IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G" MUMBAI

BEFORE SHRI KULDIP SINGH (JUDICIAL MEMBER)
AND
SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)

ITA Nos. 3033 to 3038/MUM/2022
Assessment Years: 2014-15 to 2019-2020

Asstt. CIT Central Circle-2(1), Old CGO Building, 804, 8th floor, M.K. Road, Mumbai-400020.	***Vs.***	M/s GM Modular Pvt. Ltd., 8/9 Bokadia Industrial Estate Waliv, Sativali Road, Vasai East Vasai Palghar-401 208. **PAN No. AABCG 3313 Q**
Appellant		**Respondent**

ITA No. 3211/MUM/2022
Assessment Year: 2014-15

Asstt. CIT Central Circle-2(1), Old CGO Building, 804, 8th floor, M.K. Road, Mumbai-400020.	***Vs.***	M/s G Trade and Capital Venture Pvt. Ltd., 6 G Laxmi Industrial Estate, New Linking Road, Andheri (West) Mumbai-400053. **PAN No. AADCG 7583 Q**
Appellant		**Respondent**

Revenue by	**:**	Dr. Kishor Dhule, CIT-DR
Assessee by	**:**	Mr. Naresh Jain a/w Mr. Mahaveer Jain
Date of Hearing	**:**	12/04/2023
Date of pronouncement	**:**	31/05/2023

ORDER

PER BENCH

The captioned appeals by the Revenue are directed against respective orders passed by the Ld. Commissioner of Income-tax (Appeals)-48, Mumbai [in short 'the Ld. CIT(A)'] for assessment year 2014-15 to 2019-2020 in the case of assessee namely 'GM Modular Pvt. Ltd'. and assessment year 2014-15 in the case of the assessee namely 'G Trade and Capital Venture Pvt. Ltd'. In all these appeals identical issues permeating from same set of facts and circumstances are involved and therefore, these appeals were heard together and disposed off by way of this consolidated order for convenience and avoid repetition of facts. First of all, we take up the appeals of the assessee GM Modular Pvt. Ltd. for assessment year 2014-15 to 2019-2020.

2. Briefly stated, facts of the case are that the assessee was engaged in business of manufacturing of electrical switches and accessories. A search action u/s 132 of the Income-tax Act,1961 (in short 'the Act') was carried out in the case of the assessee along with residences of the Director and other group concern on 13/11/2019. Consequently, notices u/s 153A of the Act were issued for the assessment years relevant to the search period and those were completed by the Assessing Officer assessments u/s 153A of the Act after making various additions inter alia(i) a*ddition on account of undisclosed business income by applying Gross profit ratio on*

unaccounted turnover ;(ii) Addition on account of accommodation entry of unsecured loan u/s 68 of IT. Act ;(iii) Addition on account of unexplained expenditure u/S. 69C of the I.T. Act- ;(iv) Interest on accommodation entry of unsecured loan ;(v) Commission for arranging accommodation entry of unsecured loan ; (vi) Addition on account of disallowance of unverified labour services ;(vii) Addition on account of personal expenditure of etc.

3. We find that in view of the decision of the Hon'ble Bombay High Court in the case of **continental warehousing Corporation 374 ITR 645 (Bom),** in case of unabated assessments i.e. assessment completed before the date of the search, no addition could have been made without the aid of the incriminating material found during the course of the search. Therefore, the appeals filed by the assessee in the case of assessee namely 'G M Modular P Ltd' can be divided in two sets of appeals. The first set of appeals, where assessment was already completed before the date of search and therefore in those appeals, the assessments completed u/s 153A are in respect of unabated assessment. In respect of assessment year 2014-15 to 2017-18, no assessments were pending as of the date of the search i.e.13/11/2019, so those are undisputedly unabated assessment years. In respect of assessment year 2018-19, notice u/s 143(2) of the Act could have been issued up to 30.09.2019 for selection of the case under scrutiny but as per the records no such notice was issued prior to the date of search and therefore, the assessment for AY 2018-19 also falls in the category of the unabated assessments or completed assessments. Therefore,

in the case, assessment years before us, from AY 2014-15 to 2018-19 are unabated assessments.

