for warrants and shares and unsecured loans during the year to furnish all materials and supporting evidences that may be relevant to or useful to prove identity, capacity of the investor companies to invest and genuineness of transactions, Books of accounts maintained and the proofs for sources of the funds transferred to assessee's bank accounts. It is seen that assessee has failed to prove with the above requirement.*

*5.15 No real business appears to have been done by the company. No tangible assets are owned. After issuing commissions and making enquiries it has been reported by the Inspectors that the addresses of the companies were found to be for record purpose only & no business activities were found to be conducted at the premises.*

*5.16 The above lineup is just an example that how the unaccounted money is routed through the various paper companies. Formation and creation of such paper companies are systematically done by the entry operators especially in Kolkata. These companies do not have any infrastructure, no employees etc. As the paper companies have no source to make such investment the entire amount is unaccounted money of Kuber Group introduced in the books through paper companies. The beneficiary company pays unaccounted cash to the entry operator. The entry operator routes the cash through many bank accounts. The directors are also small person who become directors only to earn bread and butter, they do not know about the company. Actually, all the affairs of these companies are run by the entry operators. Accordingly, apart from the other evidences as discussed in the order, enquiries and findings, the investor companies are hereby declared bogus/paper company which has been used to route the unaccounted cash into the books of accounts of the beneficiary company using layering of bank accounts.*

*5.17 To find out the source of the amount which has been credited in the books of the assessee company, details of companies which made investments in assessee company and the advances / loan given or taken by the assessee company were got verified through the Inspector of the department. Inspector was deputed to verify the addresses of these companies. However none of the companies were found to be existing at these addresses. This fact was further strengthened by the fact that when summons were sent during post search proceedings to these companies, the*

*summons were either returned back by the postal authorities with Remark "No such company" / "Returned" or no compliance was made by the above companies. This fact itself shows that these companies are nothing but paper/ jamakharchi companies doing no actual business.*

*5.18 As such Kuber Group is shown to have taken share application money/capital/premium/unsecured loans from the following paper/jamakharchi companies. It has also been gathered that these address are normally used by the entry operators and no actual business is done on these addresses. The fact that the above said company was paper companies and formed only for the purpose of providing accommodation entries and no actual work has been established further strengthens the claim.*

*Thus, it can be comprehensively established that:*

- a. None of these companies were found to be physically carrying out business from their addresses*
- b. No compliances to statutory summons were made and no evidence was produced*
- c. The companies are all situated at a table place not with any infrastructure which are required to conduct proper business operations.*
- d. The directors/key persons who conduct the affairs of companies have not been produced.*

*The above findings buttress the admissions on repeated occasions of the promoter of Kuber Group, Shri Mulchand Maiu as discussed supra regarding undisclosed income on account of capital formation/share capital/share premium in the Kuber Group entities.*

*In light of the above findings and in the facts of the case, the explanations and details furnished by the assessee company are not held to be satisfactory. The assessee cannot be held to have satisfactorily discharged its onus to prove the identity, genuineness and creditworthiness of the above lenders of unsecured loans.*

*As per the facts discussed above the assessee company failed to prove the credits in his books of account in shape of unsecured loans and the same amount is chargeable to tax u/s 68 of the I T Act, 1961 as its income for the given assessment year. Therefore, it is held that the sum so credited in books by assessee company is to be charged to tax as the income of the assessee company for the year under consideration.*

*5.20 In view of above discussion, the amount of Rs. 2,47,00,000/- shown to have been raised as unsecured loans by assessee company is treated as unexplained credit and is added to its income*

*u/s 68 of the I.T. Act, 1961. I am satisfied that the assessee company has furnished inaccurate particulars of income therefore penalty proceedings u/s 21(l)(c) of the I.T. Act is initiated separately.”*

**5.4** Before the Ld. CIT(A), the assessee submitted that there was no reference of any seized material, incriminating or otherwise and therefore the assessment order was not based on seized material but some other extraneous information. The assessee also submitted that statements of persons, namely, Vikas Kumar, Devesh Upadhaya and Sh. Parveen Agrwal have been relied upon by the Assessing Officer, however no opportunity to cross examine those third parties was provided to the assessee. Regarding the statement of Sh. Mool Chand Malu, the assessee submitted that he was neither a director nor employee in the assessee company. It was submitted that Sh. Mool Chand Malu died on 10/04/2017. According to the assessee, it did not agree with the surrender made by Sri Mulchand Malu and therefore there was no question of honouring such surrender. The Assessing Officer also expressed his inability in providing cross examination of Sh. Mukchand Malu in view of his death. After detailed analysis of the submission of the assessee and remand reports from the Assessing Officer, the Ld. CIT(A) framed five issues for adjudication as under:

