Income Tax Search and Seizure: Importance of Statement u/s 132(4) of the Income Tax Act'1961, Retraction thereof

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Introduction

Authority and power to conduct search and seizure operations is strident and caustic power authorized by law to be taken recourse to when the conditions mentioned under different clauses of Section 132 (1) of the Act are satisfied.

The jurisdictional facts that have to be established before a search under Section 132 (1) of the Act can be authorised are that (i) the authority issuing the authorization is in possession of some credible information, other than surmises and conjectures (ii) that the authority has reason to believe that the conditions stipulated in clauses (a), (b) and (c) of Section 132 (1) qua the person searched exist; and (iii) the said information has nexus to such belief.

The law is well settled that a warrant of search and seizure under Section 132(1) can only be issued on the basis of some material or information on which the Commissioner/ Director has reason to believe that any person is in possession of money, jewellery or other valuable articles representing wholly or partly income or property which has not been or would not be disclosed, under the IT Act. The satisfaction of the authorities under Section 132 must be on the basis of relevant material or information. The word used in Section 132(1) are "reason to believe" and not "reason to suspect".

Having said so, the primary thrust of the Search and Seizure action is to collect evidences of tax evasion which otherwise could not have surfaced and brought to tax. Section 132(4) of the act has been put in place by the legislature consciously so as to enable the authorized officer to collect such evidences by recording statements during the course of search. Section 132(4) of the act empowers the Authorized Officer, to examine and record a statement under oath of 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 Indian Income-tax Act, 1922 (11 of 1922), or under the Income Tax Act'1961.

Direct Tax Law (Amendment) Act'1987 w.e.f. 01-4-1989, inserted an explanation to Section 132(4), which reads as under:-

> *"Explanation.—For the removal of doubts, it is hereby declared that the exami-nation 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 Indian Income-tax Act, 1922 (11 of 1922), or under this Act."*

Here, it would be relevant to point out that the statements u/s 132(4) are recorded by administering oath which is presumed to be carrying truth in view of the provisions of

section 181 and section 193 of the Indian Penal Code which provide for imprisonment if a false statement is given.

Therefore there is a considerable importance of statements recorded u/s 132(4) during search and seizure operations, which is clear from the intent of Legislature as it thought fit to include a separate sub-section 132(4) for recording of statement during a search operation. However, it is further most pertinent to mention here is that the words 'may be used in evidence in any proceedings' appearing in section 132(4) are of great significance. The Legislature seems to be aware that some admissions may be made at the time of search which may be true, but for which sufficient corroborative evidence may not be found.

The word 'statement' is defined neither in the Income-tax Act nor in the Indian Evidence Act, and, hence, it assumes its dictionary meaning of 'something that is stated'.

The Division Bench of the Kerala High Court in *CIT v. Hotel Meriya [2011] 332 ITR 537 / [2010] 195 Taxman 459 (Ker.)* considered the scope of a statement recorded under Section 132(4) and found that such statement recorded by the officer as well as the documents seized would come within the purview of evidence under the Income-tax Act read with Section 3 of the Evidence Act. The necessary corollary is that such an evidence should be admissible for the purpose of search assessments too. The Explanation to Section 132(4) of the Income Tax Act was also noticed by the Division Bench to further emphasize that the evidence so collected would be relevant in all purposes connected with any proceedings of the Income Tax Act.

Having said so, it is further pertinent to mention that statement recorded on oath u/s 132(4) of the act is significant both from the point of view department as well as the assessee who is subjected to search. From the departmental point of view, such a statement enables the department to bring on surface the tax evasion, to examine the nature of incriminating documents, assets etc. found during the course of search and record the assessee's version with the regard to the contents of such incriminating documents and assets, its source, mode and manner of earning/application and its accountability in the books of accounts whether disclosed or not. Such a statement recorded on oath carries a significant evidentiary value which may be used by the Assessing Officer during the course of assessment proceedings as a corroborative evidence along with documentary evidences material unearthed during the course of search and seizure action.

On the other hand, the assessee subjected to such a search and seizure action, by making a valid disclosure of its undisclosed income in the statement recorded u/s 132(4) gets benefitted from less or no levy of penalty for the specified previous year u/s 271AAA or 271AAB, as the case may be, though on fulfillment of conditions mandated in Section 271AAA and/or 271AAB. Therefore, the assessee's must be cautious enough about his or her disclosures, manner of disclosures of unaccounted income and it's substantiation thereof as the manner and way in which assessee makes the declarations decides the fate of the assessee as regards the penal provisions are concerned.

It is further pertinent here that invariably in every search and seizure action, statements u/s 132(4) are recorded multiples times, till the search is concluded. The persons giving such statements during search proceeding remain under great mental pressure, nervousness and stress. Most of times 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 the statements made during the search proceeding are often vulnerable on the ground that same cannot be correctly furnished.

There may be cases, in the course of search and seizure operations wherein an attempt

is often made to extract information about undisclosed income with the desire to announce the success of the operation of search by the concerned authorities, for achieving their success in search operations. In such cases, the Income-tax Department may adopt the pressure tactics for confessions of undisclosed income, which amounts to violation of human rights and on the contrary an assessee always complains of adopting pressure tactics by the department to extract confessions for declaration of undisclosed income. In such cases the authorities try to obtain and record Statement of the nature they would like to record. The persons making the Statements are made to sign on the statements and other documents.

To curb such erroneous practices of seeking involuntary forced confession of undisclosed income, the CBDT issued Circular F. No. 286/2/2003-IT(Inv.), dated 10-3-2003 after taking due recommendation of Kelker Committee, which clearly states that 'no attempt should be made to obtain confession/surrender as to the undisclosed income during search. Any action on the contrary shall be viewed adversely'.

CBDT Instruction F. No. 286/2/2003-IT (Inv.), dated 10-3-2003 regarding confession of additional income during the course of search & seizure and survey operation is as reproduced herein under –

"In pursuance of the Finance Minister's budget speech dated 28-2-2003 this instruction was issued by the CBDT and is as under:

"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 taken/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. Any action on the contrary shall be viewed adversely". This instruction is in line with the recommendation of the Task Force on Direct Taxes Chaired by Dr. Vijay Kelker."

Recommendation in final Report Para 3.27 of Task Force on Direct Taxes Chaired by Dr. Vijay Kelkar in this context

- The CBDT must issue immediate instruction to the effect that no raiding party should obtain any surrender whatsoever.
- Where, a taxpayer desire to voluntarily make a disclosure, he should be advised to make so after the search.
- All cases where surrender is obtained during the course of the search in violation of the instruction of the CBDT, the leader of the raiding party be subjected to vigilance enquiry.
- All statements recorded during the search should be Video recorded.

Subsequently, CBDT also issued another letter [F.NO.286/98/2013-IT (INV.II)], DATED 18-12-2014, emphasizing upon the need to focus on gathering evidences during Search/Survey and to strictly avoid obtaining admission of undisclosed income under coercion/undue influence. The letter is being reproduced herein under:-

"SECTION 132, READ WITH SECTION 133A OF THE INCOME-TAX ACT, 1961 - SEARCH & SEIZURE - ADMISSIONS OF UNDISCLOSED INCOME UNDER COERCION/PRESSURE DURING SEARCH/ SURVEY

LETTER [F.NO.286/98/2013-IT (INV.II)], DATED 18-12-2014

Instances/complaints of undue influence/coercion have come to notice of the CBDT that some assessees were coerced to admit undisclosed income during Searches/Surveys conducted by the Department. It is also seen that many such admissions are retracted in the subsequent proceedings since the same are not backed by credible evidence. Such actions defeat the very purpose of Search/Survey operations as they fail to bring the undisclosed income to tax in a sustainable manner leave alone levy of penalty or launching of prosecution. Further, such actions show the Department as a whole and officers concerned in poor light.

