**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**TAX APPEAL NO. 207 of 2008**
**With**
**TAX APPEAL NO. 208 of 2008**
**TO**
**TAX APPEAL NO. 210 of 2008**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE MR.JUSTICE KS JHAVERI** **SD/-**

**and**
**HONOURABLE MR.JUSTICE G.R.UDHWANI** **SD/-**

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| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ? | YES |
| 2 | To be referred to the Reporter or not ? | NO |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ? | NO |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ? | NO |

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THE COMMISSIONER OF INCOME TAX-IV....Appellant(s)

Versus

RAMANBHAI B PATEL....Opponent(s)

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Appearance:
MR NITIN K MEHTA, ADVOCATE for the Appellant(s) No. 1
MR RK PATEL with MR B D KARIA with MR DARSHAN R PATEL, ADVOCATES for the Opponent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE KS JHAVERI**

and
**HONOURABLE MR.JUSTICE G.R.UDHWANI**

**Date : 20/07/2016**

**ORAL JUDGMENT**

**(PER : HONOURABLE MR.JUSTICE KS JHAVERI)**

By way these appeals, the appellant—Department has challenged the judgment and order DATED 23/03/2007 passed by the ITAT in ITA No.1891/2000 for the assessment year 1991-92, whereby the order passed by the CIT (A) came to be confirmed reversing the order passed by the AO.

2. The short facts of the case are that the AO made addition on the basis of a statement recorded by the ADIT under Section 131 of the Income Tax Act. In the statement recorded, the assessee has admitted to have earned Rs.1,79,00,000/- in cash on account of various projects. The details of the projects as well as break-up of the same has already been furnished by the assessee in the statement recorded. The utilization of these income has also been furnished by the assessee. However, after two months, the assessee has retracted from the statement giving the reasoning that the same was obtained under threat. The AO has rejected the retracted statement of the assessee with a reasoning that the same has been furnished after two months and the statement was recorded in the presence of assessee's Advocate and also the fact that the detailed break-up submitted by the assessee with

respect to earning of income cannot be put into the mouth of the assessee and thereby additions were made.

2.1 The matter was carried before the CIT (A), which had deleted the additions and the Tribunal has confirmed the order passed by the CIT (A) which has given rise to this appeal.

3. While admitting these appeals, following question of law has arisen for consideration of this Court:

> *"Whether the Appellate Tribunal is right in law and on facts in confirming the order passed by the CIT (A) deleting the additions made by the Assessing Officer pursuant to the statement under Section 131 of the assessee which was subsequently retracted after three months?"*

4. Learned Counsel for the appellant has taken this Court to the findings recorded by the AO and contended that the retraction was not legal and the statement was recorded under Section 131 of the Income Tax Act during the proceedings. He has further contended that the statement was recorded and after a period of almost three months, it was retracted and the income was assessed as per the statement recorded pursuant to the statement recorded of one Shir Subhash Pandey.

4.1 He has also contended that since the

retraction was nothing but an afterthought, the same should have been rejected and the order of the AO is required to be upheld by the Tribunal.

4.2 In support of his submissions, learned Counsel for the Department has relied upon a decision in case of ***Assistant Commissioner of Income Tax v. Hukum Chand Jain &Ors. (2011) 337 ITR 0238*** and contended that 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 the allegation that he was forced to make the statement in question. He, therefore, submitted that the appeal may be allowed by answering the question in favour of the Department.

5. On the other hand, learned Counsel for the assessee has contended that retraction was made immediately within the period of three months and the statement was recorded under telephonic talks by the Department pursuant to the statement recorded of one Shir Subhash Pandey. However, the assessee was not allowed to cross-examine the said statement.