3.1 The second set of appeals are in respect of which the assessment was not completed as on the date of search, and thus same got abated. In the case of the assessee search was conducted on 13/11/2019, so relevant assessment year 2020-21, is the year of the search and regular return of income was due for filing subsequent to the date of the search, therefore, the assessment year 2020-21 is in category of the abated assessment. Similarly, regular return of income for assessment year 2019-20 i.e. for the previous year from 01.04.2018 to 31.03.2019 was due on 30.11.2019 and notice u/s 143(2) of the Act could have been issued for assessment year 2019-2020 up to 30.09.2020 and therefore, the assessment year 2019-2020 also falls in the category of the abated assessment.The Ld CIT(A), however in para 3.1 of his order for AY 2019-20 has wrongly mentioned that assessment under section 143(3) was completed for assessment year 2019-20. The fact of non-issue of notice under section 143(2) of the Act for the AY 2019-20 has been verified from the information available on the database of the Income tax department, which wassubmitted by the learned departmental representative (DR).

3.2 In first set of appeals i.e. for AY 2014-15 to AY 2018-19, the assessee filed appeals before the ld CIT(A) against the assessment order passed u/s 153A of the Act and challenged validity of

reassessment u/s 153A of the Act on the ground that no incriminating material was found during the course of search. The Ld. CIT(A) accordingly deleted the additions made by the Assessing Officer except for the assessment year 2015-16 wherein, the assessee also declared/offered undisclosed income in respect of transactions as reflected in Annexure A-2 to A-4 found from the residence of one of the directors, which were not recorded in regular books of accounts.

4. Before us, the Revenue has challenged the relief granted to the assessee by the Ld. CIT(A) for AY 2014-15 to AY 2018-19 holding that no incriminating material was found during the course of search qua the additions deleted.

4.1 Before us, the assessee has also challenged the validity of the reassessment passed u/s 153A of the Act, utilizing material found during the course of the search at third party i.e. Director of the assessee company, by way of an application under Rule 27 of the ITAT Rules, 1963(in short the 'Rules') for AY 2014-15 to AY 2019-20.As the applications filed under Rule 27, challenges the jurisdiction of the Assessing officer, admissibility of same is taken up first for adjudication.

Application under Rule 27 of the ITAT Rules

5. Before us, the Ld. Counsel of the assessee has filed an application under Rule 27 of ITAT Rules and submitted that in the

case, the addition for suppression of sales i.e. undisclosed business income applying gross profit rate on unaccounted turnover,has been made on the basis of certain diaries (Annexure A-2, A-3 and A-4), which were found and seized from the premises of 'Shri Kumarpal Banda' and not from the premises of the assessee-company, therefore, addition based on those diaries, could be made in the hands of the assessee only by way of invoking the provisions of u/s 153C of the Act and not u/s 153A of the Act. He placed reliance on the decision of the Delhi Tribunal in the case of **Mr. Trilok Chand Chaudhary v. ACIT [ITA No. 5870/Del/2017]**. The specific grounds raised under Rule 27 of the application are reproduced as under for ready reference:

> *i. The assessee submits that a search was conducted on Mr. Kumarpal Banda on 13.11.2019. During the course of search, certain diaries (Annexure A-2, A-3 and A-4) was found and seized which pertain to AY 2015-16. The copy of the panchanama is enclosed as Annexure-1*
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> *ii. Thereafter, based on the document found from Mr. Kumarpal Banda pertaining to AY 2015-16, the Ld. AO has made an addition of Rs. 41,83,30,486/- by applying GP rate on alleged unaccounted sale. The Ld. AO has passed the order dated 12.08.2021 u/s 153A of the Act.*
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> *iii. The assessee submits that the aforesaid addition is made based on the material found during the course of search in the case of third party i.e. Mr. Kumarpal Banda. Therefore, the addition, if any, should be made by invoking the procedure u/s 153C of the Act and not u/s 153A of the Act. Thus, the addition made by the Ld. AO in the order u/s 153A of the Act is bad-in-law and liable to be deleted. Reliance can be placed on the decision of the Hon'ble Delhi Tribunal in*

the case of Mr. Trilok Chand Chaudhary Versus ACIT [ITA No.5870/Del/2017].