2. *I am further directed to invite your attention to the Instructions/Guidelines issued by CBDT from time to time, as referred above, through which the Board has emphasized upon the need to focus on gathering evidences during Search/Survey and to strictly avoid obtaining admission of undisclosed income under coercion/undue influence.*

3. *In view of the above, while reiterating the aforesaid guidelines of the Board, I am directed to convey that any instance of undue influence/coercion in the recording of the statement during Search/Survey/Other proceeding under the I.T.Act,1961 and/or recording a disclosure of undisclosed income under undue pressure/ coercion shall be viewed by the Board adversely.*

4. *These guidelines may be brought to the notice of all concerned in your Region for strict compliance.*

5. *I have been further directed to request you to closely observe/oversee the actions of the officers functioning under you in this regard.*

6. *This issues with approval of the Chairperson, CBDT."*

It is often argued by the Department that in the confessional statements during the course of search, there is a mention that there was no pressure and the statement was given voluntarily without any threat. In this connection, the Bombay Tribunal in *Deepchand & Co. v. Asstt. CIT (1995) [IT Appeal Nos. 1231 to 1234 (Bom.) of 1993, dated 27-7-1994]* has observed thus:

> *'The stereotyped mention at the end of the statement that whatever was stated was true and to the best of the knowledge and belief and the statement given was voluntary without any threat, force or undue influence, would not mean that they agreed for making additions. Putting certain expression at the end of the statement cannot be taken as true in view of the retraction. Retraction can be made only after understanding the correct meaning and consequences of the statement.'*

There may be cases also where the assessee on his own motion gives the disclosures of undisclosed income including its manner of earning without being prompted by the authorized officer. However, later on, such an assessee may realize, on deeper analysis and investigation that such a statement was given under a fallacy or under mistaken belief of facts or at times of nervousness, stress and panic and thereby the statement so tendered doesn't reflect the true state of affairs. To illustrate by way of a simple example, there may be a case wherein an assessee declares cash found at his premises as his undisclosed income but later on realizes that in fact such cash found is disclosed which actually represents the cash available in his books of accounts. There can be number of such illustrations.

Issue under consideration:-

Now a question arises whether the statement recorded u/s 132(4) of the act can be retracted and under what circumstances.

This is a vital issue for discussion in respect to search and seizure cases.

The Thumb Rule to address this issue is to understand the legal principle that though an admission u/s 132(4) of the act is an extremely important piece of evidence, but it cannot be said that it is conclusive and it is open to the person, who made it, to show it that the impugned statement has incorrectly been made and the person, making the statement should be given proper opportunity to show that it does not show the correct state of facts. At the same time, it has to be kept in mind that merely because a statement is retracted, it cannot become as statement which involuntarily or unlawfully obtained. For any retraction to be successful in the eyes of law, the assessee has to show as to how earlier recorded statements do not state the true facts or that there was coercion, inducement or threat while recording his earlier statements. During the course of practice of search and seizure cases, it is observed that on several occasions, after having admitted certain facts, in a statement made under section 132(4) of the act during a search and seizure operation, assessee's retract the admissions made by denying the facts admitted, claiming that the admissions were obtained under duress, by applying mental pressure, or under mistaken belief of facts and law. Although law permits retraction of a statement, it lays down certain perquisites, without which the statement, though retracted, can be used as evidence in any proceedings under the Act. Any statement recorded under section 132(4), statutorily deemed to have evidentiary value; cannot be retracted at the mere will of the party. A statement made under oath deemed and permitted to be used in evidence, by express statutory provision, has to be taken as true unless there is contra evidence to dispell such assumption. A self-serving retraction, without anything more cannot dispell the statutory presumption. 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.

Therefore, whenever an assessee pleads that the statements have been obtained forcefully/ by coercion/undue influence without material/ contrary to the material, then it should be supported by strong evidence. 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

Generally, as explained hereinabove, the statements made earlier u/s 132(4) are retracted when the maker contends that earlier admissions:

(i) were untrue; or

(ii) were on a mistaken understanding, misconception; or

(iii) were not voluntary; or

(iv) were under mental stress, undue influence, pressure

At this juncture, it is pertinent to mention that Section 31 of the Indian Evidence Act, 1872 states that admissions are not conclusive proof of the matters admitted. Furthermore, in view of Section 94 of the Indian Evidence Act, presumption can be rebutted by proving that the admission or confession was caused by inducement, threat or promise, thereby making the admission irrelevant. Thus, an admission or acquiescence cannot be a foundation for an assessment where the admission was made under involuntarily, threat, force, pressure, coercion or erroneous impression or misconception of law. In such circumstances, it is always open to an assessee to demonstrate and satisfy the authority concerned with documentary evidence and thereby retract from

the statement so rendered u/s 132(4) though without any significant delay of time.

The settled principle of law suggests that a confession of an accused would need corroboration with evidences to convict the accused. It is a matter of acceptance that though an admission is an important piece of evidence but it is not conclusive and it is open to the assessee to show that it is incorrect. At this stage, it shall not be out of place to quote the verdict of Hon'ble Supreme Court of India in case of *Pullangode Rubber Produce Co. Ltd. v. State of Kerala [1973] 91 ITR 18* wherein 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. The landmark verdict was followed by the Hon'ble Delhi High Court of Delhi in case of *S. Arjun Singh v. CWT [1989] 175 ITR 91.*

Further reliance can also be placed on the judgement of the apex court in case of *Nagubai Armul V. B Sharma Rao AIR 1956 SC 100* wherein it was held that an admission is an extremely important piece of evidence but it cannot be said that it is conclusive. It is open to the assessee who made the admission to show that it is incorrect. In yet another case of *Sarwan Singh Rattan Singh v. State of Punjab AIR 1957 SC 637,* the Hon'ble Supreme Court of India held that an admission is not conclusive as to the truth of the matters stated therein. It is only a piece of evidence, the weight to be attached to which must depend on the circumstances in which it is made. It can be shown to be erroneous or untrue."

In yet another case of *Asstt. CIT v. Jorawar Singh M. Rathod [2005] 148 Taxman 35 (Ahd. - Trib.) (Mag.)* the assessee during the recording of his statement was under constant threat of penalty and prosecution and was confused about various questions asked by the searching party about documents, papers, etc., of other persons found from his premises. He declared such 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 as under:

> *"...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. It is settled position of the law that authorities under the Act are under an obligation to act in accordance with law. Tax can be collected only as provided under the Act. If 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 [S.R. Koshti v. CIT [2005] 193 CTR (Guj.) 518]. . . . In the light of above discussion, we apply the ratio of Apex Court in the case of Durga, (supra), [CIT v. Durga Prasad More [1973] CTR (SC) 500], i.e., test of human probabilities. 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)*

On the similar lines the Hon'ble Chandigarh bench of the Income tax Appellate Tribunal in case of *Surinder Pal Verma v. Asstt. CIT [2004] 89 ITD 129 (Chd.) (TM)* took a realistic view of the facts and circumstances in which disclosure is generally made in search and seizure proceedings. It was observed as under:-

> *"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)

On the similar footing in case of *ITO v. Bua Dass (2005) 97 TTJ (Asr.) 650/(2006) 155 Taxmann 130(Asr.) (Mag.)* it was held that where the assessing officer made additions merely on the basis of confessional statement, made by the assessee before DDIT(Inv.), which was not supported by any independent and corroborative evidence and said statement was subsequently retracted by assessee during course of assessment, additions made on the basis of said statements were to be deleted.

Further reliance can be placed in the case of the *DCIT v. Pramukh Builders (2008) 112 ITD 179* wherein it was held that there being no spectre of evidence regarding undisclosed income, addition made only on the basis of statement given in the state of confusion and later retracted could not be sustained.