- “(i) No addition can be made in an assessment u/s 153A if it is not based on incriminating documents/material found during search. The assessment order does not refer to any seized/document/material (found during search), this is an unabated assessment year, date of search being 09.10.2014.*
- (II) Addition cannot be made merely on the basis of statement made by a person who is not a director (or an employee of the company)*



- (III) *A statement that is not relatable to any incriminating documents or material found during search and seizure operation cannot be used for making assessment u/s 153A or u/s 153C.*
- (IV) *The person whose statement, the AO wishes to rely upon needs to be necessarily got cross examined, particularly, if specifically demanded by an assessee. Not providing cross examination makes the assessment bad. Even otherwise, the statement needed to have nexus with incriminating material found during search. No incriminating material was found during search.*
- (V) *The additions made u/s 68 are not sustainable as the assessee appellant had submitted complete documents relating to the transactions at hand and had discharged onus cast upon it.*

**5.6** Regarding the first issue, the Ld. CIT(A) observed that the assessment order does not refer to any seized or incriminating material found during the course of the search and the entire addition is based upon the admission/statement u/s 132(4) of the Act of Sri Mulchsnd Malu, who was neither a director nor employee the assessee company. The Ld. CIT(A) relied on the decision of the Hon'ble Delhi High Court in the case of Kabul Chawla (supra) Mita Gutgatia (supra). The relevant part of the order of the Learned CIT(A) is reproduced as under:

*"I find that the additions made in the assessment order are not based on any incriminating material or documents found during search. In fact, the assessment order does not refer to any seized material or any incriminating material found during the course of search. This position of law (that addition u/s. 153A/153C can be made only on the basis of incriminating material etc. found during search), has been laid down by the Hon'ble Jurisdictional High Court in a plethora of cases. Some of which are-*

- (a) *CIT Vs. Kabul Chawla , 381 ITR 570 (Delhi)*
- (b) *Pr. CIT Vs. Kurele Papers Mills Pvt. Ltd. , 380 ITR 571 (Delhi)*
- (c) *Pr. CIT Vs. Meeta Gutgutia, 395 ITR 526 (Delhi)*

*I am bound by law as laid down by my jurisdictional High Court as elaborated above. As such, I hold that the addition made by the Assessing Officer, not being based upon any seized material or incriminating material found during the course of search, is not sustainable."*

**5.7** Regarding the issue whether the statement recorded under section 132(4) of the Act in itself constitute incriminating material, the Ld. CIT(A) relied on the decision of the Hon'ble Delhi High Court in the case of **CIT Vs Harjeev Aggrawal (supra)** and held that statement made by Sri Muklchand Malu had no Nexus with any seized material, the relevant finding of Ld. CIT(A) is reproduced as under:

*“The appellant has pointed out (based upon elaboration of law by Hon'ble Delhi High Court) that the statements recorded u/s 132(4) do not themselves constitute incriminating material.*

*I have examined the aforesaid position of law. I find that the additions made by the AO are solely made on the basis of disclosure/ surrender made by Shri Mul Chand Malu u/s 132(4) of I.T. Act, 1961. I find that the statement made by Shri Mul Chand Malu has no nexus with any seized material. Infact, the addition u/s 68 is not based upon any seized/incriminating material at all. Hon'ble Delhi High Court in the case of CIT vs Harjeev Aggarwal 241 Taxman 199(Delhi) have held at para 21 as follows-*

***“The undisclosed income of an Assessee has to be computed on the basis of evidence and material found during search. The statement recorded u/s 132(4) of the Act may also be used for making the assessment, but only to the extent it is relatable to the incriminating emdence/material unearthed or found during search. In other word, there must be a nexus between the statement recorded and the evidence /material found during search in order to for an assessment to be based on the statement recorded.”***

*This position was reiterated by Hon'ble Delhi High Court in the case of Pr. CIT Vs. Best Infrastructure (India) Pvt. Ltd., 397 ITR 182 (Delhi.), order dated 01.08.2017. the Hon'ble Delhi High Court held in this order at para 38 as follows:*

*“38. Fifthly, statements recorded under Section 132(4) of the Act of the Act do not by themselves constitute incriminating material as has been explained by this Court in Harjeev Aggarwal (Supra).”*

**5.8** In view of the detailed observation, the Ld. CIT(A) concluded that in the case, no incriminating material was found during the course of the search and no assessment order reassessment was pending on the date of the initiation of the search and therefore no addition could have been made in the instant assessment year. Accordingly, he deleted the addition of ₹ 2,47,00,000/- made under section 68 of the Act by the Assessing Officer.