5.1 The Ld. Counsel submitted that aforesaid ground being a jurisdictional ground and goes to the root of the matter, same can be raised at any point of time, including in application under rule 27 of the ITAT Rules and in support of above proposition, he relied on the decision of the Hon'ble Jurisdictional Bombay High Court in the case of **Mr. Peter Vaz and Mr. Edgar Braz Afonso v. ACIT (2021 (4) TMI 605).**

5.2 We have heard rival submission of the parties on the issue of admissibility of application under Rule 27 of the ITAT Rules. We may note that against the order of the Ld. First Appellate Authority, only Revenue has preferred these appeals and assessee has not preferred any appeals or cross-objections. The assessee has filed only application under Rule 27 of the ITAT Rules. Regarding the admissibility of the application of the assessee, it is relevant to reproduce said Rule as under:

> *"The respondent, though he may not have appealed, may support the order appealed* ***against on any of the grounds decided against him.****"*
>
> *(emphasis supplied externally)*

5.3 Before us, the Ld. Departmental Representative (DR) referred to Rule 27 and submitted that said rule can be invoked by the respondent assessee in respect of any of the grounds decided against the assessee and not on the issues which are not decided by

the CIT(A). For raising the issues which are not decided, the option before the respondent assessee was to file either appeal or cross objection, which in the case has not been filed, therefore, the assessee is not authorised in law for raising the issue of jurisdiction of the AO under Rule 27 of ITAT Rules. He referred to the decision of the Hon'ble Bombay High Court in the case of **B.R. Bamasi v. CIT 83 ITR 223 (Bombay)**. The Hon'ble Bombay High Court in the said case has held that *assessee could use the argument only to sustain the order of the ld. first appellate authority, but not to get for the relief and have the assessment itself annulled and thus adversely affect the appellant and place it in a position worse than if it had not appealed at all.* According to the Hon'ble Bombay High Court,further held that *if the respondent has not himself taken any proceeding to challenge order in appeal, the Tribunal cannot set aside the order appealed against invoking rule 27 of the ITAT rules*. The relevant finding of the Hon'ble Bombay High Court is reproduced as under:

> *"39. Now there is no doubt that, as the assessee had already filed a voluntary return, the notice under section 34(1)(a) was wrongly issued and the proceedings of assessment which took place in pursuance of that notice are invalid. This is the ratio laid down by the Supreme Court in its said judgment in the case of Commissioner of Income-tax v. Ranchhoddas Karsondas. Mr. Joshi has not disputed this position. The only question is whether the Tribunal was entitled in law to refuse to allow the assessee to urge that ground in the appeal before it. Now a Division Bench of this High Court in Commissioner of Income-tax v. Hazarimal Nagji & Co., after considering the relevant sections of the Income-tax Act and the relevant*

Rules made thereunder, held that the powers of the Appellate Tribunal are similar to the powers of an appellate court under the Civil Procedure Code. It has further held that the respondent in an appeal is undoubtedly entitled to support the decree which is in his favour on any grounds which are available to him, even though the decision of the lower court in his favour may not have been based on those grounds. It has further held that if the appellant in his challenge to the decree of the lower court is entitled to take a new ground not agitated in the court below by leave of the court, there appears to be no reason why a respondent in support of the decree in his favour passed by the lower court should not be entitled to agitated a new ground and subject to the same limitation. A Division Bench of the Allahabad High Court has taken a similar view in Kanpur Industrial Works v. Commissioner of Income-tax. That judgment has considered the position of an appeal under section 33 of the Income-tax Act along with the relevant Rules and that of an appeal under the Code of Civil Procedure and the provisions of Order XLI, rule 22. The judgment holds that when the department files an appeal for an increase in the assessed income, the subject-matter of the appeal is the increase claimed by the department and the assessee can urge any ground of defence even though it might have been rejected by the Appellate Assistant Commissioner for showing that there should be no increase. It has further held that that the assessee is not liable to be assessed at all is a ground for showing that there should be no further assessment and the department's appeal can therefore be resisted on that ground and that there is no incongruity in maintaining the assessment order passed against the assessee and yet refusing to increase it on the ground that he was not liable to be assessed at all. ***The judgment points out however that if the Tribunal accepts the ground of defence that the assessee was not liable to be assessed, it can only refuse to increase the assessed income as only such an order would be within the scope of the appeal filed by the department and any other order such as annulling the assessment would be outside the scope of the appeal****. That judgment holds that the position of an appeal under section 33 of the Income-tax Act and an appeal under the Code of Civil Procedure is identical. A Full Bench of the Madras High Court has in Venkata Rao v. Satyanarayanamurthy, held that it was open to a respondent*