Similarly, the Hon'ble Delhi ITAT in case of *M.S. Aggarwal v. DCIT (2004) 90 ITD 80 (Del)* following the judgement of the Hon'ble Supreme Court in case of *Pullangode Rubber Product Co. Ltd. v. State of Kerala (1973) 91 ITR 18* held that the statement can't be the only basis for making addition if the facts are different and the same are demonstrated by way of evidences at later stages.

In *Hotel Kiran v. Asstt. CIT [2002] 82 ITD 453*, the Pune Bench of the Tribunal has held as under :

"8. However, there are exceptions to such admission where the assessee can retract from such 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 allegations to prove that 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 law. It is well settled that there cannot be estoppel against the law. If a person is not liable to tax in respect of any receipt, he cannot be made liable to pay tax merely because he has agreed to pay the tax in the statement under section 132. He can always retract in such situation. For example the assessee might have sold his agricultural land and not declared its sale proceeds in his income-tax return. If such agricultural land does not fall within the ambit of the words 'capital asset' then no tax is payable. If the assessee had offered to pay tax on the profits on such sale under section 132(4), in our opinion, he can always retract from such statement. Similarly, if the assessee can show that the statement has been made on mistaken belief of facts, he can retract from the statement if he can show that facts on the basis of admission so made were incorrect. This is what has been held by the Hon'ble Supreme Court in the case of Pullangode Rubber & Produce Co. Ltd."

"9. In view of the above discussions, we are of the view that admission made in statement under section 132(4) has great evidentiary value and is binding on a person who makes it. Therefore, the admission can be made on the basis of such admission by using the same in evidence. The Legislature was well aware that under the general law mere admission may not be conclusive one. The Income-tax Act is a specific Act and assessment has to be made on the basis of material gathered by the Assessing Officer. For this purpose, vast powers have been conferred on the Income-tax Authorities for making investigation

including the powers of search. If in the course of such search, the assessee makes some admission, he debars the authorised officer from making further investigation. In view of this, Legislature in its wisdom has provided that such statement can be used in evidence and the assessment can be made on the basis of such statement. The sanctity of such provision would be lost if the assessee is allowed to contend that no addition can be made on the basis of such admission. However, such admission can be retracted by the assessee only if the circumstances as mentioned in the earlier paragraphs are established by the assessee to exist." [Emphasis supplied]

Burden to prove the genuiness of retraction is on the assessee:-

The statement recorded under section 132(4) has evidentiary value, as provided in the Act itself that it can be used in evidence. The person who has given the statement can retract from the same if he can establish that (i) the statement was given under duress, coercion or under some other adverse circumstances; (ii) the statement was given under misconception of facts and law; (iii) the statement was not correct in the view of facts or material/evidence on record; and (iv) such other facts, material/ evidence that come to light at a later stage show that the statement was not correct.

Merely because a statement is retracted, it cannot become as involuntarily or unlawfully obtained. For any retraction to be successful in the eyes of law the assessee has to show as to how earlier recorded statements do not state the true facts or that there was coercion, inducement or threat while recording his earlier statements. The burden of proof in on the assessee.

The Hon'ble Supreme Court has considered the question of burden of proof in the decision reported in *CIT v. Best & Co. (P.) Ltd. A.I.R.1966 S.C.1325* and specifically dealt with it in paragraph 6:

"6. At this stage the question of burden of proof raised at the Bar may be noted. In (1965) 57 ITR 400: (AIR 1966 SC 54), this court observed:

".....it must in the first instance be observed that it is for the revenue to establish that a particular receipt is income liable to tax...."

We may point out, as some argument was advanced on the question of burden of proof, that this Court did not lay down that the burden to establish that an income was taxable was on the Revenue was immutable in the sense that it never shifted to the assessee. The expression "in the first instance" clearly indicates that it did not say so. When sufficient evidence, either direct or circumstantial, in respect of its contention was disclosed by the Revenue, adverse inference could be drawn against the assessee if he failed to put before the Department material which was in his exclusive possession. This process is described in the law of evidence as shifting of the onus in the course of a proceeding from one party to the other. There is no reason why the said doctrine is not applicable to income-tax proceedings. While the Income-tax authorities have to gather the relevant material to establish that the compensation given for the loss of agency was a taxable income, adverse inference could be drawn against the assessee if he had suppressed documents and evidence, which were exclusively within his knowledge and keeping."

- The Allahabad High Court in *Dr. S.C. Gupta v. CIT (2001) 248 ITR 782 (All-HC),* in para 7 of the report, held as under:–

"7. As regards the assessee's contention that the statement having been retracted the assessing officer should have independently come to a conclusion that there was additional

income as sought to be assessed and that there was no material to support that there was such income, this contention in our view is not correct. As held by the Supreme Court in Pullan-gode Rubber Produce Co. Ltd. v. State of Kerala, (1973) 91 ITR 18 (SC) an admission is an extremely important piece of evidence though it is not conclusive. Therefore, 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.

Similarly, P.K. Palwankar v. CGT, (1979) 117 ITR 768 (MP-HC) and CIT v. Mrs. Doris S. Luiz, (1974) 96 ITR 646 (Ker-HC) on which also learned counsel for the assessee placed reliance are of no help to the assessee. The Tribunal's order is concluded by findings of fact and in our view no question of law arises. The applications are, accordingly, rejected."

- The Hon'ble Kerala High Court in case of *CIT V O. Abdul Razak [2012] 20 taxmann.com 48 (Ker.)* held that a self-serving retraction, without anything more cannot dispel statement made under oath under section 132(4). A statement made under oath deemed and permitted to be used in evidence, by express statutory provision, has to be taken as true unless there is contra evidence to dispell such assumption.

Brief Facts of the case were as under:-

Pursuant to a search conducted at the residential premises of the assessee, the Assessing Officer computed the undisclosed income on the basis of the seized documents and further on the basis of clear admission made by the assessee in the sworn statement recorded under section 132(4) made certain additions. The first addition was with regard to the actual money paid by the assessee for purchase of four properties. The assessee had voluntarily submitted before the ITO that the amounts shown in the document were not the actual amounts and that he had paid more than that shown in the document. He had also categorically stated the amounts actually paid with reference to the total extent of each of the properties, The second addition was with respect to the personal expenses. Last of the additions was an amount of Rs. 3 lakh which the assessee claimed as an NRI loan in his cash flow statement and later in a reply stated to be a loan from his elder brother. On appeal the first appellate authority confirmed the additions. On further appeal, the Tribunal, inter alia, held that the statement recorded under section 132(4) could not be the sole ground for making addition and the Assessing Officer ought to have obtained sufficient evidence to make the additions especially in the context of the statement under section 132(4) having been retracted by the assessee.

On revenue's appeal:

The Hon'ble Court held as under:-

"The additions made by the Assessing Officer was on the basis of clear admission made by the assessee in the statement recorded under section 132(4). The Tribunal has proceeded to deal with the issues on the premise that no evidentiary value can be attributed to the statement under section 132(4) especially in the context of there being a retraction and that for making additions, the Assessing Officer should necessarily unearth materials during the search. [Para 6]

From a reading of the statement on oath given by the assessee, it is evident that the assessee had voluntarily submitted before the Income-tax Officer that the amount shown in the document with respect to purchase of four properties were not the actual amounts and that he had paid more than that shown in the document. The assessee has also categorically

stated the amounts actually paid the reference to the total extent of each of the properties. In fact, it is the case of the assessee as is revealed from the order of the Tribunal, that the documents recovered during the search were put across to the assessee and it was looking into these documents that the assessee had stated the details of the various transactions. The statement given under oath has to be considered in the context of the long prevalent practise of not stating the actual consideration with respect to transactions of immovable properties, for the purpose of evading stamp duty: True, the assessee has a case in his retraction statement, as also before the first appellate authority and the Tribunal that he was threatened and coerced into stating the facts recorded in the statement under section 132(4). It is pertinent to note that the first appellate authority has clearly found that the appellant had volunteered the information and the demeanour of the deposition belies the contention of threat and coercion. Strangely, the Tribunal refused to go into that aspect as is discernible from its order.

