

**IN THE INCOME TAX APPELLATE TRIBUNAL  
AGRA BENCH: AGRA**

**BEFORE SHRI A. D. JAIN, JUDICIAL MEMBER AND  
DR. MITHA LAL MEENA, ACCOUNTANT MEMBER**

**I.T.A No. 84/Agra/2015 A.Y. 2008-09**

**I.T.A No. 85/Agra/2015 A.Y. 2007-08**

**I.T.A No. 86/Agra/2015 A.Y. 2006-07**

**I.T.A No. 87/Agra/2015 A.Y. 2005-06**

ACIT, Circle-2, Gwalior.  <b>(Revenue)</b>	<b>Vs.</b>	M/s Gahoi Foods Pvt. Ltd., Shankarpur, A.B. Road, Gwalior. PANNo.AABCG0944R <b>(Assessee)</b>
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**C.O. No.10/Agra/2018 (in I.T.A No. 84/Agra/2015 A.Y. 2008-09)**

**C.O. No.11/Agra/2018 (in I.T.A No. 85/Agra/2015 A.Y. 2007-08)**

**C.O. No.12/Agra/2018 (in I.T.A No. 86/Agra/2015 A.Y. 2006-07)**

**C.O. No.13/Agra/2018 (in I.T.A No. 87/Agra/2015 A.Y. 2005-06)**

M/s Gahoi Foods Pvt. Ltd., Shankarpur, A.B. Road, Gwalior. PANNo.AABCG0944R <b>(Assessee)</b>	<b>Vs.</b>	ACIT, Circle-2,(1) Gwalior.  <b>(Revenue)</b>
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**I.T.A No. 56/Agra/2015 A.Y. 2009-10**

**I.T.A No. 57/Agra/2015 A.Y. 2011-12**

M/s Gahoi Foods Pvt. Ltd., Shankarpur, A.B. Road, Gwalior. PANNo.AABCG0944R <b>(Assessee)</b>	<b>Vs.</b>	ACIT, Circle-2, Gwalior.  <b>(Revenue)</b>
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<b>Revenue by</b>	<b>Shri Inderjeet Singh, CIT.DR.</b>
<b>Assessee by</b>	<b>Shri Anurag Sinha, AR.</b>

<b>Date of Hearing</b>	<b>18.06.2018</b>
<b>Date of Pronouncement</b>	<b>14.08.2018</b>

### ORDER

**PER, A. D. JAIN, JUDICIAL MEMBER:**

These are Department's appeals and assessee's Cross-objections for Assessment Years 2005-06 to 2008-09 and assessee's appeals for A.Ys. 2009-10 & 2011-12 respectively.

2. Facts, for convenience, are being taken from I.T.A No. 87/Agra/2015 & C.O. No.13/Agra/2018 A.Y. 2005-06).

3. The sole ground taken by the Department is as follows:

*“1. Whether on the facts and in the circumstances of the case, the Ld. CIT (Appeals) was justified in law and on facts in deleting the addition of Rs.10,78,27,200/- made by the Assessing Officer to the income of the assessee on account of unaccounted production of Gutka Pouches.*

4. The following cross-objection has been raised by the assessee.

*“1. Because, additions as made in assessment were not based on any incriminating material, found as a result of search. Thus, the additions made under section 153A of the Act were beyond jurisdiction, illegal and bad in law.”*

5. Heard. The issue involved in the cross objections is that where the addition made is not based on any incriminating material found during search, such addition made u/s 153C of the IT Act is not legally sustainable. This being a legal issue going to the root of the matter, it is being decided first.