**6.** Before us, the parties appeared through Video Conferencing facility. The assessee filed a paper-book electronically. In support of her contentions, the Learned DR also filed copy of statements of Late Sh. Mulchand Malu and his son Sh. Vinay Malu.

**7.** The learned DR strongly relied on the order of the Assessing Officer and submitted that Late Sh. Mulchand Malu in statement under section 132(4) of the Act offered undisclosed income of more than Rs.150 Crores based on the incriminating materials found during the course of the search and the undisclosed income offered included share capital and loans etc. According to her addition in dispute has been made on the basis of the undisclosed income offered in statement under section 132(4) of the Act, which is an admissible evidence, and therefore, contention of the Ld. CIT(A) that no incriminating material is found in the course of the search, is not correct finding of fact. The Learned DR also relied on the decision of the Hon'ble Supreme Court in the case of B Kishore Kumar Vs DCIT reported in (2015) 62 taxmann.com 215 (SC) .

**8.** On the other hand, Learned Counsel of the assessee relied on the order of the Ld. CIT(A). The learned Counsel submitted that original return of income in the case was filed on

30/09/2009 and no notice under section 143(2) of the Act was issued prior to the date of the search and, therefore, no assessment was pending as on the date of the search. Further, he submitted that Learned CIT(A) has relied on the decision of the Hon'ble jurisdictional High Court in the case of **Kabul Chawla reported in 380 ITR 573**. Regarding statement of Sri Mulchand Malu, the learned Counsel submitted that the assessee is from day one contending that Shri Malu was neither a director nor an employee of the assessee company. He further submitted that statement/surrender by third-party is not binding on the assessee. In support of his contention, he relied on the decision of the Hon'ble Delhi High Court in the case of **CIT Vs Ved Prakash Choudhary, 305 ITR 245 (Del)**. He further submitted that the statement of alleged entry-providers, which had been referred by the Assessing Officer in the assessment order, were recorded much prior to the date of the search and despite a specific request by the assessee, the Assessing Officer failed to provide opportunity to cross examine those persons namely Sh. Vikas Aggrwal, Sh. Devesh Uphadhya and Sh. Prveen Aggrawal.

**8.1** The learned Counsel further submitted that in the case of sister concern of the assessee, namely, Kuber Foods Products and Kuber Khanpan, the Tribunal in order dated 22/10/2019 in ITA No. 580/Del/2019 has considered the statements and held that those statements cannot be relied upon by the Revenue as the same were without providing opportunity of cross-examination to assessee. The learned Counsel submitted that statement of the third-party under section 132(4) without corroborating evidence does not constitute incriminating material as held in the case of

Harjeev Aggrawal (supra) by the Hon'ble Delhi High Court and therefore in absence of an incriminating material no addition could have been made in completed assessment, following the decision of the Hon'ble judicial High Court in the case of Kabul Chawala (supra).

**9.** We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. As far as decision of the Hon'ble Delhi High Court in the case of the **Kabul Chawla** (supra) is concerned, no addition could have been made in any assessment years if-

- (i) no incriminating material is found during the course of the search from the premises of the assessee.
- (ii) No assessment was pending as on the date of the search.

**9.1** As far as second condition above is concerned, the assessee had filed his original return of income on 30/09/2009 declaring total income of ₹ 1,89,72,710/-. No notice under section 143(2) of the Act was issued till 30/09/2010, which was the limitation under which notice u/s 143(2) of the Act could have been issued. The search action in the case of assessee was carried out on 09/10/2014, therefore, no assessment proceeding was pending in the case of the assessee as on date of the search. This position has not been disputed by the Revenue also.