The Tribunal without going into that aspect merely disbelieves the statement recorded under section 132(4) relying on the retraction statement as also on the lack of any material on record with respect to the alleged actual payments. The deletion made by the Tribunal is on the premise that the burden of proving undisclosed income in search is not established by the department. [Para 7]

It cannot be doubted for a moment that the burden of proving the undisclosed income is squarely on the shoulders of the department. Acquisition of properties by the assessee are proved with the documents seized in search. Since under statement of consideration documents is the usual practise the officer questioned the assessee on payments made over and above the amounts stated in the documents. Assessee gave sworn statement honestly disclosing the actual amounts paid. The question now to be considered is whether the sworn statement constitutes evidence of undisclosed income and if so whether it is evidence collected by the department. The burden of proof is discharged by the department when they persuaded the assessee to state details of undisclosed income, which the assessee disclosed in his sworn statement, on being confronted with the title deeds seized in search. [Para 8]

Section 132 deals with search and seizure and sub-section (4) of section 132 empowers the authorized officer during the course of the search and seizure to examine on oath any person who is found to be in possession of 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 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 their in with the same powers as vested in a Court under the Code of Criminal Procedure, for the purpose of the Act. [Para 9]

A Division Bench of this Court in CIT v. Hotel Meriya [2011] 332 ITR 537 /[2010] 195 Taxman 459 (Ker.) considered the scope of a statement recorded under section 132(4) and found that such statement recorded by the officer as well as the documents seized would come within the purview of evidence under section 158(BB) read with section 3 of the Evidence Act and section 131 of the Act Based on the above finding, it was also

held that such evidence would be admissible for the purpose of block assessments too. The Explanation to section 132(4) was also noticed by the Division Bench in further emphasis that the evidence so collected would be relevant in all purposes connected with any proceedings of the Act. [Para 10]

The Tribunal's finding that the statement recorded under section 132(4) has no evidentiary value, hence cannot be sustained. The reliance placed by the Tribunal on the retraction statement is totally untenable in so far as any statement recorded under section 132(4), statutorily deemed to have evidentiary value; cannot be retracted at the mere will of the party. A statement made under oath deemed and permitted to be used in evidence, by express statutory provision, has to be taken as true unless there is contra evidence to dispel such assumption. A self-serving retraction, without anything more cannot dispel the statutory presumption. The admission made by the assessee before the Assessing Officer corroborated by the title deeds seized in search absolves the department from discharging any burden regarding the additions made on the strength of such admission. 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. In the instant case, the first appellate authority has clearly found that the plea of the assessee that the admissions were made under threat and coercion is clearly unfounded. The Tribunal also has categorically refused to consider the issue of threat and coercion. In such circumstances, the Tribunal ought to have seen if the assessee has established that the admissions made were erroneous and factually incorrect. It was well within the capacity of the assessee to have shown before the fact finding authorities either at the original or at the appellate stage that the assessee had only paid amounts as disclosed in the documents for the various property transactions entered into by him. The assessee having not proved any threat or coercion and further having failed to prove that the amounts shown in the documents were the only payments made, the Tribunal was not right in casting a burden on the department The assessee in the instant case has failed to successfully disprove the admissions made by him and admissions made in a statement under section 132(4), by the clear provisions in the statute has to be considered to have evidentiary value. In the circumstances, addition made by the revenue on the basis of the statement of the assessee under section 132(4) was justified. [Para 11]

The sustainability of the additions made by the Assessing Officer with respect to undisclosed income vis-a-vis the property transactions as also that made on account of personal expenditure has to be decided with reference to the answer in the first question, since both additions arc on account of admissions made in section 132(4) statement corroborated by documents recovered in search and the attendant circumstances. The Tribunal place much reliance on the retraction and even went to the extent of stating that it was the Department's burden to prove the retraction to be untrue by bringing in any corroborative evidence.

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 afterthought

and no reliance can be 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). [Para 12]"

- The *ACIT v. Ramesh Chandra 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 at the statement is 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.

- The Hon'ble Delhi High Court in case of *CIT V. Sunil Aggarwal [2015] 64 taxmann.com 107 (Delhi)* held that a retracted statement under Section 132(4) of the Act would require some corroborative material for the AO to proceed to make additions on the basis of such statement. Of course, where the retraction is not for any convincing reason, or where it is not shown by the Assessee that he was under some coercion to make the statement in the first place, or where the retraction is not followed by the Assessee producing material to substantiate his defense, the AO might be justified in make additions on the basis of the retracted statement.

Retraction has to be within reasonable time

The statement under section 132(4) of the act is binding on the assessee and the same can be rebutted only on the ground that the same was made under mistaken belief of law or facts or it was obtained by coercion or duress. Where the assessee intends to retract his admission on the aforesaid ground, he should come forward at the earliest point of time with sufficient, credible and corroborative evidence to support his claim.

It is pertinent to mention here is that declaration u/s 132(4) of the assessee makes the departmental authorities to believe that the declaration made by the assessee is true and induced them to act upon such belief. The predominant judicial view is that it is not open to the assessee to change the stand it has already taken after a significant elapse of time and thus cause the situation in his favour by inducing the department not to investigate or enquire into the matter on the seized documents.

In the course of practice, it is seen that the assessee's subjected to search and seizure action and after having tendered a statement u/s 132(4), generally sits over such statement till the commencement of assessment proceedings. This is not warranted. If any retraction has to be made, it has to be made at the earliest. By seeking to retract at a later stage, the assessee scuttles the investigation that might have been been resorted by the Investigation wing had the statement bring retracted earlier. This is also due to the fact that with passage of time, the evidence which the department could have collected may no longer be available; they might be manipulated, fabricated or destroyed. Further, the power of authorized officer to investigate is far wide and intense as compared to the power of Assessing Officer. By making the declaration before the authorized officer and admitting concealment and thereafter retracting it before the Assessing Officer, means practically closing the investigation by the investigation wing of the department. The predominant judicial view negates such retractions made at a later stage being an afterthought. Thus,

any retraction sought to be made by the assessee after several months of declaration and admission under section 132(4) is only a well thought out device to shut the department from collecting the evidence to unearth unaccounted income.

- In case of *PCIT v. Roshan Lal Sancheti (ITA No. 47/2018)*, the Hon'ble Rajasthan High Court held that the statement recorded under section 132(4) of the Act and later confirmed in statement recorded under section 131 of the Act, 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 and thus not permissible.

- In case of *CIT, Bikaner v. Ravi Mathur 2017 (1) WLC (Raj.) 387*, the Hon'ble High Court of Rajasthan held that the statements recorded under section 132(4) of the Income Tax Act have great evidentiary value and they cannot be discarded summarily and cryptic manner, by simply observing that the assessee retracted from his statement. One has to come to a definite finding as to the manner in which the retraction takes place. **Such retraction should be made as soon as possible** and immediately after such statement has been recorded by bringing to the notice of the higher officials by way of duly sworn affidavit or statement supported by convincing evidence, stating that the earlier statement was recorded under pressure, coercion or compulsion. Para 15 of the said judgment, is reproduced herein under:-

> *"15. In our view, the statements recorded under section 132(4) have great evidentiary value and it cannot be discarded as in the instant case ITA No. 720/JP/2017 M/s. Bannalal Jat Construction (P) Ltd., Bhilwara v. ACIT, Central Circle-Ajmer 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, loses 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/by coercion/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 and in the instant case we notice that the assessing officer in the Assessment Order observes :–

"Regarding the amount of Rs. 44.285 lakhs, it is now contended that the statement under section 132(4) was not correct and these amounts are in ITA No. 720/JP/2017 M/s. Bannalal Jat Construction (P) Ltd., Bhilwara v. ACIT, Central Circle-Ajmer thousands, not lakhs i.e. it is now attempted to retract from the statements made at the time of S & S operations."

