

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
MUMBAI BENCH “G”, MUMBAI**

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER  
AND  
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA No.1457/M/2022  
Assessment Year: 2011-12**

Dy. Commissioner of Income Tax, Circle 4(2)(1), Room No.642, 6 <sup>th</sup> Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020  (Appellant)	Vs.	M/s. Gemini Engi Fab Ltd., 501, Palm Spring, Link Road, Malad (E), Mumbai – 400 064 <b>PAN: AAACG7948N</b>  (Respondent)
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**Present for:**

Assessee by : Shri Rutuja Pawar, A.R.  
Shri Hetal Laghve, A.R.

Revenue by : Shri Ashok Kumar Kardam, D.R.

Date of Hearing : 04 . 10 . 2022

Date of Pronouncement : 22 . 12 . 2022

**O R D E R**

**Per : Kuldip Singh, Judicial Member:**

The appellant, M/s. Gemini Engi Fab Ltd. (hereinafter referred to as ‘the assessee’) by filing the present appeal, sought to set aside the impugned order dated 21.02.2022 passed by Commissioner of Income Tax (Appeals), Mumbai [hereinafter referred to as the CIT(A)] qua the assessment year 2011-12 on the grounds inter-alia that :-

*“1. Whether on the facts and in the circumstances of the case and in law the Ld.CIT(A) was justified in deleting the addition of*

*Rs.2,94,24,503/- made on account of estimation of Net Profit without appreciating the fact that the assessee has failed to produce the books of accounts before the AO?*

*2. Whether on the facts and in the circumstances of the case and in the law, the Ld.CIT(A) was justified in deleting the addition of Rs.2,94,24,503/- made on account of estimation of Net profit without appreciating the fact that there was gross deviation in maintenance of books of accounts and the same was not justified by the assessee with any material evidences?"*

2. Briefly stated facts necessary for adjudication of the issues at hand are: the assessee being a public limited company is into the business of manufacturing and trading in engineering machines. On the basis of information received by the Assessing Officer (AO) from DCIT, Central Circle1-(2), Ahmedabad that during a search conducted in case of accommodation entry provider group, Ahmedabad on 04.12.2004 it was found that one Barter group has been indulging in market manipulation of shares and from the documents found it was also noticed that memorandum of understanding (MOU) was signed by the promoter director of the assessee company on its letter head with company seal dated 27.09.2019 which indicated that the assessee was to bring an IPO which was to be manipulated by the said group. A fee of Rs.10,00,00,000/- was payable to the group but the said IPO did not materialize and then one Rakesh Panchal promoter of the assessee company through its advocate issued a notice by returning the cash commission paid for the IPO etc. On the basis of aforesaid seized material and information proceedings under section 153C of the Act were initiated. The AO, after declining the contentions made by the assessee, made an addition of Rs.2,94,24,503/- on account of difference in the net profit disclosed during the year and earlier years by taking the average of the net profit of preceding

two years and the difference in the net profit was treated as income of the assessee and thereby framed the assessment under section 144 read with section 153C of the Act.

3. Assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has partly allowed the appeal. Feeling aggrieved the Revenue has come up before the Tribunal by way of filing present appeal.

4. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

5. We have perused the impugned order passed by the Ld. CIT(A) deleting the addition made by the AO on legal ground that where in case of completed/unabated assessment, no incriminating material is found during the course of search the assessment under section 153A/153C of the Act is to be made on originally assessed/returned income by returning following findings:

*"7.8 On perusal of the assessment order, it is evident that the learned AO has estimated the net profit of the appellant for the year under reference by comparing the same with the net profit of earlier years and making a suo motu analysis of the same. Thus, the finding of the learned AO is not supported by any evidence found during the course of the search. Accordingly, the matter was referred back to the learned AO vide letter dated 14/01/2022, which was served in his office on 18/01/2022, and the AO was asked to clarify whether there is any material found during the course of the search to support the addition made in the impugned assessment order. The remand report was called for by 31/01/2022. The AO did not respond to the same.*

7.9 *it is evident that there is no discussion in the assessment order about any specific incriminating material found during the course of search operation in relation to the impugned addition on account of estimating the net profit of the appellant: neither any such evidence was brought on record during the course of remand proceedings. It is, therefore, a material fact on record that the AO has failed to bring on record any incriminating material either during the course of the assessment proceedings or the remand proceedings to support the addition for the year under reference.*