5.1 Learned Counsel for the assessee has relied upon letter [F.No.286/98/2013-IT (INV.II] dated 18/12/2014 whereby the instructions was issued in relation to Section 132, read with Section 133A of the Income Tax Act, 1961 with regard to search & seizure, admission of undisclosed income under coercion / pressure during the search / survey. The said

circular reads thus:

> *"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 bakced 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.*
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> *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."*

5.2 He has also drawn attention of this Court to one letter dated 10/03/2003 issued by the Ministry of Finance & Company Affairs, Department of Revenue, Central Board of Direct Taxes in respect of confession of additional Income during the course of search and seizure and survey operation. The said circular reads thus:

> *"Instances have come to the notice of the Board where assessees have claimed that they have been forced to confess the undisclosed income during the course of the search & seizure and survey operations. Such confessions, if not based upon credible evidence, are later retracted by the concerned assessees while filing returns of income. In these circumstances, on confessions during the course of search & seizure and survey operations 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 been disclosed or is not likely to be disclosed before the Income Tax Department. Similarly, while recording statement during the course of search it seizures and survey operations no attempt should be made to obtain confession as to the undisclosed income. Any action on the contrary shall be viewed adversely.*
>
> *Further, in respect of pending assessment proceedings also, assessing officers should rely upon the evidences / materials gathered during the course of search / survey operations or thereafter while framing the relevant assessment orders."*

5.3 In support of his argument, learned Counsel for the assessee has relied upon a decision in case of ***Andaman Timber Industries v. Commissioner of Central Excise, Kolkata-II [2015] 62 taxmann.com 3 (SC)*** and has relied upon paragraph Nos.6, 7, 8 and 9 which reads thus:

> *"6. According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.*
>
> *7. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and*

*wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.*

*8. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show Cause Notice.*

*9. We, thus, set aside the impugned order as passed by the Tribunal and allow this appeal. No costs."*

5.4 Learned Counsel for the assessee has also relied upon a decision in case of ***Commissioner of Income-tax v. Chandrakumar Jethmal Kochar [2015] taxmann.com 292 (Gujarat)*** and contended that similar issue has cropped wherein this Hon'ble Court has held in favour of the assessee.

5.5 Learned Counsel has lastly contended that

the findings recorded by the CIT (A) and Tribunal are just and proper and therefore the appeal may be dismissed by answering the issue in favour of the assessee and against the Department.

6. We have heard learned Counsel appearing for the respective parties.

7. Having gone through the order passed by the CIT (A) and the Tribunal, this Court is of the view that the assessee was not allowed to cross-examine the person, on the basis of whose statement the proceedings was initiated. The Tribunal in its order in paragraph No.22 has in detail discussed this aspect and rightly come to the conclusion which reads thus:

> *"22. In view of the aforesaid case law we are of the view that the admission made by the assessee is not a conclusive proof and such admission can be used as an evidence unless it is not retracted. The assessee in this case has already retracted the statement which in our opinion is a valid retraction. Although there had been search in the case of Gokul Corporation and its partner Shri Suresh A Patel on which the Revenue has relied for making the additions in the case of the assessee but the Revenue could not bring any evidence or material except the statement of the assessee which was recorded on 8.1.96 and also the statements of Shri Subhash Pandey and Shri Kashyap Thakore and these statements were although recorded at the back of the assessee. When the assessee has asked for their cross-examination, the cross-examination of Shri Subhash Pandey was not given to the assessee, although the statement of the assessee was recored in consequence of the statement of Shri Subhash*

*Pandey recorded on 1.1.96 u/s. 131. The statements of Shri Suresh A Patel and Shri Kashyap Thakore nowhere state the name of the assessee. Thus the Revenue has not brought any evidence. The onus, in our opinion, is on the Revenue to prove that the assessee has earned the income. It gets shifted on the assessee once the assessee claims the exemption of income. We therefore do not find any illegality or infirmity in the order of the CIT (A) in deleting the additions made by A.O. We therefore confirm the orders of the CIT (A) for AYs. 1991-92, 1992-93, 1993-94 and 1996-97."*

8. The decision in case of ***Andaman Timber Industries (supra)*** is relevant for this purpose and the Apex Court has considered the issue of not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity.

9. This Court had also an occasions to deal with the similar issue in case of ***Chandrakumar Jethmal Kochar (supra)***, where this Hon'ble Court after considering various pronouncements has held as under:

*"3. Learned advocate for the appellant has submitted that the Tribunal has committed an error in allowing the appeal. He further submitted that the Tribunal has not given any cogent reasons in its order.*

*"4. As against this, Mr. Soparkar, learned Senior counsel heavily relied upon the decision of this Court in the case of* ***Kailashben Manharlal Chokshi Vs. Commissioner of Income***

***Tax,*** *reported in* ***[2010] 328 ITR 411 (Guj.),*** *more particularly paragraph No.23. In the aforesaid case, the judgment rendered in CIT Vs. D.L.F., reported in [2000] ITR 855 has been referred. Paragraph No.23 of the decision of Kailashben Manharlal Choksh (supra) reads as under:-*

> *23. The main grievance of the Assessing Officer was that the statement was not retracted immediately and it was done after two months. It was an afterthought and made under legal advise. However, if such retraction is to be viewed in light of the evidence furnished alongwith the affidavit, it would immediately be clear that the assessee has given proper explanation for all the items under which disclosure was sought to be obtained from the assessee. So far as amount invested in house property is concerned, the assessee has specifically stated in his explanation dated 28.2.1989 that there was absolutely no basis for making the disclosure on account of bunglow at 68, Sarjan Society, Athwa Lines, Surat. It was in the year 1964 that the assessee took one Plot No.68 in Sarjan Co.Operative Housing Society which was also constructing the bunglow for which the assessee claimed to have been made contribution from time to time. The assessee took possession of the bunglow in 1974 when only ground floor was constructed. Since then he has been living there. The assessee has constructed first floor during 1986 to 1988 and he has incurred the expenses for first floor structure to the tune of Rs.2,03,185.65 ps. but this amount has been withdrawn from the account of the firm in which the assessee is a partner. As per say of Mr.Shah even departmental valuation officer has also accepted that the cost of construction of first floor worked out to Rs.2,06,060/-. There was, therefore, no reason for making addition of Rs.4 lacs on the basis of alleged disclosure made by the assessee in his statement recorded under Section 132(4) of the Act. In support of this statement the Revenue has not brought any evidence whatsoever which would establish that the assessee had in fact incurred an amount of Rs.4 lacs on the construction of the first floor and that amount was invested out of the undisclosed income. Hence there is no justification for making account of Rs.4 lacs merely on the basis of statement recorded under Section 132 (4). None of the authorities have considered this explanation and the CIT(A) as well as Tribunal both have proceeded on the footing that the Assessing Officer has considered the explanation.*

*So far as the addition on account of gold ornament to the tune of Rs.1 lac is concerned, the assessee has given the explanation that was reproduced by the Assessing Officer in his assessment order which says that during the course of search and seizure proceeding, statement of assessee's wife, Smt. Kailashben Chokshi was recorded and according to which she had received about 25 tolas of gold each from her parents and from her parents in law side at the time of her marriage in the year 1960. She had given 15 tolas of gold ornaments to her daughter Ritaben at the time of her marriage in the month of March, 1988. If the total jewellery found during the course of search is taken into consideration, in light of the instructions issued by the Board, any middle class Indian family may be having jewellery and gold ornaments to that extent. Hence, no addition can be made on that count. Even if the board Circular may not have retrospective operation, looking to the quantum of holding and assessee's explanation, we are of the view that this is a normal holding which can be found in any middle class Indian family and hence no addition could have been justified on that count.*

*So far as addition of Rs.1 lac on account of unaccounted investment in furniture is concerned, it is stated by the assessee that on the ground floor furniture was made before 15 years and assessee had spent Rs.25,000/- for renovation after making withdrawal from the firm's account. It is further submitted that the furniture on the first floor was partly received and paid out of withdrawals from the firm. At the time of the search additional furniture meant for the first floor was just received by way of parcel from Ahmedabad and was lying in bundles. A detailed source of investment of furniture purchased from Ahmedabad with a due confirmation from the party concerned have been filed by the assessee before the Assessing Officer. Since no payment of this additional furniture was made by the assessee till the date of search, no addition could have been made on this count.*

*5. We have heard learned advocates appearing for both the parties and perused the material available on record. The Tribunal while deciding the appeal in paragraph No.8 has observed as under:-*

*8. We have heard the assessees counsel and the D.R. We are of the opinion that the CIT(A) when he relied upon the statement of the assessee made on 8.8.90*

*ignored the fact that there were two statements recorded on that day. The first statement was recorded at the 8 am. and second statement was recorded at 8:45 pm. in the night. In the first statement recorded in the morning which are contained on pages 1 to 12 of the assessees paper book. There is no acceptance of the fact that the business belonged to him and not to the other persons who are said to have given the statements against him. It is notable that 33 questions were asked in the morning session and this morning session statement was the first statement. Therefore, if the line of reasoning recorded by the CIT (A) is accepted then the reliance has to be placed on the first statement in the morning. In this first statement in the morning there is no acceptance of any benamidari or any disclosure. It is notable that the second statement of the assessee started at 8:45 pm. which according to the assessee continued upto 6 am. next day. This is contained from pages 13 to 26 of the paper book and contains 35 questions and answers. Till question No.21 of the second statement there is no allegation of any benamidari. From question No.22 the statement starts talking about proprietorship of different concerns in the name of his various employees. Even in answer to question No.22 he could not give the names of the proprietors of Kamal Traders, Naman Traders, Sampat Traders, Adarsh textiles. In the last sentence of the said answer he stated as translated in English besides above there are no other firms in the name of our employees. In answer to question No.23 he accepted that Sugam Textiles was being run by his employees as his benami. In answer to question No.24 he accepted that all the concerns mentioned in question No.22 are his benami concerns. In answer to question No.26 he accepted that certain bank accounts were his benami bank accounts. In answer to question No.27 he further agreed that all the deposits made in the name of his employees are his deposits. In answer to question No.33 he disclosed an income of Rs.15 lakhs. He could not give any further details on that date. On 31.8.90 another statement of this assessee was recorded. In that he accepted that he was a partner in Padam Enterprises as individual and in Mahavir Trading Co. as HUF. In answer to question No.14 he stated that through the two concerns of Sugam Textiles and Shanti Traders the profits of 14 concerns belonging to his group were reduced. The name of 14 concerns are given on assessees paper book page No.28. In answer to question No.12 he made a disclosure of Rs.24 lakhs in all including Rs.15 lakhs disclosed on 8.8.90. From the above statements one thing is clear that in*

*the first statement made in the morning of 8.8.90 this assessee did not disclosure any benamidari and it was only in the second statement taken from 8:45 pm. onwards that he disclosed certain benamidaris and proceeded make certain disclosure. It is notable that the disclosure. Made in answer to question No.12 appearing on assessees paper book page No.32 in the statement given on 31.8.90 talks about disclosure of 24 lakhs in 14 concerns as group disclosure. The issue regarding group disclosure has neither been discussed by the A.O. nor by the CIT(A). Under I.T. Act an assessment has to be made on an assessee on an income determined in his case for a particular year. The quantum of disclosure made in each and every 14 concerns have not been identified by either of the lower authorities. The department has also not contested the fact that this assessees son suffered from diabetes. In view of the above circumstances we see reason to believe that the second statement given by the assessee after 8:45 pm. was not given under the the circumstances which could be said as normal for the assessee.*

*6. In view of the above discussion and considering the principal laid down in the case of Kailashben Manharlal Choksh (supra), we are of the considered opinion that the view taken by the Tribunal is just and proper. We are not convinced with the submissions made by Mr. Mehta, learned advocate for the appellant that the Tribunal has not given cogent reasons. Therefore, the answer to the first question would be against the Revenue and in favour of the assessee. The second question will also enure for the benefit of the assessee as from the record it is clear that other concerns were not Benami concerns of the assessee."*



10. In view of the aforesaid settled legal situation and in view of the findings arrived at by the Tribunal, we are not convinced with the submissions made by Mr.Mehta, learned Advocate for the appellant. Accordingly, we dismiss all these appeals and answer the issue raised in these appeals in favour

of the assessee and against the Department.

**(K.S.JHAVERI, J.)**

**(G.R.UDHWANI, J.)**

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