**9.2** The only dispute is regarding whether there was any incriminating material found during the course of the search. According to the Learned DR statement of Sh. Mulchand Malu recorded under section 132(4) constitute incriminating material

and therefore decision of the Kabul Chawla (supra) is not applicable over the facts of the assessee.

**9.3** We find that Hon'ble Delhi High Court in the case of **PCIT Vs Best Infrastructure Private Limited, 397 ITR 82** has held that statement under section 132(4) in the itself does not constitute incriminating material. The relevant finding of the Hon'ble High Court is reproduced as under:

*“38. Fifthly, statements recorded under Section 132 (4) of the Act of the Act do not by themselves constitute incriminating material as has been explained by this Court in **Commissioner of Income Tax v. Harjeev Aggarwal** (supra). Lastly, as already pointed out hereinbefore, the facts in the present case are different from the facts in **Smt. Dayawanti Gupta v. CIT** (supra) where the admission by the Assessee themselves on critical aspects, of failure to maintain accounts and admission that the seized documents reflected transactions of unaccounted sales and purchases, is non-existent in the present case. In the said case, there was a factual finding to the effect that the Assessee were habitual offenders, indulging in clandestine operations whereas there is nothing in the present case, whatsoever, to suggest that any statement made by Mr. Anu Aggarwal or Mr. Harjeet Singh contained any such admission.”*

**9.4** The relevant paragraph of the decision of the Hon'ble Hon'ble Delhi High Court in the case of **Harjeev Agrawal** (supra) also reproduced as under:

*“20. In our view, a plain reading of Section 158BB(1) of the Act does not contemplate computing of undisclosed income solely on the basis of a statement recorded during the search. The words “evidence found as a result of search” would not take within its sweep statements recorded during search and seizure operations. However, the statements recorded would certainly constitute information and if such information is relatable to the evidence or material found during search, the same could certainly be used in evidence in any proceedings under the Act as expressly mandated by virtue of the explanation to Section 132(4) of the Act. However, such statements on a standalone basis without reference to any other material discovered during search and seizure operations would not empower the AO to make a block assessment merely*

*because any admission was made by the Assessee during search operation.*

21. A plain reading of Section 132 (4) of the Act indicates that the authorized officer is empowered to examine on oath any person who is found in possession or control of any books of accounts, documents, money, bullion, jewellery or any other valuable article or thing. The explanation to Section 132 (4), which was inserted by the Direct Tax Laws (Amendment) Act, 1987 w.e.f. 1st April, 1989, further clarifies that a person may be examined not only in respect of the books of accounts or other documents found as a result of search but also in respect of all matters relevant for the purposes of any investigation connected with any proceeding under the Act. However, as stated earlier, a statement on oath can only be recorded of a person who is found in possession of books of accounts, documents, assets, etc. Plainly, the intention of the Parliament is to permit such examination only where the books of accounts, documents and assets possessed by a person are relevant for the purposes of the investigation being undertaken. Now, if the provisions of Section 132(4) of the Act are read in the context of Section 158BB(1) read with Section 158B(b) of the Act, it is at once clear that a statement recorded under Section 132(4) of the Act can be used in evidence for making a block assessment only if the said statement is made in the context of other evidence or material discovered during the search. A statement of a person, which is not relatable to any incriminating document or material found during search and seizure operation cannot, by itself, trigger a block assessment. The undisclosed income of an Assessee has to be computed on the basis of evidence and material found during search. The statement recorded under Section 132(4) of the Act may also be used for making the assessment, but only to the extent it is relatable to the incriminating evidence/material unearthed or found during search. In other words, there must be a nexus between the statement recorded and the evidence/material found during search in order to for an assessment to be based on the statement recorded.

22. In ***CIT v. Sri Ramdas Motor Transport Ltd.: (1999) 238 ITR 177 (AP)***, a Division Bench of Andhra Pradesh High Court, reading the provision of Section 132(4) of the Act in the context of discovering undisclosed income, explained that in cases where no unaccounted documents or incriminating material is found, the powers under Section 132(4) of the Act cannot be invoked. The relevant passage from the aforesaid judgment is quoted below:

*"A plain reading of sub-section (4) shows that the authorised officer during the course of raid is empowered to examine any person if he is found to be in possession or control of any*