- The Hon'ble Punjab and Haryana High Court in *CIT v. Lekh Raj Dhunna (2012) 344 ITR 352 (P&H-HC)* taking note of the fact that the assessee had made a statement under section 132(4) of the Income Tax Act whereby a surrender of Rs. 2 lakh was made and further that the assessee had admitted that he had earned commission from a party, which was not disclosed in the return filed by him and certain documents were seized which bore the signature of the assessee, held in para 16 of the report as under :–

"16. Thus, in view of sub-sections (4) and (4A) of section 132 of the Act, the assessing officer was justified in drawing presumption against the assessee and had made addition of Rs. 9 lakhs in his income under section 68 of the Act. The onus was upon the assessee to have produced cogent material to rebut the aforesaid presumption which he had failed to displace.

The assessee retracted from the said statement, vide letters dated November 24, 1998, and March 11, 1999, during the course of assessment proceedings. However, no value could be attached thereto in the present case.

In case the statement which was made by the assessee at the time of search and seizure was under pressure or due to coercion, the assessee could have retracted from the same at the earliest. No plausible explanation has been furnished as to why the said statement could not be withdrawn earlier. In such a situation, the authenticity of the statement by virtue of which surrender had been made at the time of search cannot be held to be bad. The Tribunal, thus, erred in concluding otherwise. The Tribunal, therefore, was not justified in reversing the order of the assessing officer which was affirmed by the Commissioner (Appeals) also."

- On the Similar Lines, the Hon'ble Punjab and Haryana High Court in *Bachittar Singh v. CIT (2010) 328 ITR 400*, in para 7 of the report, held as under :–

"7. It is not disputed that the statement was made by the assessee at the time of survey, which was retracted on 28-5-2003, and he did not take any further action for a period of more than two months. In such circumstances, the view taken by the Tribunal that retraction from the earlier statement was not permissible, is definitely a possible view. The mere fact that some entries were made in a diary could not be held to be sufficient and conclusive to hold that the statement earlier made was false. The assessee failed to produce books of account which may have been maintained during regular course of business or any other authentic contemporaneous evidence of agricultural income. In the circumstances, the statement of the assessee could certainly be acted upon."

- In *Vasant Thakroor v. ACIT (2013) 27 ITR 254*, the Hon'ble Mumbai ITAT didn't conceded to a retraction filed after more than 2 years.

- In *Video Master V JCIT [2002] 83 ITD 102 (MUM.)*, the Hon'ble Mumbai ITAT propounded that to prove that whether the retraction made was valid or not, one has to consider the following factors:-

i. The time gap between the date of recording the statement under section 132(4) of the Act and the date of filing the affidavit retracting the above statement.

ii. The evidence of the witnesses who were present during the course of search.

iii. Communication made with the higher authorities and the documents seized during the course of search.

The observations of the court in this regard is reproduced herein under:-

> *"10. So far as the arguments of the learned counsel regarding the retraction of the statements of Shri D.N. Shah recorded under section 132(4) of the Act are concerned, we find nothing on record to indicate that income tax authorities have employed third degree methods to force Shri D.N. Shah to make confession or admissions. To prove that whether the retraction made was valid or not, one has to consider the following factors:*
>
> *(i)The time gap between the date of recording the statement under section 132(4) of the Act and the date of filing the affidavit retracting the above statement.*
>
> *(ii)The evidence of the witnesses who were present during the course of search.*
>
> *(iii)Communication made with the higher authorities and the documents seized during the course of search.*
>
> *So far as the first factor is concerned, the retraction of the statement was made by Shri D.N. Shah by filing an affidavit only after about a month. The statements under section 132(4) of the Act were recorded on 24-8-1995 and 25-8-1995 whereas the affidavit for retraction by Shri D.N. Shah was filed on 20-9-1995. If the statement of Shri D.N. Shah was recorded by using duress, intimidation or coercion, he would have immediately on the same day or on the following day filed the retraction. The very fact that he kept quite for almost a month after recording the statement proves beyond doubt that the statement was not recorded by using any force by the search party. Therefore, the affidavit filed by Shri D.N. Shah was an afterthought and it was simply a device to frustrate the efforts of the Department to sniff off the unaccounted income of the assessee.*
>
> *11. Coming to the factor of evidence of the witnesses who were present during the course of search, the issue cannot be decided merely because Shri D.N. Shah , one of the partners of the assessee firm made a protest after the conduct of the search. There is nothing to show that the search was conducted out of any malice on the part of the officer of the Department. There is nothing in the evidence to show that the search party intimidated Shri D.N. Shah to give a confession of Rs. 3 crores in the course of search. The assessee had not discharged the burden of proving coercion and use of force during the course of recording the statement of Shri D.N. Shah under section 132(4) of the Act. The search is generally conducted in the presence of two independent witnesses preferably from the same locality. The assessee has failed to obtain any statement from the witnesses to the effect that there was any irregularity in the search or the statement of Shri D.N. Shah was recorded under coercion and by use of force by the search party which resulted in the disclosure of undisclosed income of Rs. 3 crores. The statement was given by Shri D.N. Shah voluntarily as we have discussed above. It is quite usual for persons whose premises are subjected to search to send complaints of unfounded allegation with the view to escape from the consequences and from disclosures made during the course of search. The assessee*

had not obtained any statement or affidavit from the witnesses in support of the plea that the statement of Shri D.N. Shah was obtained by coercion or intimidation. So the assessee has totally failed to discharge the burden of proving that fact. Therefore, we do not find any force in the retraction filed by Shri D.N. Shah.

12. Coming to the factor of communications made with higher authorities, we do not find anything on record which would indicate the efforts made by the assessee to bring into the notice of the higher authorities, the methods used by the search party to extract the disclosure of Rs. 3 crores from Shri D.N. Shah in his statement recorded under section 132(4) of the Act. Section 132 of the Income-tax Act deals with search and seizure of any books of account or other documents and to make a note or any inventory of any money, bullion, jewellery or other valuable articles or thing in the course of search of any premises. Sub-section (4) and the explanation there under read as follows :

> *"(4) The authorised officer may, during the course of 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 articles or thing and any statement made by such person during such examination may thereafter be used in evidence in any proceedings under the Indian Income-tax Act, 1922 (11 of 1922) or under this 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 Indian Income-tax Act, 1922 (11 of 1922) or under this Act."*

Thus the authorised officer had the power to record statements on oath on all matters pertaining to the suppressed income. The statement cannot be confined only to the books of account. If Shri D.N. Shah, partner of the firm came forward to disclose Rs. 3 crores of undisclosed income of the firm during the course of search in his statement under section 132(4) of the Act, there is no reason why the Assessing Officer shall not make use of it even though there was no actual verification of the various documents seized during the course of search. The statement was made voluntarily. If there had been any irregularity or use of any force or intimidation, the assessee could have made correspondence with higher authorities immediately after recording such statement appraising them of the coercion or duress used for obtaining the statement. There is nothing to stop the assessee to meet either personally or through their Authorised Representative to authorities of bringing to their notice through written communication that any statement or admission made by them before the search party was on account of threat, coercion or under higher influence. Moreover, as we have stated above, merely writing would not be sufficient, but what actual threat, coercion or undue influence was exercised is also required to be spelt out so that its veracity could be verified with the witnesses who were there at the time of search. But in the present case, Shri D.N. Shah neither met the higher authorities personally nor he made any written communication with higher authorities immediately after recording his statement regarding the duress or coercion used by the search party for extracting the disclosure of undisclosed income of Rs. 3 crores. Shri D.N. Shah also did not bring