6. The matter is squarely covered in favour of the assessee by ‘CIT vs. Kabul Chawla’, 380 ITR 573 (Del), as followed by us in our order dated 11.09.2017, passed in ITA Nos. 159 & 160/Agra/2012, in ‘Shri Mahendra Kumar Jain vs. ACIT’, (copy at APB 1-9). Our observations are as follows:

*“6. We have heard both the parties and have perused the relevant material on record. In “Meeta Gutgutia” (supra), the main contention of the Department before the Hon’ble High Court was that the decision of the Division Bench of the High Court in “Commissioner of Income Tax (Central-III) v. Kabul Chawla”, 380 ITR 573 (Del) as regards the assumption of jurisdiction under Section 153A of the Act require reconsideration, particularly in the light of a later decision of the coordinate Bench of the High Court in “Smt. Dayawanti Gupta v. CIT”, 390 ITR 496 (Del). The Revenue's submission was that the invocation of Section 153A of the Act to re-open concluded assessments of the AYs. earlier to the year of search is justified even in the absence of incriminating material found during the search qua each such earlier AY.*

7. *The facts in “Meeta Gutgutia” (supra) were that a search and seizure operation under Section 132 of the Income Tax Act, 1961 was conducted on 23rd December, 2005. A number of documents were seized apart from cash, jewellery and valuables. The ld. CIT(A) had accepted the assessee’s contention that there was no incriminating material found in the search, for any of the earlier assessment years, i.e., AYs. 2000-01 to 2003-04 preceding the year of search, i.e., AY 2004-05. The Tribunal followed, inter alia, “Kabul Chawla” (supra) and held that assumption of jurisdiction under Section 153A of the Act for AYs. 2000-01 to 2003-04 was bad in law. The relevant question of law before the Hon’ble High Court, as raised by the Department, was regarding the validity of the invocation of section 153A of the Act by the Revenue, as regarding AYs. 2000-01 to 2003-04.*

8. *The Hon’ble High Court refused to agree with the Department’s contention that the invocation of Section 153A of the Act to re-open concluded assessments of the AYs earlier to the year of search is justified even in the absence of incriminating material found during the search qua each such earlier AY. The decision in “Kabul Chawla” (supra), was reiterated, holding that the ITAT was justified in holding that the invocation of section 153A by the Revenue for the AYs 2000-01 to 2003-04 was without any legal basis, as there was no incriminating material qua each of those AYs. The question framed (supra) was answered in the negative, i.e., in favour of*

*the assessee and against the Revenue. It was held that in the facts and circumstances, the Revenue was not justified in invoking section 153A of the Act against the assessee in relation to AYs 2000-01 to AYs 2003-04.*

9. *In the present case, there is no dispute about the fact that no incriminating material / evidence was found in the search qua the year under consideration.*

10. *The assessee is a resident of Gwalior in M.P. The impugned order was passed by the ld. CIT(A), Gwalior. Therefore, neither “Meeta Gutgutia” (supra), by the Hon’ble Delhi High Court, nor “Kesarwani” (supra) by the Hon’ble Allahabad High Court, is by the Jurisdictional High Court qua the assessee. Now, it is well settled that where on an issue there are divergent opinions of different High Courts, which are non-jurisdictional High Courts so far as regards the assessee, the view in favour of the assessee needs to be followed.*

11. *Hence, following “Meeta Gutgutia” (supra), we hold that the assessee is correct in contending, by way of the additional ground raised, that in the assessment completed u/s 153A of the Act, no addition can be made, which is not related to documents seized during the search. Accordingly, there admittedly being no incriminating material/documents relating to the year under consideration seized during the search, the addition of Rs.61,404/- made for the year under consideration is deleted. The additional ground is*

*accepted, leaving nothing further surviving for adjudication.”*

7. The Id. DR has contended that as held by the AO as well as the CIT(A), in the cases at hand, incriminating material had been found, whereas it is the contention of the assessee that this has reference to machinery, which is part of the balance sheet of the assessee. The Department has placed reliance on the statement of Gulzari Lal Gupta, director of the assessee. This statement is placed in the assessee's supplementary paper book, at pages 213-214 (English Translation of the Hindi original, which is at pages 210-212). In this statement, Shri Gupta stated, inter alia, that in their company, Pooja Gutkafit and Hira Gutka were manufactured with the use of machines; that in the factory as on the date of the statement, seven machines were working and three machines stood sealed by the Excise Department; that in the factory, the work was done in two shifts; that in one hour, nine thousands pouches were manufactured and that in a day, 1,53,000 pouches were made by one machine; that there were sixteen machines in the factory, out of which six machines stood sold, as condemned, in September 2010; and that one machine worked till July and two machines stood sealed.

8. In this regard, it is seen that the appeals presently under consideration are for A.Ys. 2005-06 to 2008-09. The statement of Gulzari Lal Gupta is dated 07.10.2010. He, as rightly contended, has nowhere stated that the assessee was

producing the goods out of books. As per Form No.32 filed with the Registrar of Companies, copy whereof has been placed on record, Shri Gupta was appointed Director of the assessee company on 09.05.2009, i.e., in A.Y. 2010-11. Therefore, he was not a Director for the period under consideration.

9. The Department has also placed reliance on APB 235, which is a copy of application dated 21.08.2010 filed by the assessee before the Assistant Commissioner, Custom and Central Excise, for grant of permission to dispose of six pouch packaging machines after extracting usable parts there-from. This application, as is self-evident there-from, does not pertain to the years under consideration and as such, has no relevance to the present controversy.

10. Further, the production, as to whether it concerned three or ten machines was worked out by the AO (AO, page 2, para 4.3), on the basis of Excise Notification dated 01.07.2008. Again, this Notification does not pertain to the years before us. It was applicable for A.Y. 2009-10.

11. The Department has also sought to place reliance on 'JRD Stock Brokers (P) Ltd. vs. CIT', order dated 04.03.2015 passed by the Hon'ble Delhi High Court in ITA 134/2014, in C.M.-Appl. 5666/2014. In that case, the Hon'ble High Court was dealing with the question as to whether penalty u/s 158BFA(2) of the IT Act could be levied in respect of income which was not undisclosed income, but was determined on the basis of estimation on the application of weight formula of gross credit in various bank statements, considered as turnover. The Hon'ble High Court

held that in the search proceedings u/s 132(4) of the Act, the assessee had admitted that the amount originally claimed entirely to have been derived from share business, also included sums forming part of the turnover on account of providing accommodation entries. The Hon'ble High Court held that this certainly formed the basis for material discovered during the course of search proceedings; and that having regard to this admission of the assessee, the AO was entitled to determine, considering the commission originally declared, whether that was in line with the new activity disclosed. It was held that the determination was based upon material discovered, i.e., the statement made by the assessee u/s 132(4) of the Act, which radically changed the character of the income originally declared.

12. Firstly, the facts of the present case are nowhere in pari materia with 'JRD Stock Brokers' (supra). Moreover, post 'JRD' (supra), in 'CIT vs. Harjeev Agarwal', 70 Taxmann.com 95 (Del), it has been held that statement recorded u/s 132(4) of the Act forms a basis for block assessment, only if such statement relates to any incriminating evidence of undisclosed income unearthed during search and seizure. No decision contrary to 'Harjeev Agarwal', (supra) has been cited.

13. In view of the above discussion, it is seen, as correctly contended, that the additions in the present cases are not based on any incriminating material found during the search. Therefore, respectfully following 'Kabul Chawla', (supra), the Cross-objections are accepted and the additions for all the four years are deleted.

**I.T.A No. 56/Agra/2015 A.Y. 2009-10**

14. This is assessee's appeal for A.Y. 2009-10, contending that the Id. CIT(A) has erred in confirming the additions of Rs.4 lacs on account of share application money received by the assessee. By way of additional grounds, the assessee has contended that this addition made u/s 153A of the IT Act, was not based on any incriminating material found as a result of search and that so, this addition is unsustainable in law.

15. It being a legal issue, not requiring any further material beyond that already on record for adjudication, the additional ground is admitted.

16. It has been pointed out that in para 3 of the assessment order, it has been observed by the AO as follows:

*“3. The assessee company is engaged in the business of manufacturing & selling of Gutkha. On going through the various Schedules attach and forming part of Balance Sheet as at 31<sup>st</sup> March 2009 (Schedule (A' of Share Capital) it reveals that a fresh share application money amounting to Rs.4,00,000/- has been introduced by the assessee company. The assessee vide questionnaire dated 27/11/2012 was asked to explain the identity, creditworthiness of the person and genuineness of the transactions as required u/s 68 of the Act.”*

17. Thus, it remains undisputed that the addition was not made on the basis of any incriminating material found during the search.

18. The matter, again, is covered in favour of the assessee of 'Kabul Chawla', (supra). Respectfully following the same, the addition is deleted.

**I.T.A No. 57/Agra/2015 A.Y. 2011-12**

19. This is assessee's appeal for A.Y. 2011-12, contending that the Id. CIT(A) has erred in confirming the addition of Rs.19,41,786/- on account of difference in stock value.

20. Excess stock amounting to Rs.19,41,786/- was found from the premises of the assessee. This was added u/s 69 of the IT Act. The search party, during the search, had prepared a stock inventory. A trading account as on 06.10.2010 was also prepared. Stock available with the assessee on the date of the search, i.e., 07.10.2010, was arrived at. The stock found was of Rs.58,55,915/-. The stock, as per the assessee's accounts, amounted to Rs.39,14,136/-. The addition represented the difference between the two.

21. The assessee contended before the Id. CIT(A) that as per the statement of Anil Kumar Gupta, Director of the assessee company, there were certain stocks which had been received, but their bills had not arrived. Thereafter, before filing the return, the assessee calculated the difference in such stocks as per its record and the short-fall between such stock and the stock found during search, i.e., the raw material, was of Rs.4,83,487/- and the short-fall in the case of finished goods was of Rs.44,130/-, due to which, a sum of Rs.5,27,617/- had been added by the

assessee as income declared at the time of search, in the return of income. This amount was included by the AO in the total income of the assessee.

22. The Id. CIT(A) opined that nothing had been given before the AO. The CIT(A) confirmed the addition of Rs.19,41,786/- representing excess stock found during the search. The assessee contends that since the assessee has itself declared the amount of Rs.5,27,617/- in its return of income, addition, if at all, could be confirmed only at Rs.14,14,169/-. It has also been contended that the chart prepared by the assessee and filed with the return of income cannot be left out of consideration. It has further been submitted that in the valuation of the finished goods, the rate applied by the search party seems to be the selling price, whereas the method of valuation of closing stock adopted by the assessee is at cost. It has been requested that as such, the amount of Rs.5,27,617/- be reduced from the income, since it has already been added and the AO be directed that as regards the remaining amount, verification be carried out by the AO apropos the discrepancies between the actual stock, as mentioned by the assessee.

23. The Id. DR has placed reliance on the impugned order.

24. The request of the assessee is justified. The amount of Rs.5,27,617/- was declared by the assessee in the return of income filed. This comprised of shortfall of Rs.4,83,487/- in raw material, representing the difference in the stock as per the record of the assessee and the stock found during the search, and of Rs.44,130/- in the case of finished goods. The assessee is entitled to the benefit of the amount of

Rs.5,27,617/-, as declared in the return of income filed, to be allowed against the stock. For the purpose, the matter is remitted to the file of the AO, subject to verification and co-relation, as above.

25. In the result, C.O. Nos. 10 to 13/Agra/2018, for A.Ys. 2005-06 to 2008-09, respectively, are allowed, whereas the corresponding ITA Nos. 84 to 87/Agra/2015, for A.Ys. 2005-06 to 2008-09, respectively, are dismissed. ITA No. 56/Agra/2015 for A.Y. 2009-10 is allowed. ITA No. 57/Agra/2015, for A.Y. 2011-12, is treated as allowed for statistical purposes.

**Order pronounced in the open court on 14/08/2018.**

**Sd/-  
(DR. MITHA LAL MEENA)  
ACCOUNTANT MEMBER**

**Sd/-  
(A.D. JAIN)  
JUDICIAL MEMBER**

\*AKV\*

Copy forwarded to:

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