in appeal who had not filed cross objection with regard to the portion of the decree which had gone against him to urge in opposition to the appeal of the plaintiff a contention which it accepted by the trial court would have necessitated the total dismissal of the suit, but the decree in so far as it was against him would stand. The judgment of the Tribunal in our case clearly shows that, although the assessee wanted to raise a new point as a ground of defence in the appeal, he specifically stated that he wanted to rely upon it only for the purpose of having the appeal by the department for enhancement in income-tax dismissed. But even if the assessee had not made such a statement, the above judgment shows that the assessee would be entitled to raise a new ground, provided it is a ground of law and does not necessitate any other evidence to be recorded, the nature of which would not only be a defence to the appeal itself, but may also affect the validity of the entire assessment proceedings. If the ground succeeds, the only result would be that the appeal would fail. The acceptance of the ground would show that the entire assessment proceedings were invalid, but yet the Tribunal which hears that appeal would have no power to disturb or to set aside the order in favour of the appellant against which the appeal has been filed. The ground would serve only as a weapon of defence against the appeal. ***If the respondent has not himself taken any proceedings to challenge the order in appeal, the Tribunal cannot set aside the order appealed against. That order would stand and would have full effect in so far as it is against the respondent.*** *The Tribunal refused to allow the assessee to take up allowed to be urged and succeeded, the Tribunal would have not only to dismiss the appeal, but also to set aside the entire assessment. The point would have served as a weapon of defence against the appeal, but it could not be made into a weapon of attack against the order in so far as it was against the assessee."*

5.4 The Ld. DR also referred to the decision of the ITAT, Ahmedabad in the case of **DCIT v. Sandip M Patel ITA Nos. 866 to 871 and 1016 and 1339 (Ahd.) of 2008** to support that the Rule 27 sanction defendant only to support order of the Ld. CIT(A)

and not permitting to attack the judgment of the LD CIT(A). The Ld. DR submitted that respondent may support the verdict of the First Appellate Authority and side by side can argue against any of the ground held against him, but noton any of the ground which has not been adjudicated by the Ld. CIT(A). The relevant finding of the Tribunal(supra) is reproduced as under:

> *"3.5 From the above reproduction few important points of law emerges, to be highlighted so as to resolve the controversy. (1) An appeal lies from operative part of the judgment and not from the reasons in support of it.Naturally certain findings ought to have been given, whether on facts or on law, on which the operative part of the judgment is based, but those ought not to be the ground of an appeal. (2) A successful party, i.e. presently the respondent- assessee, cannot appeal merely in respect of a finding given adversely to get corrected, as notwithstanding the said adverse finding, the operative judgment is in his favour. He is not aggrieved by the outcome of the judgment. (3) An appeal lies by an aggrieved litigant, if not aggrieved no appeal. There is no gain by appealing against an adverse finding. That could be a cause of grumble but not a cause of grievance. An appeal is a redress or recompense or restitution of a substantial grievance for an aggrieved party arising from the result of a judgment. (4) A cross-objection is a substitute for an appeal. It is not permissible simply to file a cross-objection against the rejection of any argument or point of attack. (5) When one line of defence is accepted but the other rejected, the defendant/respondent in an appeal, filed by the aggrieved party against the judgment, has a right to defend that part of the finding which was adversely expressed, though not appealed against by him.Rule 27 covers this situation only. The defendant has a right to urge under Rule 27 that a particular finding was wrongly given and if that adverse finding is upheld than the favourable result of the appeal may get over-turned,(6) That a cross-objector has a legal right to support an order of the first appellate authority but no right is enshrined under Rule 27 to attack that judgment. (7) That*

Rule 27 sanctions a defendant only to "support" the order of CIT(A) and not permitted to "attack" the judgment. (8) That by the very language of Rule 27 a respondent can support the verdict of the first appellate authority and side by side can argue against any of the grounds held against him. This shows that the grounds against the respondent is within the circumference of the favourable judgment. Such finding or the grounds thus are linked to the final verdict of the issue decided and has a direct link with the final view taken. The ground is not independent of the issue decided, because whilearriving to the conclusion, in between the process of drafting of an order, there is a possibility of taking an adverse view by rejecting any of the argument or the grounds of defence taken. (9) Lastly, how a respondent can support "any of the grounds decided against him as worded in Rule 27?. But the Hon'ble Courts have removed this confusion by explicitly mentioning that the judgment being favourable but could have an adverse finding or reasoning and that ground though against the respondent can be defended in Rule 27, nevertheless by supporting the final verdict. The interpretation of the word "grounds" is in wider sense because the same is not at par with the "ground" of appeal.

3.6 On this issue, there is one more decision pronounced by the Hon'ble Bombay High Court in the case of B.R.Bamasi (supra), wherein the assessee wanted to raise a new point as a ground of defence in the appeal but stopped to raise due to the reason that such new point may affect the validity of the entire assessment proceedings. The Court has said that the point would have served as a weapon of defence against the appeal, but it could not be made a weapon of attack against the order insofar as it was against the assessee. Relevant portion of this judgment is reproduced below:-

"It has further held that the respondent in an appeal is undoubtedly entitled to support the decree which is in his favour on any grounds which are available to him, even though the decision of the lower Court in his favour may not have been based on those grounds. It has further held that if the appellant in his challenge to the decree of the lower Court is entitled to take a new ground not agitated in the Court below by leave of the Court, there appears to be no reason why a respondent in support of the decree in his favour

passed by the lower Court should not be entitled to agitate a new ground and subject to the same limitation. A Division Bench of the Allahabad High Court has taken a similar view in Kanpur Industrial Works v. CIT [1966] 59 ITR 407 (All). That judgment has considered the position of an appeal under s. 33 of the IT Act along with the relevant Rules and that of an appeal under the CPC and the provisions of O. XLI, r. 22. The judgment holds that when the Department files an appeal for an increase in the assessed income, the subject-matter of the appeal is the increase claimed by the Department and the assessee can urge any ground of defence even though it might have been rejected by the AAC for showing that there should be no increase. It has further held that that the assessee is not liable to be assessed at all is a ground for showing that there should be no further assessment and the Department's appeal can therefore be resisted on that ground and that there is no incongruity in maintaining the assessment order passed against the assessee and yet refusing to increase it on the ground that he was not liable to be assessed at all. The judgment points out however that if the Tribunal accepts the ground of defence that the assessee was not liable to be assessed, it can only refuse to increase the assessed income as only such an order would be within the scope of the appeal filed by the Department and any other order such as annulling the assessment would be outside the scope of the appeal. That judgment holds that the position of an appeal under s. 33 of the IT Act and an appeal under the CPC is identical. A Full Bench of the Madras High Court has in Venkala Rao v.Satvanaravanamurthy ILR 1944 Mad 147 : AIR 1943 Mad. 698 (FB) held that it was open to a respondent in appeal who had not filed cross-objection with regard to the portion of the decree which had gone against him to urge in opposition to the appeal of the plaintiff a contention which if accepted by the trial Court would have necessitated the total dismissal of the suit, but the decree insofar as it was against him would stand. The judgment of the Tribunal in our case clearly shows that, although the assessee wanted to raise a new point as a ground of defence in the appeal, he specifically stated that he wanted to rely upon it only for the purpose of having the appeal by the Department for enhancement in income-tax dismissed. But even if the assessee had not made such a statement, the above judgment shows that the assessee would be entitled to raise a new ground, provided it is a

ground of law and does not necessitate any other evidence to be recorded the nature of which would not only be a defence to the appeal itself but may also affect the validity of the entire assessment proceedings. If the ground succeeds, the only result would be that the appeal would fail. The acceptance of the ground would show that the entire assessment proceedings were invalid, but yet the Tribunal which hears that appeal would have no power to disturb or to set aside the order in favour of the appellant against which theappeal has been filed. The ground would serve only as a weapon of defence against the appeal. If the respondent has not himself taken any proceedings to challenge the order in appeal, the Tribunal cannot set aside the order appealed against. That order would stand and would have full effect insofar as it is against the respondent. The Tribunal refused to allow the assessee to take up this ground under an incorrect impression of law that if the point was allowed to be urged and succeeded, the Tribunal would have not only to dismiss the appeal, but also to set aside the entire assessment. The point would have served as a weapon of defence against the appeal, but it could not be made into a weapon of attack against the order insofar as it was against the assessee."