7.10 *The Hon'ble Bombay High Court in the case of CIT vs. Continental Warehousing Corporation [374 ITR 645], has held that when the assessment has attained finality, then the AO while passing the independent assessment order u/s 1534 of the Act can't disturb the assessment / reassessment order which has attained finality, unless the materials gathered in the course of the proceedings u/s 132 of the Act establish that the reliefs granted under the finalized assessment/reassessment were contrary to the facts unearthed during the course of search operation. Further, upon perusal of SLP No. 18560 of 2015 dated 12/10/2015 admitted by Hon'ble Supreme Court against the decision of Hon'ble Bombay High Court rendered in CIT Vs. Continental Warehousing Corporation (supra), it is found that Hon'ble Apex Court has only admitted SLP against the ruling of the Hon'ble Bombay High Court's finding. However, it is seen that the Hon'ble Apex Court has not stayed or suspended the operation of the decision of the Hon'ble Bombay High Court in any manner and, therefore, at the moment, the decision of jurisdictional High Court is binding.*

7.11 *Furthermore, a similar view has been taken by the Hon'ble Bombay High Court (Nagpur Bench) in case of Murli Agro Products Ltd Vs. CIT 49 Taxman.com 172 in ITA No 36 of 2009, wherein it has been held that on initiation of proceedings U/s. 153A, it is only the assessment proceedings that are pending on the date of conducting search U/s. 132 or making requisition U/s, 132A of the Act that stand abated and not the assessments already finalized. This view was upheld in another decision of the Hon'ble Bombay High Court in CIT v. Gurinder Singh Bawa [2016] 386 ITR 483/[2017] 79 taxmann.com 398.*

7.12 *The aforesaid findings are fortified by the decision of the Hon'ble Delhi High Court in CIT Central-III vs. Kabul Chawla, 380 ITR 573 (Del). The Hon'ble Delhi Court in the case of Pr. CIT vs. Meeta Gutgutia [2017-TIOL-1000-HC-DEL-IT] has affirmed the view that no addition can be made for a particular assessment year without there being an incriminating material that relates to the said assessment year which would justify such an addition. The Hon'ble Supreme Court in the case of Principal Commissioner of Income-tax, Central IT, New Delhi Vs. Meeta Gutgutia [2018] 96 taxmann.com 468 (SC) has dismissed the*

*SLP in the case and thus upheld the decision of Hon'ble Delhi High Court that invocation of section 153A to re-open concluded assessments of assessment years earlier to year of search was not justified in absence of incriminating material found during search qua each such earlier assessment year. As noted by the Hon'ble Delhi High Court in the case of Meeta Gutgutia (supra), several other High Courts have also come to a similar conclusion either by following Kabul Chawla (supra) or otherwise. This includes the decisions of the Hon'ble Gujarat High Court in Pr. CIT v. Soumya Construction (P) Ltd. [2016] 387 ITR 529/[2017] 81 taxmann.com 292 (Guj.); Pr. CIT v. Devangi alias Rupa [Tax Appeal Nos. 54, 55 to 57 of 2017, dated 2-2-2017] the Hon'ble Karnataka High Court in CIT v. IBC Knowledge Park (P) Ltd [2016] 385 ITR 346/69 taxmann.com 108 (Kar.); the Hon'ble Kolkata High Court in Pr. CIT v. Salasar Stock Broking Ltd. [GA No. 1929 of 2016, dated 24-8-2016]. In Meeta Gutgutia (supra) the entire gamut of the case law had been analysed and the legal position was reiterated that unless there is incriminating material qua each of the AYS in which additions are sought to be made, pursuant to search and seizure operation, the assumption of jurisdiction under Section 153A of the Act would be vitiated in law.*

*7.13 The Hon'ble Delhi High Court in a recent decision in the case of PCIT, Central-3 vs Allied Perfumers (P.) Ltd. [2021] 124 taxmann.com 358 (Delhi) has reiterated the aforesaid position of law with following findings:*

*"12. We have duly considered the contentions advance by Mr. Maratha, however, are unable to agree with him. The ITAT, after perusing the relevant records, including the orders passed by the Revenue Authorities, observed is follows:*

*10. We find that the additions made by the AO are beyond the scope of section 153C of the Income-tax Act, 1961, because no incriminating material or evidence had been found during the course of search so as to doubt the transactions. It was noted that in the entire assessment order, the AO has not referred to any seized material or other material for the year under consideration having being found during the course of search in the case of assessee, leave alone the question of any incriminating material for the year under appeal. We also find that the case laws cited by the Ld. CIT(DR) are not relevant to the present case. Therefore, in our considered opinion, the action of the AO is based upon conjectures and surmises and hence, the additions made is not sustainable in the eyes of law, because this issue in dispute is now no more res-integra, in view of*