*undisclosed books of account, documents, money or other valuable articles or things, elicit information from such person with regard to such account books or money which are in his possession and can record a statement to that effect. Under this provision, such statements can be used in evidence in any subsequent proceeding initiated against such person under the Act. Thus, the question of examining any person by the authorised officer arises only when he found such person to be in possession of any undisclosed money or books of account. But, in this case, it is admitted by the Revenue that on the dates of search, the Department was not able to find any unaccounted money, unaccounted bullion nor any other valuable articles or things, nor any unaccounted documents nor any such incriminating material either from the premises of the company or from the residential houses of the managing director and other directors. In such a case, when the managing director or any other persons were found to be not in possession of any incriminating material, the question of examining them by the authorised officer during the course of search and recording any statement from them by invoking the powers under section 132(4) of the Act, does not arise. Therefore, the statement of the managing director of the assessee, recorded patently under section 132(4) of the Act, does not have any evidentiary value. This provision embedded in sub-section (4) is obviously based on the well established rule of evidence that mere confessional statement without there being any documentary proof shall not be used in evidence against the person who made such statement. The finding of the Tribunal was based on the above well settled principle."*

23. *It is also necessary to mention that the aforesaid interpretation of Section 132(4) of the Act must be read with the explanation to Section 132(4) of the Act which expressly provides that the scope of examination under Section 132(4) of the Act is not limited only to the books of accounts or other assets or material found during the search. However, in the context of Section 158BB(1) of the Act which expressly restricts the computation of undisclosed income to the evidence found during search, the statement recorded under Section 132(4) of the Act can form a basis for a block assessment only if such statement relates to any incriminating evidence of undisclosed income unearthed during search and cannot be the sole basis for making a block assessment.*

24. *If the Revenue's contention that the block assessment can be framed only on the basis of a statement recorded under Section 132(4) is accepted, it would result in ignoring an important check on the power of the AO and would expose assesseees to arbitrary assessments based only on the statements, which we are conscious*



*are sometimes extracted by exerting undue influence or by coercion. Sometimes statements are recorded by officers in circumstances which can most charitably be described as oppressive and in most such cases, are subsequently retracted. Therefore, it is necessary to ensure that such statements, which are retracted subsequently, do not form the sole basis for computing undisclosed income of an assessee.*

25. In **Commissioner of Income Tax v. Naresh Kumar Aggarwal: (2014) 3699 ITR 171 (T & AP)**, a Division Bench of Telangana and Andhra Pradesh High Court held that a statement recorded under Section 132(4) of the Act which is retracted cannot constitute a basis for an order under Section 158BC of the Act. The relevant extract from the said judgement is quoted below:

*“17. The circumstances under which a statement is recorded from an assessee, in the course of search and seizure, are not difficult to imagine. He is virtually put under pressure and is denied of access to external advice or opportunity to think independently. A battalion of officers, who hardly feel any limits on their power, pounce upon the assessee, as though he is a hardcore criminal. The nature of steps, taken during the course of search are sometimes frightening. Locks are broken, seats of sofas are mercilessly cut and opened. Every possible item is forcibly dissected. Even the pillows are not spared and their acts are backed by the powers of an investigating officer under section 94 of the Code of Criminal Procedure by operation of sub-section (13) of section 132 of the Act. The objective may be genuine, and the exercise may be legal. However, the freedom of a citizen that transcends, even the Constitution cannot be treated as non-existent.”*

*“18. It is not without reason that Parliament insisted that the recording of statement must be in relation to the seized and recovered material, which is in the form of documents, cash, gold, etc. It is, obviously to know the source thereof, on the spot. Beyond that, it is not a limited licence, to an authority, to script the financial obituary of an assessee.”*

*“19. At the cost of repetition, we observe that if the statement made during the course of search remains the same, it can constitute the basis for proceeding further under the Act even if there is no other material. If, on the other hand, the statement is retracted, the Assessing Officer has to establish his own case. The statement that too, which is retracted from the assessee cannot constitute the basis for an order under section 158BC of the Act.”*

**9.5** In view of the above finding of the Hon'ble Delhi High Court statement of Sh. Mulchand Malu under section 132(4) of the Act alone cannot be considered as incriminating material unless any corroborating incriminating material is found during the course of the search from the premises of the assessee.