into the notice of the higher authorities, the particular form of force or intimidation used by the search party. Under the circumstances, the retraction made by Shri D.N. Shah after about a month of recording the statement under section 132(4) of the Act is an afterthought to cover up the undisclosed income. The affidavit filed by Shri D.N. Shah is not supported by any evidence whatsoever, therefore, the same has been rightly rejected by the Assessing Officer as the same does not inspire any confidence. During the course of search, a number of documents were seized by the search party. The documents seized contains various types of financial transactions which runs into several crores. Shri D.N. Shah made the disclosure on the basis of such documents seized during the course of search. We find sufficient force in the arguments of the learned DR that if the offer of settlement in the form of confessional statement is made and the same is accepted by the Department, the assessee cannot subsequently turn around and disown the settlement. If Shri D.N. Shah would not have made this confessional statement, the Department could have continued the search and thereafter, the Department could have investigated the entire matter on the basis of the various documents seized during the course of search. By making the disclosure of Rs. 3 crores, Shri D.N. Shah stopped the entire process of further investigation as the Department accepted the disclosure and closed further investigation. After making such an offer of settlement in the form of confessional statement which is also accepted by the Department, the retraction filed by Shri D.N. Shah after about a month from the date of confessional statement cannot be considered as a valid retraction and the same is nothing but a well planned device to frustrate the efforts of the Department to unearth unaccounted funds by resorting to action under section 132(4) of the Act. In view of the discussion above, the retraction filed by the assessee is, therefore, an afterthought and the same is rejected."

- In *Hiralal Maganlal & Co. v. DCIT [2005] 96 ITD 113 (MUM.)*, the Hon'ble Mumbai ITAT held that the retraction sought to be made by the assessee several months after making the declaration under section 132(4) was nothing but a well planned device to frustrate the efforts of the Department to unearth unaccounted income. In para 25, the court observed as under:-

> *"25. In our view, the retraction sought to be made by the assessee several months after making the declaration under section 132(4) was nothing but a well planned device to frustrate the efforts of the Department to unearth unaccounted income. The attempt of the assessee to retract from the said declaration is not only against the well-settled principles of common law and against the letter and spirit of section 115 of the Evidence Act but also against the principles of equity, justice and good conscience. The declaration made by Shri Prataprai Sanghvi under section 132(4) clearly fell under section 115 of the Evidence Act and hence it was not open to the assessee to retract from the said declaration after the Departmental Authorities had accepted the same and altered their position by closing the search. Further, declarations falling under section 115 of the Evidence Act do not require any corroboration. Retraction from declaration or acts falling under section 115 of the Evidence Act is also not possible at all. The retraction filed by the assessee in the case before us is hit by section 115 and hence the Assessing Officer was justified in rejecting the same. We see no infirmity in his action."*

- The Hon'ble High Court of Chhattisgarh in the case of *Asstt. CIT v. Hukum Chand Jain [2010] 191 Taxman 319* held that if an allegation of duress or coercion was made almost after two years, then such allegation has to be overruled.

- The Hon'ble Ahmedabad Bench of ITAT in case of *Kantilal C. Shah v. ACIT [2011] 14 taxmann.com 108 (Ahmedabad)* held that retraction after a significant delay creates doubt on its veracity. The court observed as under:-

> *"5.2 We have heard both the sides. We have also perused the retraction made by the assessee. First, we shall deal with the admissibility of the retraction in the present set of facts and circumstances of the 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 on 12/12/1995 at 12'O clock, however, after a lapse of around nine and a half months, i.e. 01/10/1996 a retraction was made through an Affidavit. It is also important to place on record that 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 ld.DR Mr. S.K. Gupta that the retraction in the form of an Affidavit dated 1/10/1996 was kept with the assessee for 1½ 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.*
>
> *5.3 We have perused the contents of the retraction which appears to be general in nature and there is no specific mention of a particular admission which was claimed to be retracted. There was a mention of ill-health or mental disturbance. In the said retraction, there was also a mention of some pressure tactics applied by the revenue but remained unsubstantiated. There was no reference or mention of any evidence. As noted above, though at the close of the statement recorded it was duly verified that the same was made without any pressure but it was so alleged in the impugned retraction. Had there been any pressure or torture as alleged, the assessee would have complained the same to the Commissioner or to any other Authority. No such attempt was ever made. Law in respect of admissibility of a retraction is very well settled. 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."*

- The Hon'ble Mumbai ITAT in case of *Manmohansingh Vig v. DCIT [2006] 6 SOT 18 (MUM.)* also warranted against such late retractions and held that such late retraction can scuttle the investigation proceedings. The court observed as under:-

> *"18. About the argument of the ld. counsel of the assessee that no enquiries were done from the seller of the property by the Assessing Officer, we are of the view that the admission and disclosure made by the assessee had practically persuaded the ADI not to make any enquiry. The result of such enquiries is authentic only when they are conducted along with the search without loss of time. Passage of time gives opportunities to the concerned parties to create, destroy, manipulate, and arrange evidence to suit them. Reality and Truth are often lost in the delayed action. In the present case the Assessing Officer or the ADI did not investigate further, as the matter had practically come to a close after the admission and disclosure by the assessee. If the Assessing Officer had taken any action even after admission and disclosure, he would have been alleged for harassment. The thought of further investigation would arise only after*

the retraction. And it is done after 11 months of the search. Investigation in such matter after lapse of so many months is an exercise in futility. We therefore reject this argument also.

39. We have heard the rival submissions and considered the facts and materials on record including the statements, replies of assessee and reasonings of the Assessing Officer for making the additions. We have also considered the submissions of learned counsel for the assessee of Shri Manmohan Singh given in that appeal before us and who submitted to adopt his arguments in the present case also. After considering the material and also the case laws cited in the case of Shri Manmohan Singh, we are of the view that issue simply boils down to the point that whether statement given under section 132(4) has to be used against the assessee or retraction is given weightage and additions be deleted. The issue has been considered in detail in the case of Shri Manmohan Singh Vig (HUF) (supra) by this Tribunal. Following that order, we hold that :

1. *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).*

2. *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.*

3. *No material has been submitted to show that there was 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.*

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

5. *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 after- thought.*

6. *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 section 132(4)/131(1A) reveal correct state of affairs and retraction has to be ignored."*

- The Hon'ble Delhi High Court in case of *PCIT v. Avinash Kumar Setia [2017] 81 taxmann.com 476 (Delhi)* held that where an assessee surrendered certain income by way of declaration and withdraw same after two years without any satisfactory explanation, it could not be treated as bona fide and, hence, addition would sustain.

- In case of *Principal Commissioner of Income-tax-9 v. Om Prakash Jakhotia [2019] 107 taxmann.com 283 (Delhi)*, the assessee made a statement u/s 132(4) wherein a substantial disclosure of undisclosed income was made during the course of search which was retracted after a significant lapse of time and that too

without being corroborated by some material and thereafter the assessee approached the settlement commission with significantly lower additional income. The assessee during the course of Settlement offered certain additional amount stating to be in spirit of settlement. The court held that once the assessee approached it with a certain amount, representing that it constituted full and true disclosure (and had maintained that to be the correct amount till the date of hearing) the question of "offering" another higher amount as a "full" disclosure is impermissible. Ajmera Housing (supra) clearly held that:

> *"there is no stipulation for revision of an application filed under 245C (1) of the Act and thus the natural corollary is that determination of income by the Settlement Commission has necessarily to be with reference to the income disclosed in the application filed under the said Section in the prescribed form."*

The court further held that the amount offered in this case, clearly could not have been considered or accepted. The ITSC, in this regard, fell into error as there was no full and true disclosure by the assessee's.

With regard to the delayed retraction, the court held as under:-

> *"The stark facts emerging from the above discussion and the discussion in the impugned order thus are that statement was made voluntarily on 20.01.2012, in the course of search proceedings. There is presumptive value to such statement by virtue of Section 132(4) of the Act. Moreover, it is not merely the statement that is material in the present case; in fact ledgers and other books of accounts were seized. The first respondent candidly stated that the amounts constituted unanticipated or sudden expenditure and that it was not feasible for him to indicate the veracity of the statement.*
>
> *This Court is of the opinion that the approach of the ITSC was flawed throughout. Apart from brushing aside the fact that the retraction took place close to two years after the statement was made, the commission overlooked that nowhere did the assessees complain that the statement of the first respondent was recorded under coercion. His explanation for retraction was that the disclosures were not feasible, because he did not have the benefit of the records. But that is the point: if indeed someone is involved in clandestine activities, but is aware of its monetary magnitude and indeed discloses it voluntarily, he is in the best position to say if it is supported by evidence. At the stage of voluntary disclosure there was candour on the part of the first statement, that he could not support the "out of book" transactions with evidence. Later too, the position did not alter. Furthermore, the other important fact is that the assessee made no attempt to support the claim that the loan credit and other credits were genuine; the parties concerned, their creditworthiness and the reason for the credit was not substantiated in any manner."*

Retraction of Statement recorded during odd late hours in nervousness, panic and stress

It is also noted that various courts in the following cases have held that during the search the whole atmosphere is of utmost pressure and therefore there is very little scope for free and fair thinking on the part of a person searched. The courts have held that such a statement which has been recorded in late hours cannot be considered to be free, fearless and voluntary and an assessee can retract such a statement though after inducing valid evidences and substantiate so far as to how the factual position is in contrast as compared to the earlier statement so retracted.

- In *CIT v. Naresh Kumar Agarwal, (2014) 369 ITR 171*, the Hon'ble High Court of Andhra Pradesh observed that 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 Cr.P.C 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".

- In *DCIT v. Rajiv Kumar Gupta (ITA No. 15/ DEL/2013) vide order dated 21-12-2018*, the Hon'ble Delhi ITAT has deleted the additions made on the basis of statement u/s 132(4) of the act and held as under:-

> *"7.2 We also note that following pleadings and evidences were made in this regard before AO and Ld. CIT(A) submitting that statement recorded allegedly during the course of search was not free and fair and therefore addition cannot be made on that basis. At page no. 79-83 of the Paper Book, it is noted that the search was com,pleted at the locker of the assessee on 25.3.2009 and letter of retraction was made within 48 hours of such completion. It is also noted from page no. 57-58 of the Paper Book that no witnesses were present at the time of recording of statement which is evident from statements itself that there is no mention of any witness or any signatures of witnesses on statements. Also AO has also not provided the names of person present at the time when the statements have been recorded. Thus the above facts demonstrates that no witness were present at the time of such record. At Page No. 84-87 of the Paper Book there is a copy of retraction letter dated 27.03.2009 filed before ADIT (Inv.) along with affidavit of Smt. Sushmita Gupta and Shri Rajiv Kumar Gupta elucidating that statements were made under force, coercion and duress. She has further clarified that the same were made under mental tension and utter confusion; At page No. 89-90 of the Paper there is a copy of letter dated 20.04.2009 filed by the assessee to Ld. ADIT (Inv.) explaining that surrender made in statements recorded during search was product of coercion, duress, threat and mental tension and thus, the same was retracted by the assessee. At page no. PB 312-316 of the Paper Book there is a copy of letter dated 29.10.2010 filed before the Ld. ACIT stating that amount surrendered by the assessee along with her husband has been retracted vide letter dated 27.03.2009. lt was further emphasized that surrendered amount was illegal, without any basis and was under mental tension, duress, coercion, treat and undue influence. At page no. 370-383 (PB 373) of the Paper Book is the copy of submission filed before the Ld. CIT(A) reiterating that surrender made by assessee and her husband was not voluntary and was under undue pressure from the search officials with assurance to conclude search. However, the assessee explained the source of each and every asset/loose paper found during the course of search and submitted before AO and Ld. CIT(A) that as to why additions cannot be made in respect of such assets/loose documents. The AO made an abrupt addition of Rs. 1,50,00,000/- which was affirmed by Ld. CIT(A) as against amount of Rs. 15, 58,632/- offered by the assessee suo-moto before the Ld. CIT(A). We also note that the case laws cited by the Ld. CIT(DR) are not exactly on the same facts and circumstances of the present case, hence, does not support the case of the Revenue."*

- In *Kailashben Manharlal Chokshi v. CIT (2008) 220 CTR 138*, the Hon'ble Gujarat High Court

held that if a statement is recorded during odd hours late in the night or after long search operation when assessee is fully tired and exhausted, retraction of such statement may be accepted by the courts after taking into account the entire gamut of facts and circumstances of the case. In para 22, the court as under:-

> *"The glaring fact required to be noted in the instant case was that the statement of the assessee had been recorded under section 132(4) at mid night. In normal circumstances, it is too much to give any credit to the statement recorded at such odd hours. The person may not be in a position to make any correct or conscious disclosure in a statement, if such statement is recorded at such odd hours. Moreover, that statement was retracted after two months. [Para 22]"*

- In *Deepchand & Co. v. ACIT (1995) 51 TTJ 421,* the Hon'ble Mumbai Tribunal held that statements recoded during search proceedings which continued for an unduly long period also cannot be considered to be free, fearless and voluntary. Thus can be successfully retracted contending the same were recorded under pressure and force.

Retraction of Statement given under mistaken belief of law or fact

It is a settled position of law 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.

- In case of *Jyotichand Bhaichand Saraf & Sons (P.) Ltd. v DCIT [2012] 26 taxmann.com 239 (Pune),* the Hon'ble ITAT Pune held that though It is a settled position that admission made by assessee under section 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.

- The Amritsar ITAT Bench in *Asstt. CIT v. Janak Raj Chauhan [2006] 102 TTJ 316*, 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.

- The Jodhpur ITAT 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.

- In case of *Krishan Lal Shiv Chand Rai v. CIT [1973] 88 ITR 293 (Punjab & Haryana)*, the Hon'ble Punjab and Haryana High Court held that the assessee has the right to prove that the admission was in fact wrong and the surrender was made simply to avoid botheration. It is an established principle of law that a party is entitled to show and prove that the admission made by him previously is in fact not correct and true

- Likewise, in case of *Abdul Qayume v. CIT [1990] 184 ITR 404 (All.),* the Hon'ble 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.

- Similarly, In case of *Satinder Kumar (HUF) v. CIT [1977] 106 ITR 64 (HP)*, their lordships 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.

Recently in *Commissioner of Income Tax-14, Mumbai v. Rakesh Ramani [2018] 94 taxmann.com 461 (Bombay)*, it was held that in course of block assessment, wherein the 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 under section 132, had admitted that said jewellery belonged to him, could not be sustained.

Having said so, even otherwise, the authorities under the Act are under an obligation to act in accordance with law. Tax can be collected only as provided under the Act. If any assessee, under a mistake, misconceptions or on not being properly instructed is over assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected. The Hon'ble Bombay High Court has dealt with this issue in case of *Balmukund Acharya (310 ITR 310)* and has held as under:-

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

Reliance can also be placed on the *Departmental Circular No. 14(XL-35), dated 11-4-1955* which states that officers of the Department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a taxpayer in every reasonable way. Therefore, the retraction of statement tendered on mistaken belief of law or facts should be accepted by the department. The departmental circular is reproduced herein under:-

"Administrative instructions for guidance of Income-tax Officers on matters pertaining to assessment

Circular : No. 14(XL-35), dated 11-4-1955.

1. The Board have issued instructions from time to time in regard to the attitude which

the Officers of the Department should adopt in dealing with assessees in matters affecting their interests and convenience. It appears that these instructions are not being uniformly followed.