*the decision dated 29-8-2017 of the Hon'ble Supreme Court of India in the case of Commissioner of Income Tax- III, Pune v. Sinhgad Technical Educational Society reported in (2017) 84 taxmann.com 290 (SC) as well as the decisions of the Hon'ble Delhi High Court passed in the case Commissioner of Income-tax v. Kabul Chawla reported (2016) 380 ITR 573 (Del.) and in the case of Principal Commissioner of Income-tax (Central) -2 v. Index Securities (P) Ltd.*

*11. Respectfully following the precedents as aforesaid, as aforesaid, we quash the assessment made u/s 153(C)/143(3) of the IT. Act, 1961 and decide the legal issue in favour of the Assessee and accordingly, allow the Cross Objection filed by the assessee.*

*12. Following the consistent view taken in the assessment year 2001-02 in the Assessee's Cross objection, as aforesaid, the another Cross objection filed by the Assessee relating to assessment years 2002-03 also stand allowed."  
(Emphasis Supplied)*

*13. Upon reading of the aforesaid extracted portion of the impugned order, it is clearly discernible that the ITAT has given a finding of fact that the assessments make no reference to the seized material or any other material for the years under consideration that was found during the course of search, in the case of the assessee. Mr. Maratha is also unable to point out any incriminating material related to the assessee which could justify the action of the Revenue. Merely because a satisfaction note has been recorded, cannot lead us to reach to this conclusion especially when the Revenue has not laid any foundation to support their contention in the factual background as explained above the assumption of jurisdiction under section 153C cannot be sustained in view of the decision of this Court in the case of Kabul Chawla (supra)."*

*7.14 In view of the aforesaid detailed discussion and respectfully following the judicial precedents, I am of the view that the AO does not have jurisdiction to make additions/disallowances which are not based on any incriminating material found during the course of search. To conclude, in the case of completed/un-abetted assessments where no incriminating material is found during the course of search, the assessment u/s 153A/153C of the Act is to be made on originally assessed/ returned income and no addition or disallowance can be*

*made de hors the incriminating evidences recovered during the course of search.*

*7.15 In this case, since the addition of Rs.2,94,24,503/- made by estimating the net profit is not based on any incriminating material found during the course of Search conducted u/s 132 of the Act, the same is directed to be deleted. The Ground is accordingly ALLOWED.*

*7.16. As to ground no 3. it is evident that originally return of income was filed by the appellant on 27.09.2011 declaring total income of Rs 12,65.190 which was processed u/s 143(1) of the Act and subsequent to issue of notice u/s 153C the assessee requested to treat the said return of income as return of income filed in compliance to the same. have gone through the submissions of the assessee and I am of the considered view that the assessee could not have been treated as a non-filer in the given facts of the case. Ground No. 3 is accordingly Allowed.”*

6. When undisputedly assessment qua the year under consideration was completed/unabated and no incriminating material was found during the course of search in case of group very initiation of reassessment under section 153C of the Act is not sustainable in the eyes of law as has been held by Hon’ble Delhi High Court in case of Kabul Chawla 380 ITR 573 (Del) and Pr. CIT vs. Meeta Gutgutia (2017-TIOL-1000-HC-DEL-IT) and that no addition can be made for the particular assessment year without there being an incriminating material relating to the assessment year under consideration.

7. Hon’ble Bombay High Court in case of CIT vs. Continental Warehousing Corporation (374 ITR 645) also decided the identical issue that when assessment has attained finality as in the present case, the AO while passing independent assessment order under section 153 of the Act cannot disturb the assessment/reassessment order already made unless some incriminating material pertaining to the year under consideration has come on record.

8. The Ld. CIT(A) has decided the issue after thrashing the facts in the light of law settled by Hon'ble Bombay High Court and Hon'ble Delhi High Court in case of Kabul Chawla (supra) and Continental Warehousing Corporation (supra) referred to in the preceding paras.

9. Issue at hand is already decided by the co-ordinate Bench of the Tribunal in case of assessee for A.Y. 2011-12 in ITA No.481/M/2022 vide order dated 05.09.2022 wherein addition deleted by the Ld. CIT(A) in the absence of incriminating material during the search proceedings has been upheld by the Tribunal.

10. In view of what has been discussed above, we find no illegality or perversity in the impugned findings returned by the Ld. CIT(A).

11. Resultantly, appeal filed by the Revenue is hereby dismissed.

**Order pronounced in the open court on 22.12.2022.**

**Sd/-**  
**(AMARJIT SINGH)**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**(KULDIP SINGH)**  
**JUDICIAL MEMBER**

Mumbai, Dated: 22.12.2022.

\* Kishore, Sr. P.S.

Copy to: The Appellant  
The Respondent  
The CIT, Concerned, Mumbai  
The CIT (A) Concerned, Mumbai  
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.