**9.6** As far as the decision in the case of Sh. B Kishore Kumar (supra) is concerned Hon'ble Supreme Court has dismissed the SLP filed by the assessee against the decision of Hon'ble Madras High Court (decision reported in 52 taxmann.com 449), wherein the Hon'ble Court has held that where the assessee himself has stated in sworn statement during search and seizure about his undisclosed income, tax was to be levied on the basis of the admission without be scrutinizing documents. The relevant finding of the Hon'ble High Court is reproduced as under:

*“6. With regard to the undisclosed income of Rs.52,73,920/- supported by printouts, in the sworn statement dated 29.8.2006, the assessee says that he had separate business income which was not included in his income tax returns. Therefore, admission of undisclosed income of Rs.52,73,920/- is categoric and undisputed. The assessee in the sworn statement made on 10.10.2006, stated that outstanding loans to the tune of Rs.25 Lakhs to 30 Lakhs are to be recovered with interest at the rate of 18%. This is a clear admission. This amount has also been calculated and added as undisclosed income. When there is a clear and categoric admission of the undisclosed income by the assessee himself, in our considered opinion, there is no necessity to scrutinize the documents. The document can be of some relevance, if the undisclosed income is determined higher than what is now determined by the department. Moreover, it is not the case of the assessee that the admission made by him was incorrect or there is mistake. In fact, when there is a clear admission, voluntarily made, by the assessee, that would constitute a good piece of evidence for the Revenue.*

*7. The learned counsel for the assessee relied upon a decision of the Delhi High Court in CIT v. Girish Chaudhary, [2008] 296 1TR 619/163 Taxman 608 to plead that loose sheets of papers should not be taken as a basis for determining undisclosed income. However, in the case on hand, loose sheets found during the search*

*are not the sole basis for determining the tax liability. It is a piece of evidence to prove undisclosed income. The printout statements of undisclosed income is not disputed by the assessee and in his sworn statements it is accepted. In fact, he admitted that outstanding loans to be recovered are in the range of Rs.25 Lakhs to 30 Lakhs. We find no error in the procedure followed by the Assessing Officer on admitted facts. The entire exercise by the department to bring to tax undisclosed income, we find has been generous and simple. There appears to be no confusion in the quantification of the tax liability and we uphold the order of the Tribunal.”*

**9.7** Thus, we find that in the above decision addition has been sustained on the basis of the statement recorded of the assessee himself and not based on the statement of any third-party. The facts of above case are distinguishable from the facts of the assessee.

**9.8** In view of the above facts and circumstances, we do not find any error in the order of the Ld. CIT(A) on the issue in dispute. Following the finding of the Hon'ble Delhi High Court in the case of Kabul Chawal (supra), we, accordingly, uphold the same. The ground No. 1 of the appeal of the Revenue is accordingly dismissed.

**10.** Since no addition could have been made in the case of the assessee, we are not deciding the arguments of the parties on the merit of the addition. The grounds related to merit of the addition are accordingly dismissed as infructuous.

**11.** In the result, the Appeal of the Revenue is dismissed.

**ITA No. 4225/Del./2018 for AY : 2011-12**

**12.** In the appeal of the Revenue (ITA No. 4225/Del./2918) for assessment year 2011-12 also original return of income was filed

on 30/09/2011 and assessment under section 143(3) was completed on 20/02/2014 and therefore no assessment was pending as on the date of the search i.e. 09/10/2014. As far as facts of incriminating material are concerned, the facts are identical to assessment at 2009-10.

**13.** Accordingly, following our finding in assessment year 2009-10, the appeal of the Revenue in assessment year 2011-12 is also dismissed.

**ITA No. 4226/Del./2018 for AY: 2013-14**

**14.** In ITA no. 4226/Del/2018 for assessment year 2013-14, also identical facts to the case for assessment year 2009-10 are involved. In assessment year 2013-14, the original return of income was filed on 30/09/2013 declaring total income of ₹ 96,59,413/-. In this case, time limit for issuance of notice under section 143(2) expired on 30/09/2014, however, no such notice was issued. Therefore no assessment proceedings were pending as on the date of the search. Accordingly, following our finding in assessment year 2009-10, the appeal of the Revenue for assessment year 2013-14 is also dismissed.

**15.** In the result, all the three appeal of the Revenue are dismissed.

***Order pronounced in the open court on 26<sup>th</sup> March, 2021***

**Sd/-  
(K.N. CHARY)  
JUDICIAL MEMBER**

**Sd/-  
(O.P. KANT)  
ACCOUNTANT MEMBER**

Dated: 26<sup>th</sup> March, 2021.

RK/-(DTPDS)

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi