

आयकर अपीलीय अधिकरण ,इन्दौर न्यायपीठ ,इन्दौर
IN THE INCOME TAX APPELLATE TRIBUNAL,
INDORE BENCH, INDORE

श्री कुल भारत, न्यायिक सदस्य

तथा

श्री मनीष बोरड, लेखा सदस्य के समक्ष

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI MANISH BORAD, ACCOUNTANT MEMBER

आ.अ.सं./I.T.A. No. 303/Ind/2017		
निर्धारणवर्ष/ Assessment Year : 2005-06		
Shri Ashok Vani, Prop.M/s.Shriram Traders, Laxmiganj, Jobat, Distt. Jhabua	vs.	Income-tax Officer, Ward-2, Ratlam
अपीलार्थी /Appellant		प्रत्यर्थी /Respondent
स्था.ले.सं./PAN: ADWPV1385Q		

अपीलार्थी की ओर से/Appellant by	:	Shri Anil Kamal Garg C. A. and Shri Arpit Gaur, CAs
प्रत्यर्थी की ओर से/Respondent by	:	Shri K.G.Goyal, Sr. DR

सुनवाई की तारीख/Date of hearing	:	14.05.2018.
उद्घोषणा की तारीख/Date of pronouncement	:	18.05.2018

आदेश / O R D E R

PER KUL BHARAT, J.M. :

Appeal by the assessee is directed against the order of CIT(A), Ujjain, dated 6th February, 2017, pertaining to the assessment year 2005-06.

2. The assessee has raised the following grounds of appeal :-

1. That, the learned CIT(A) grossly erred, both on facts and in law, in confirming the addition of Rs.77,845/- made by the AO in the appellant's income on allegation of unexplained cash, solely on the basis of statement of the appellant recorded during the course of survey u/s. 133A of the Act, without considering and appreciating the explanation with evidences offered by the appellant.
2. That, the learned CIT(A) grossly erred, both on facts and in law, in confirming the addition of Rs.54,220/- made by the AO in the appellant's

income on allegation of unexplained investment in stock, solely on the basis of statement of the appellant recorded during the course of survey u/s. 133A of the Act, without considering and appreciating the explanation with evidences offered by the appellant. .

3. That, the learned CIT(A) grossly erred, both on facts and in law, in confirming the addition of Rs.5066/- made by the AO in the appellant's income by estimating the total sales of the appellant, for the year under consideration, at Rs. 10,11,317/- as against the same shown by the appellant at Rs. 9,10,000/-.
4. That, the learned CIT(A) grossly erred in confirming the addition of Rs.5,53,501/- made by the AO in the appellant's income merely on the basis of statement of the appellant recorded during the course of survey u/s. 133A of the Act, without considering and appreciating the explanation with evidences offered by the appellant during the course of assessment proceedings.
5. That the learned CIT(A) grossly erred in confirming

the additions of Rs.32,484/- and Rs.81,950/- made by the AO in the appellant's income respectively on account of cash advances and kirana debtors merely on the basis of statement of the appellant recorded during the course of survey u/s. 133A of the Act, without considering and appreciating the explanation with evidences offered by the appellant during the course of assessment proceedings.

6. That, the learned CIT(A) grossly erred in confirming the addition to the extent of Rs. 3,348/- in the appellant's income on allegation of undisclosed purchases of 'Mahua', merely on surmises, guess work and conjectures by adopting arbitrary rate of net profit @ 5%.
3. Briefly stated, the facts of the case are that the survey action was carried out at the business premises on 3rd March, 2005, when the assessee surrendered a sum of Rs. 8 lakhs on account of excess stock, loose papers etc. Subsequently, the assessee filed a return declaring income

of Rs. 82,300/-. The case of the assessee was picked up for scrutiny assessment and the assessment u/s 143(3) was framed, thereby made addition of Rs. 9,68,285/- including the amount surrendered during the survey action. Against this, the assessee preferred an appeal before the Ld. CIT(A), who after considering the submissions partly allowed, thereby the Ld. CIT(A) deleted the addition of Rs. 96,251/- made on account estimation of gross profit, rest other additions were confirmed. Now the assessee is in appeal before this Tribunal.

4. Apropos ground nos. 1 to 6, the Ld. Counsel for the assessee reiterated the submissions made before the CIT(A). For the sake of clarity, the submissions made before the CIT(A) is reproduced as under :-

"The appellant is an individual, aged nearly 35 years, residing in a tribal village 'Jobat' Dist. Jhabua. The appellant started his earning career by becoming a

collection agent of Sahara India limited in the year 1993-94. He carried on such activity up till F.Y. 1996-97. Thereafter he started the business of brokerage in kirana, cotton and grain at Jobat and surrounding places. In November 2001, he started a retail kirana shop at Jobat under the name and style of "M/s. Shriram Traders" by making small investment of approx. Rs.70,000/-. The appellant had accumulated capital of Rs.3,22,800/- up till 31-03-2003. The appellant had disclosed all such facts in his Return of Income filed for the first time in respect of A.Y. 2004-05 on 05-10-2005. Along with such Return of Income for A.Y. 2004-05, the appellant had also furnished his statement of affairs as of 31-03-2004 as also a statement showing accumulation of his capital up till 31-03-2003. A copy of acknowledgement of Return, Computation of Income, Statement of Affairs and

Statement showing Accumulation of Capital, as filed by the appellant along with his Return for A.Y. 2004-05 are being submitted herewith as Annexure A-1.01 & A-1.02 [Paper Book Page No. 13 to 18]. The Return of Income filed by the appellant for A.Y. 2004-05 was duly accepted by the learned A.O.

A survey under section 133A of the Income-Tax Act, 1961 was carried on in the business premises of the appellant on 03-03-2005 by the Income-Tax Officer, Ward-2, Ratlam.

During the course of survey, certain books, documents and loose papers were found and the same were impounded by the survey party. Xerox copy of the inventory of books and other documents found during the course of survey is being submitted herewith. Besides, an inventory of stock and cash balance lying with the appellant were also prepared. Copy of list of

stock and inventory of cash are being submitted herewith. Further, during the course of such survey, statement of the appellant were also got recorded by the Assessing Officer conducting the survey. A copy of the statement recorded is being submitted herewith. During the course of statement, the appellant made a declaration of additional income of Rs.8,00,000/- pertaining to the previous year under consideration.

The appellant being a retail trader, covered under section 44A of the Act, was not required to maintain any books of account. However, he was jotting down his transactions in unsystematic manner in various books and loose papers as impounded by the survey party.

Subsequently, the appellant furnished his Return of Total Income pertaining to the assessment year under consideration on 05-10-2005 vide Ack. No. 14311 declaring total income of Rs.82,300/-. A copy of the

Computation of Total Income along with the copy of acknowledgement of Income-Tax Return are being submitted herewith. Along with such Return of Total Income, the appellant also furnished a statement containing 'Notes on Survey'. A copy of such statement is being submitted herewith.

Subsequently, case of the appellant was selected under scrutiny and Notices under section 143(2) and 142(1) were issued and served upon the appellant from time to time. A copy of such Notices are being submitted herewith. The appellant made compliance of all such Notices from time to time by making the written submission and also by producing relevant evidences in support of his written submissions. A copy of such written submissions are being furnished herewith.

Finally, on 18-12-2007, the learned Assessing Officer framed the assessment under section 143(3) of the

Income-Tax Act, 1961 by determining the Total Income at Rs.10,50,590/- as against the Returned Income of Rs.82,500/- thereby making addition of Rs.9,68,285/- on the following grounds:

<i>S.no.</i>	<i>Particulars</i>	<i>Amount in Rs.</i>
<i>1</i>	<i>Alleged unexplained cash</i>	<i>77,845</i>
<i>2</i>	<i>Alleged unaccounted investment in stock</i>	<i>54,220</i>
<i>3</i>	<i>Addition on account of alleged suppressed sales</i>	<i>96,251</i>
<i>4</i>	<i>Addition on account of GP on alleged suppressed sales</i>	<i>5,066</i>
<i>5</i>	<i>Addition on account of Annexure A/1 to A/19 impounded during the course of survey</i>	<i>5,53,501</i>
<i>6</i>	<i>Addition on account of cash advances</i>	<i>32,484</i>
<i>7</i>	<i>Addition on account of kirana debtors</i>	<i>81,950</i>
<i>8</i>	<i>Addition on account of undisclosed purchases of Mahua</i>	<i>66,968</i>

	<i>TOTAL ADDITIONS</i>	<i>9,68,285</i>
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No addition is called for in view of the facts and circumstances of the case and following submissions:

SUBMISSIONS

Ground No. 1

"That determination of Total Income at Rs.10,50,590/- as against the Returned Income of Rs.82,300/- by making addition of Rs.9,68,285/- is quite unjustified, unwarranted, arbitrary, excessive and bad-in-law."

Ground No. 2

"That, the learned assessing officer grossly erred in making the addition of Rs.77,845/- in the appellant's income by alleging unexplained cash, solely on the

basis of statement of the appellant recorded during the course of survey u/s. 133A of the Act, without considering the explanation with evidences offered by the appellant, during the course of assessment proceedings."

In this context, it is submitted as under:

2.01 That, during the course of the survey, carried on in the business premises of the appellant 03-03-2005, total cash of Rs.77,845/- was found.

2.02 That, the appellant was carrying on retail trade of kirana and cosmetic items at a very petty scale. The total turn over of the appellant for the relevant previous year, as determined by the learned AO himself, was to the extent of Rs.10,11,317/- only

and since the appellant had opted for scheme of presumptive taxation under the provisions of s. 44AF of the Act, he was not required to maintain any books of account.

2.03 That, during the course of survey, statement of the appellant was recorded by the Assessing Officer.

2.04 That, during the course of recording the statement, the appellant in reply to Q. No.3, had specifically replied that he was not maintaining regular books of account.

2.05 That, despite appellant's statement to the effect that he was not maintaining any books of account, the assessing officer asked the appellant to show the source of cash physically found in his books of

account. The innocent appellant, being a villager residing in a tribal area, came forward to accept the entire amount of cash found as his undisclosed income for the relevant previous year.

2.06 That, during the course of assessment proceedings, the appellant, vide his counsel's letter dated 10-12-2007, had explained the source of cash of Rs.77,845/- found during the course of survey. The appellant had explained that the sources of the cash were from (i) sale proceeds of his retail shop, (ii) recovery of advances given by him earlier and (iii) withdrawals of cash of Rs.50,000/- made by him from his Saving Bank Account bearing No.159/14 maintained with Jila Sahakari Kendriya Bank Maryadit, Jhabua on 10-11-2004. In order to corroborate transaction of cash

withdrawal from Bank, the appellant had also furnished a copy of his Bank Statement for the relevant period.

In the note appended to the Computation of Income also, the appellant had explained that he had set apart cash sum of Rs.80,000/- on 18-11-2004 out of sales proceeds of his retail shop and cash withdrawal made from his savings bank account on 10-11-2004. The appellant had explained that such fact is verifiable from page No.41 and 48 of rough cash-book maintained by him which was impounded during the course of survey. On a perusal of Page Nos. 41 & 48 of such rough cashbook, it shall be observed by Your Honour that the appellant had made withdrawal of Rs.50,000/- from his savings bank account as aforesaid and

thereafter as on 18-11-2004 he had set apart a sum of Rs.80,000/- from his business. Such set apart was made by the appellant for the purpose of savings only.

2.07 That, the learned AO did not dispute withdrawal of cash by the appellant from his savings bank account. He also did not claim that the amount of Rs.80,000/- set apart by the appellant from his business was utilized by the appellant for any other purpose before the date of survey. The learned AO did not accept the contention of the appellant that the cash found during the course of survey was out of his past savings. The learned AO, mainly on the basis of the statement given by the appellant during the course of survey proceedings, made the impugned addition.

2.08 Before commenting upon the action of the learned AO in making the impugned addition solely on the basis of the statement, it is submitted that the appellant had been carrying on retail business of kirana since November'2001. He had obtained a license from the competent authority of the concerning Municipal Corporation for carrying on the said business in October'2002.

A copy of the license obtained by the appellant was duly submitted before the learned AO during the course of assessment proceedings. A copy of the same is also being submitted herewith for kind perusal. Before commencing the retail business of kirana, the appellant had carried on business of acting as a collection agent of a NBFC and also of brokership in kirana, cotton and grains. The appellant had accumulated capital of

Rs.3,49,744/- up till 31-03-2004 as per the details given in the statement of affairs and other statements submitted along with the Return of Income furnished by the appellant for A.Y. 2004-05. It shall be worthwhile to note that same assessing officer has accepted past savings in the hands of the appellant, as on 31-03-2004, at Rs.3,49,744/-, as he did not disturb the Return of Income furnished by the appellant for A.Y. 2004-05. It is further submitted that the learned Assessing Officer has also made a reference of the statement of affairs furnished by the appellant along with his Return of Income for A.Y. 2004-05 in para (9) of his Assessment Order.

2.09 Now as regard the action of the learned AO in placing absolute reliance on the statement recording during the course of survey by brushing

aside genuine explanation and documentary evidences furnished by the appellant, at the outset, it is submitted that under the scheme of Law a statement on oath cannot be recorded during the course of proceedings under section 133A of the Act. It shall be appreciated by Your Honour that any statement on oath can be recorded only under sections 131 or 132(4) of the Income-Tax Act, 1961. It would thus follow that merely on the basis of a statement recorded during the course of survey no adverse inference can be drawn against an assessee without having any other cogent evidence. In the scheme of Law, statement on oath cannot be recorded under the provisions of section 133A of the Income-Tax Act, 1961 and any such statement recorded on oath has no evidentiary value. Their Lordships of High Court of Kerala in

case of Paul Mathews & Sons vs. CIT as reported in (2003) 181 CTR (Ker) 207 have also held the same view. The Hon'ble Court observed as under:

"Sec. 133A however, enables the IT authority only to record any statement of any person which may be useful for, but does not authorize for taking any sworn in statement. On the other hand, we find that such a power to examine a person on oath is specifically conferred on the authorized officer only under s. 132(4) of the IT Act in the course of any search or seizure. Thus, the IT Act, whenever it thought fit and necessary to confer such power to examine a person on oath, the same has been expressly provided whereas s. 133A does not empower any

ITO to examine any person on oath. Thus, in contra-distinction to the power under s. 133A, s. 132(4) of the Act enables the authorized officer to examine a person on oath and any statement made by such person during such examination can also be used in evidence under the IT Act. On the other hand, whatever statement recorded under Section 133A of the IT Act is not given any evidentiary value obviously for the reason that the officer is not authorized to administer oath and to take any sworn in statement which alone has the evidentiary value as contemplated under law. Therefore, there is much force in the argument of the learned counsel for the appellant that the

statement, elicited during the survey operation has no evidentiary value and the ITO was well aware of this."

2.10 Your Honour, at the cost of repetition, it is submitted that the appellant is an under educated villager, residing in a tribal area, with very little knowledge of accounts and Income-Tax and it was therefore that at the time of survey he got himself shocked and could not present even his legitimate affairs in the desired manner. In such state of mind, full of fear of Government Authorities, he made himself agree to each and every discrepancy alleged by the survey party. In such situation, it shall be appreciated by Your Honour that statements given by the appellant cannot be regarded as the admission of the appellant and specially in a case where the recording of

statement on oath itself was against the settled law. Consequently, on the sole basis of statement given during the course of survey the learned AO was not justified in forming an adverse view against the appellant. Instead of placing entire reliance on the statement of the appellant, the learned Assessing Officer ought to have considered the explanation with documentary evidences adduced by the appellant. Since, in the instant case, the learned Assessing Officer has not brought on record any material or evidence to discard the explanation tendered by the appellant and therefore the entire addition so made by the learned AO deserves to be deleted. Reliance is also placed on judicial decisions of Ajit Chintaman Karve vs. Income-Tax Officer, ITAT Pune 'B' Bench, (2007) 112 TTJ (Pune) 480.

2.11 Your Honour, recently Hon'ble High Court of Madras in case of CIT vs. S. Khader Khan Son (2008) 300 ITR 157 (Mad) has also enunciated the principal that an admission made by person is not conclusive and the person making the admission is entitled to show that the admission was incorrect. It further went out to hold that whatever statement is recorded under section 133A of the IT Act it has no evidentiary value for the reason that the officer is authorized to administer oath and take any sworn statement which alone has evidentiary value as contemplated under law.

2.12 It is further submitted that even the Central Board of Direct Taxes in its instruction dated 10-03-2003 has warned all the Assessing Officer not to obtain any confession of additional income during the

course of search and seizure and survey operations. The said circular reads as follows:

".....Instances have come to the notice of the Board where assesses have claimed that they have been forced to confess the undisclosed income during the course of search and seizure and survey operations. Such confessions, if not based upon credible evidence, are later retracted by the concerned assesseees while filing returns of income. In these circumstances, on confessions during the course of search and 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 not been disclosed or is not likely

to be disclosed before the IT Department. Similarly, while recording statement during the course of search and seizure 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, AOs should rely upon the evidences/materials gathered during the course of search/survey operations or thereafter while framing the relevant assessment orders."

Reliance is also placed on following judicial authorities:

- i) *Kailashben Maneherlal Choksi vs. CIT (2008) 220 CTR (Guj) 138*
- ii) *Unitech Products Ltd. vs. ITO (2008) 22 SOT 429 (Mum)*
- iii) *ACIT vs. Raj Homes (P) Ltd. (2007) ITJ 286 (Ind-Trib)*

In view of the above facts and circumstances of the case, it is submitted that the addition so made by the learned AO at Rs.77,845/- on account of unexplained cash being unjustified, unwarranted and against the material on record, deserves to be deleted in to to.

Ground No. 3

"That, the learned assessing officer grossly erred in making the addition of Rs.54,220/- in the appellant's income by alleging unexplained investment in stock, solely on the basis of statement of the appellant

recorded during the course of survey u/s. 133A of the Act, without considering the explanation with evidences offered by the appellant, during the course of assessment proceedings."

In this context, it is submitted as under:

3.01 That, during the course of survey, physical inventory of all the kirana and cosmetic goods found in the business premises of the appellant was taken by the survey party. A copy of such inventory is placed at Page No. 21 to 26 of the Paper Book. On a perusal of such inventory it shall be observed by Your Honour that total valuation of the inventory of various kirana and cosmetic items found in the business premises of the appellant was to the extent of a very meager sum of Rs.54,220/- only. It shall further be observed by Your

Honour that the appellant was having as many as 163 items in his kirana shop but the total valuation of the inventory worked out at Rs.54,220/- only which speaks in volumes about the scale of business carried on by the appellant.

3.02 That, the learned Assessing Officer has not controvert the explanation and other documentary evidences furnished by the appellant to establish that he was carrying on his retail business since November'2001.

3.03 During the course of survey, the appellant vide reply to Q. No. 9 accepted the entire amount of investment in stock worth of Rs.54,220/- as his additional income for the relevant previous year. It shall be appreciated by Your Honour that the appellant in reply to Q. No. 2 had clearly stated that he was carrying on his business since November'2001.

3.04 Your Honour shall appreciate that the reply to Q. No. 9 of the statement given by the appellant was either not voluntarily or it was given under a confused state of mind without properly perceiving the situation. By any stretch of imagination, it cannot be presumed that entire investment in stock was made by the appellant during the relevant previous year only and at the commencement of the relevant previous year, the appellant was having zero inventory. Any retail kirana trader who is required to sale more than 150 items of kirana and cosmetic goods is required to maintain bare minimum stock of worth of Rs.50,000/- to Rs.1,00,000/- at all the times. Since, the appellant was carrying on this business since November'2001 and therefore, it cannot be presumed that as on 01-04-2004 being the first day of the relevant previous year, the appellant was having Nil stock. Such a crucial fact

posses a big question mark upon the evidentiary value of the reply extracted by the survey party from the appellant.

3.05 That, the learned Assessing Officer grossly erred in making the impugned addition without accepting the explanation of the appellant. The appellant had explained that the stock found during the course of survey was the normal stock of his retail trade and the same was built-up out of his past savings and activities. It was explained to the learned Assessing Officer that the appellant was having stock worth of Rs.60,500/- as on 01-04-2004, as per the statement of affairs filed along with the Return of Income for A.Y. 2004-05 [Page No. 15]. However, the learned Assessing Officer did not consider such vital fact and merely on the basis of the statement given by the appellant during the course of survey proceedings made the impugned

addition. We have already submitted in the preceding paras that no addition can be made solely on the basis of statement given during the course of survey and therefore, the same need no repetition.

3.06 Without prejudiced to the above, the learned Assessing Officer grossly erred in not appreciating the material fact that the appellant being a retail trader was not required to maintain any books of account under the provisions of section 44AA of the Act read with section 44AF.

He ought to have considered that the gross turnover of the appellant for immediately preceding assessment year was to the extent of Rs.8,36,000/- as shown by the appellant in his Return of Income for A.Y. 2004-05 and therefore maintenance of stock of meager value of Rs.54,220/- cannot be said to be excessive,

disproportionate or unexplained stock. In the line of the retail business, normally a businessman is required to maintain inventory for 2 months whereas in the case of the appellant it was not even equivalent to 1 month of his turnover.

In view of the above facts and circumstances of the case, the addition so made by the learned AO at Rs.54,220/- on account of unexplained investment in stock deserves to be deleted in to to.

Ground No. 4(a)

"That, the learned assessing officer grossly erred in making the addition of Rs.5066/- in the appellant's income by estimating the total sales of the appellant, for the year under consideration, at Rs.10,11,317/- as against the same shown by the appellant at Rs.9,10,000/-."

Your Honour looking to the smallness of the amount involved, we do not wish to press this ground of appeal.

Ground No. 4(b)

"That, the learned assessing officer also erred in not considering the material fact that the appellant was not required to maintain any books of accounts in pursuance of the provisions of section 44AA of the Income-Tax Act, 1961 and therefore the addition of Rs.96,251/- by alleging unrecorded purchases was not warranted."

In this context, it is submitted that since the appellant was neither required nor he actually maintained regular books of account in his ordinary course of retail business of kirana and therefore due to computational error he had estimated his turnover for the relevant previous year at Rs.9,10,000/- only as against the same estimated by the learned AO at Rs.10,11,317/-. Since, the learned AO had already made a

separate addition of Rs.5,066/- on account of gross profit on additional sales of Rs.1,01,317/- [Rs.10,11,317 – Rs.9,10,000] @ 5% there was no justification for making any further addition on this count. The learned Assessing Officer besides making addition of Rs.5,066/- under the head additional gross profit, further made addition of balance amount of Rs.96,251/- [Rs.1,01,317 – Rs.5,066] as unexplained purchase. Thus, the learned AO made entire addition of enhanced estimation of sales of Rs.1,01,317/- under two different heads. He grossly erred in not considering the material fact that the very source of purchase of Rs.96,251/- was from the sales proceeds of the appellant from the same business and therefore the same could not, in any manner, be regarded as unexplained under the provisions of the law.

Even, the action of the learned Assessing Officer in considering the entire amount of additional sales as

additional income of the appellant is contrary to the various judicial pronouncements made by the jurisdictional High Court and Tribunal. It has been held by the Hon'ble High Court of Madhya Pradesh in case of CIT vs. Balchand Ajit Kumar as reported in (2004) 186 CTR 419 (MP) that in the case of suppressed sales, only net profit on the sales can be added to income of an assessee. Reliance is also placed on following judicial pronouncements:

i) Eagle Seeds & Biotech Ltd. Vs. ACIT (2006) 102 TTJ (Ind) 1065

ii) ACIT vs. Sun Link Traders Pvt. Ltd. (2006) 6 ITJ (Trib) 351

iii) C.V. Sunny vs. ACIT (2008) 7 DTR (Chennai)(Trib) 478

In view of the above facts and circumstances of the case, the addition so made by the learned Assessing Officer at Rs.96,251/- deserves to be deleted in to to.

Ground No. 5

"That, the learned assessing officer grossly erred in making the addition of Rs.5,53,501/- in the appellant's income without specifying any provision of the law under which such addition has been made. He grossly erred in making such addition merely on the basis of statement of the appellant recorded during the course of survey u/s. 133A of the Act, without considering the explanation with evidences offered by the appellant, during the course of assessment proceedings."

In this context, it is submitted as under:

4.01 That, during the course of survey, certain books and loose papers were found from the business

premises of the appellant and an inventory of such books and loose papers, comprising of 19 items, was duly prepared. A copy of such inventory is placed at Page No. 19 & 20 of the Paper Book. All such books and loose papers were impounded by the survey party and same are still lying in possession of the learned AO. The appellant vide Q. No. 10 of the statement was required to reconcile the transaction stated in such loose papers with his books of account and since the appellant was not maintaining any regular books of account, he under a wrong notion got himself prepared to declare an additional income of Rs.5,53,501/- on account of such loose papers/documents.

4.02 That, xerox copy of all the books and loose papers, as referred to in the above said inventory, are

being produced herewith for kind perusal and record of Your Honour.

4.03 That, during the course of assessment proceedings, the appellant was required to explain that description and nature of books/documents/loose papers impounded during the course of survey. The appellant vide his counsel's letter dated 17-10-2007 made the necessary explanation by submitting a separate statement. A copy of such statement is being submitted for kind perusal.

4.04 That, during the course of assessment proceedings, the learned AO had verified each and every book/document/loose paper qua the explanation given by the appellant in the above referred statement. The learned AO upon the detailed verification could allege only two discrepancies viz.
(i) the total sales as per Annexure A/4, A/5 and

A/7 was to the extent of Rs.9,27,041/- for a period of 11 months as against total estimation of sales made by the appellant at Rs.9,10,000/- for the entire period of 12 months, (ii) the appellant made purchases of 'Mahua' to the extent of Rs.66,968/- as per Annexure L/54. It shall be appreciated by Your Honour that the learned Assessing Officer has made the separate additions in respect of his above stated two allegations at other places of the body of the Assessment Order.

4.05 That, on a perusal of the books/loose papers/documents impounded during the course of survey, it shall be appreciated by Your Honour that the books/loose papers/documents, belonging to the appellant, were containing jottings of retail business transactions carried on by the appellant at a very petty scale. Since, the appellant had

already shown the income from such retail business in his Return of Income, no separate estimation of income on account of such transactions was warranted.

4.06 That, on a perusal of the Assessment Order, it shall be appreciated by Your Honour that the learned Assessing Officer has not assigned any single reason for making the impugned addition of Rs.5,53,501/- in the appellant's income except stating that during the course of statement of the appellant recorded on oath, the appellant had declared an additional income of Rs.5,53,501/- on the basis of subject loose papers etc.. It shall be appreciated by Your Honour that the learned Assessing Officer had conducted independent verification of each and every loose paper and diary and he could not find any cogent basis for

making the impugned addition. As has already been submitted by us in the preceding paras that a statement recorded on oath during the course of survey has no legal sanctity and it cannot become a sole basis for making any addition in income of an assessee, especially in a situation where the Assessing Officer could not corroborate the so called admission with the material on record.

In view of the above facts and circumstances of the case, the addition so made by the learned Assessing Officer at Rs.5,53,501/- deserves to be deleted in toto.

Ground No. 6

"That, the learned assessing officer grossly erred in making the addition of Rs.32,484/- and Rs.81,950/- in the appellant's income respectively on account of cash advances and kirana debtors without specifying any provision of the law under which such addition has

been made. He grossly erred in making such addition merely on the basis of statement of the appellant recorded during the course of survey u/s. 133A of the Act, without considering the explanation with evidences offered by the appellant, during the course of assessment proceedings."

In this context, it is submitted as under:

5.01 At the outset, kind attention of Your Honour is invited to the statement of the appellant recorded during the course of survey. On a perusal of such statement, it shall be observed by Your Honour that the appellant was never confronted with the issues relating to the cash debtors and kirana debtors as alleged by the learned AO in the body of the Assessment Order. It shall be observed by Your Honour that the appellant was confronted on the issue of cash, stock and loose

papers only but he was not asked any single question in respect of cash debtors and kirana debtors. It shall be observed by Your Honour that the words 'Nagdi-Udhari' [Cash Debtors] and 'Kirana-Udhari' [Kirana Debtors] could find place in the entire body of the statement in the concluding para No. 12 only. On a careful reading of answer to Q. No. 12, it shall be observed by Your Honour that the words 'Nagdi-Udhari' [Rs.81,950/-] and 'Kirana-Udhari' [Rs.32,484/-] have been inserted only to make the amount of the surrender at round figure of Rs.8,00,000/- i.e. probably the figure which the survey party was having in their mind before commencing survey operations in the case of a small retail trader like the appellant.

5.02 Without prejudiced to the above, it is submitted that the learned Assessing Officer has not given any independent finding for making the impugned addition

and merely on the basis of amount stated (?) in reply to Q. No. 12 he has made the addition.

5.03 Without prejudiced to the above, it is submitted that the appellant had already considered cash advances and kirana debtors in his statement of affairs pertaining to A.Y. 2004-05 and as also in the statement of affairs filed for A.Y. 2005-06. Since, the appellant himself had shown the investment in such debtors and had also explained the sources thereof, no separate addition on this count was warranted.

In view of the above facts and circumstances of the case, the addition so made by the learned Assessing Officer at Rs.32,484/- and Rs.81,950/- respectively deserves to be deleted in toto.

Ground No. 7

"That, the learned assessing officer grossly erred in making the addition of Rs.66,968/- in the appellant's

income by alleging undisclosed purchases of 'Mahua', merely on surmises, guess work and conjectures and that too without affording any opportunity of being heard to the appellant on this count."

In this context, it is submitted as under:

6.01 At the outset, it is submitted that during the entire course of assessment proceedings, the appellant was not given even a single opportunity on the so called Annexure L/54.

6.02 Without prejudiced to the above, it is submitted that during the course of survey an inventory of loose papers/documents/books comprising of 19 items only was prepared by the survey party. None of the loose paper/book was inventorized as Annexure L/54 as alleged by the learned AO in his body of Assessment Order.

6.03 Since, the order of the learned AO on the issue is non-speaking, baseless and without giving any opportunity to the appellant, the impugned addition deserves to be deleted."

5. On the contrary, the Ld. Departmental Representative opposed the submissions. In rejoinder, the Ld. Counsel for the assessee has taken us through the paper book. The Ld. Counsel for the assessee submitted that the action of the AO is unjustified. He submitted that the entire addition has been made on the basis of the statement recorded during the course of survey. He further submitted that the assessee is semi-educated person and was not aware of the provisions of the Income-tax Act. He submitted that even otherwise also the authorities have failed to appreciate the facts that the assessee was not required to maintain any books of account in view of the provisions of Section 44AA read with Section 44AF of the Income-tax Act, 1961.

6. We have considered the facts, rival submissions and perused the material available on record. There is no dispute with regard to the fact that the assessee is a kirana merchant and running a kirana shop at a small place,

where he is carrying out the business of kirana in retail. As per the provisions of Section 44AA read with Section 44AF of the Act, the assessee was not required to maintain any books of account. The assessee had retracted from the statement as made before the assessing authorities. After considering the facts, material placed before us and the background of the assessee, we find merit in the contention of the Ld. Counsel for the assessee that the AO ought to have considered the facts in right perspective. We, therefore, allow grounds and direct the AO to delete the additions made in respect of unexplained cash at Rs. 77,845/-, unexplained investment in stock at Rs. 54,220/-, addition at Rs. 5,006/- which was made by estimating the total sale at Rs. 10,11,317/-, and the addition at Rs. 5,53,501/- which was solely made on the basis of the statement recorded during the course of survey. Further, the additions of Rs. 32,484/- & Rs. 81,950/- on account of

cash advances and kirana debtors and addition of Rs. 3,348/- made on account of undisclosed purchases of 'Mahua', also be deleted. Ground Nos. 1 to 6 of the assessee's appeal are allowed.

7. Ground No. 7 is of general nature and does not require any adjudication.

8. In the result, the appeal of the assessee is allowed.

The order is pronounced in the open court on 18.05.2018.

Sd/-
(मनीष बोरड)
लेखा सदस्य
(MANISH BORAD)
ACCOUNTANT MEMBER

Sd/-
(कुल भारत)
न्यायिक सदस्य
(KUL BHARAT)
JUDICIAL MEMBER

Indore: दिनांक Dated : 18/05/2018

CPU*/SPS

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order

Ashok Vani, Jobat, Distt. Jhabua

-: 50 :-

Private Secretary/DDO, Indore