2. *Complaints are still being received that while Income-tax Officers are prompt in making assessments likely to result into demands and in effecting their recovery, they are lethargic and indifferent in granting refunds and giving reliefs due to assessees under the Act. Dilatoriness or indifference in dealing with refund claims (either under section 48 or due to appellate, revisional, etc., orders) must be completely avoided so that the public may feel that the Government are actually prompt and careful in the matter of collecting taxes and granting refunds and giving reliefs.*

(3) *Officers of the Department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a taxpayer in every reasonable way, particularly in the matter of claiming and securing reliefs and in this regard the Officers should take the initiative in guiding a taxpayer where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would, in the long run, benefit the department for it would inspire confidence in him that he may be sure of getting a square deal from the department. Although, therefore, the responsibility for claiming refunds and reliefs rests with assessee on whom it is imposed by law, officers should—*

(a) *draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other ;*

(b) *freely advise them when approached by them as to their rights and liabilities and as to the procedure to be adopted for claiming refunds and reliefs.*

4. *Public Relation Officers have been appointed at important centres, but by the very nature of their duties, their field of activity is bound to be limited.*

5. *While officers should, when requested, freely advice assessees the way in which entries should be made in various forms, they should not themselves make any in them on their behalf. Where such advice is given, it should be clearly explained to them that they are responsible for the entries made in any form and that they cannot be allowed to plead that they were made under official instructions. This equally applies to the Public Relation Officers.*

6. *The intention of this circular is not that tax due should not be charged or that any favour should be shown to anybody in the matter of assessment, or that where investigations are called for, they should not be made. Whatever the legitimate tax it must be assessed and must be collected. The purpose of this circular is merely to emphasise that we should not take advantage of an assessee's ignorance to collect more tax out of him than is legitimately due from him.*

Circular : No. 14(XL-35), dated 11-4-1955."

On the similar lines, if the assessee retracts a statement made u/s 132(4) on the pretext of it being subjected to coercion, force and under influence, the burden lies on the assessee to substantiate with evidences that statement so tendered is subjected to such alleged coercion, force and under influence.

In Hotel *Kiran v. Asstt. CIT [2002] 82 ITD 453*, the Pune Bench of the Tribunal has held the burden lies on the person making such allegations to prove that statement was obtained by the aforesaid means.

The allegation that the assessee was tortured and harassed by the search team and was forced into making an admission is not enough. For the retraction to be valid, threat or coercion

has to be proved - *Manharlal Kasturchand Chokshi v. Asstt. CIT [1997] 61 ITD 55 (Ahd.).*

The Mumbai Tribunal, in the case of *Param Anand Builders (P.) Ltd. v. ITO [1996] 59 ITD 29,* has held 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. In specific reference to the income-tax proceedings, it would be useful to refer to the decision of the Madras Bench of the Income-tax Appellate Tribunal in the case of *T.S. Kumarasamy v. Asstt. CIT [1998] 65 ITD 188* where, taking note of the fact that ITOs are not Police Officers and, as such, they do not use or resort to, unfair means in recording oath statements during the search operations or during the course of any proceedings before them, it was held that such statements, admissions and confessions are binding and cannot be retracted, unless and until it is proved by legally acceptable evidence that such admission, confession or oath statement was involuntary or was tendered under coercion or duress. Drawing support from the decision of the Supreme Court in the case of *Surjeet Singh Chhabra v. Union of India [1997] 1 SCC 508* the Tribunal disallowed plea of retraction of the assessee on the ground that neither the ground of coercion or duress nor the ground of involuntary statement was proved to have existed at the time of recording of the statement. This decision of the Tribunal goes to indicate that admissions or confessions made in the statements recorded during search or survey, without there being any other evidence to support such admissions, can successfully be made use of to assess the income, unless they are proved to be involuntary or are proved to have been taken under duress, coercion, misconception, etc.

Manner of Retraction:

Generally, as discussed herein above, the statements made earlier are retracted when the maker contends that earlier admissions:

(i) were untrue; or

(ii) were on a mistaken understanding, misconception; or

(iii) were not voluntary; or

(iv) were under mental stress, undue influence, pressure or coercion.

Retraction or rebuttal of earlier statements/ admitted facts can, inter alia, be:

(a) in the form of statement which is recorded later on ; or

(b) in the form of a letter; or

(c) in the form of an affidavit filed.

Retraction by an Affidavit

Though retractions would be effective in all the manners discussed above, yet, comparatively speaking, like a subsequent statement recorded on oath by the concerned income-tax authority, retractions by way of affidavit filed on oath or affirmation attested by the Notary/Oath Commissioner are considered to be more effective for the simple reason that in the eyes of law they carry more value in view of the specific provisions of the Indian Penal Code as contained in sections 181, 191 & 193 which provide for prosecution in case of false statements given on oath.

Affidavit which is a solemn and voluntary declaration or statement of fact in writing, relating to matters in question and sworn or affirmed and signed by the deponent before a person or officer duly authorized to administer such an oath or affirmation. Such an affidavit should show the circumstances under which admission was made and the grounds for which the admission is incorrect. Necessary supporting evidences to support

the correct facts need to be filed. When by a sworn statement or affidavit facts admitted, in an earlier statement which was recorded on oath, are retracted the Assessing Officer may like to examine the maker carefully. Regarding the retraction made by way of an affidavit it is important to note that mere filing of an affidavit even before the Court will not conclusively make the earlier admissions ineffective because an affidavit is only a statement in respect of the matter in the personal knowledge and in respect of affidavit the deponent is liable to be cross-examined. On furnishing of an affidavit, the Authorized Officer is entitled to cross examine the deponent and the assessee can be required to produce the deponent in person for cross examination. If the assessee fails to comply affidavit can be ignored. However, if the Officer fails to cross-examine the deponent the statement made in the affidavit becomes unchallengeable. On this point, useful reference can be made to the decision of the Supreme Court in the case of *Mehta Parikh & Co. v. CIT [1956] 30 ITR 181* where it was held that it will not be open to the revenue to challenge the statements made by the deponent in their affidavits later on, if no cross examination with reference to the statements made in the affidavits is done.

It is also important to note here is that making an incorrect or false affidavit is criminal offence. It has been held in the case of *Baban Singh v. Jagdish Singh AIR 1967 SC 68* that where a false affidavit is sworn, the offence would fall u/s 191 and 192 of the Indian Penal Code 1860. Hence an affidavit has to be considered as a piece of evidence. The importance and relevance of the averments made in the affidavit cannot be brushed aside without really having any material to contradict the same.

Conclusion:

Having said so, from the principles of law laid down as mentioned herein above, it may be deduced that, admission is one important piece of evidence but it cannot be said that it is conclusive. It is rebuttable. It is open to an assessee who made an admission to establish that the confession was involuntary and the same was extracted under duress and coercion. The burden of proving that the statement was obtained by coercion or intimidation lies upon the assessee. Where the assessee claims that he made the statement under the mistaken belief of fact or law, he should have applied for rectification to the authority who passed the order based upon his statement. The retraction should be made at the earliest opportunity and the same should be established by producing any contemporaneous record or evidence, oral or documentary, to substantiate that that the earlier statement is contrary to the facts of the matter and doesn't hold good.

In conclusion, while making initial admissions by way of statement or otherwise, one has to be take ample precautions and before making admissions. It is most important that one should understand the facts and issues properly. One should not make initial admissions in a huff or in a casual or light hearted manner because, subsequently, it may not be easy for him to retract or disown them. Further, instead of retracting initial statements or admissions in a bald manner, one has to bring on record cogent reasons or evidences failing which any retraction thereafter may be decided against him on the basis of initial statement itself. In the interest of revenue, it is also pertinent to mention that even if the assessee has tendered a statement u/s 132(4) of the act accepting its undisclosed income, the investigating officer should reinforce such an admission based on his independent investigation and enquires during the course of post search investigation.

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