3.7 An another legal proposition has been raised that the Tribunal passes an order u/s. 254(1) of IT Act and empowered to "pass such orders thereon as it thinks fit. Section is reproduced below:-

Sec.254 (1) The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.

The word "thereon" restricts the jurisdiction of the Tribunal to the subject matter of appeal. If this word

"thereon" is to be read in conjunction with Rule 27, then the respondent is to support the order appealed against but required to confine to the subject matter of the appeal. Interestingly, in the present case though the first appellate authority has decided the issue of the applicability of the provisions of section 153C of IT Act, which was one of the ground of appeal raised by the assessee before Id. CIT(A), but even after an adverse decision of the CIT(A) on the said legal

ground, no appeal was preferred by the assessee. Because of this reason, the Tribunal is not empowered to pass an order "thereon" on the subject matter which is not in appeal as per the appeal memo to be adjudicated upon. As far as the question of withdrawal of cross-objection is concerned, in our humble opinion, in the light of the above discussion, had the cross-objection was not withdrawn, even then, such a legal issue was beyond the scope of the adjudication through a cross-objection under Sec. 253(4) of IT Act because the impugned legal issue was altogether an independent as well as a separate issue, then the issue decided in favour of the assessee which are to be supported but w/s. 27 of Appellate Tribunal Rules. The applicability as also the operation of Sec. 253(4) of IT. Act (i.e. the procedure of filing of cross-objection) is distinct than the area of operation of Rule 27. In any case, provisions of Rule 27 and the provisions of Sec. 253(4) do not over-lap each other; rather operate in two different situations. Admittedly, right now, we are not on the adiudication of a cross-objection but on the question of granting permission to argue an independent legal ground under the shelter of Rule 27 of the Tribunal Rules."

5.5 The Ld. DR also referred to the decision **CIT, New Delhi (Central) v. ADward Keventer (Successor) Pvt. Ltd. (1980) 123 ITR 200 (Del)** and submitted that *while the appellant should not be made to suffer and be deprived of the benefit given to him by the lower authorities, where the other side has not appealed, equally the procedural Rules should not be interpreted or applied so as to confer on the appellant a relief to which he cannot be entitled if the points decided in his favour on the same matter by the lower court are also considered as requested by the respondent.* The Ld. DR furtherreferred to the decision of the **Hon'ble Supreme Court in the case of State of Kerala v. Vijaya Stores [1979] AIR 355, 1979 SCR (1)**and submitted that the respondent is entitled to support the judgment of the first appellate authority on any ground open him, but he is not entitled to raise a ground so as to work adversely to the appellant and his favour. The Hon'ble Supreme Court (supra) held that*the elementary principle found in the Code ofCivil*

Procedurethat the respondent who hasneither preferred hisown appealnor filed cross-objections in the appealpreferred by the appellant must be deemed to be satisfiedwith thedecision of the lower authority andthat hewill not be entitled to seek reliefagainst a rival party in an appeal preferred by thelatter,is equally applicable torevenue proceedings.

5.6 The relevant finding of the Hon'ble Supreme Court is reproduced as under:

> *" It is true that the two Bombay decisions reported in 13 I.T.R. 272 and 31 I.T.R. 844 (supra) on which the High Court has relied `have been rendered in relation to s. 33(4) of Indian Income Tax Act, 1922 but in our view the said provisions of Income Tax Act is in pari materia with the provision of s.39(4) of the Kerala General -Sales Tax Act, 1963. Moreover, the Bombay High Court has pointed out in those decisions that s. 33(4) merely enacted what was the elementary principle to be found in Civil Procedure Code that the respondent who has neither preferred his own appeal nor filed cross-objections in the appeal preferred by the appellant, must be deemed to be satisfied with the decision of the lower authority and he will not be entitled to seek relief against a rival party in an appeal preferred by the latter. In the first mentioned case the elementary principle is stated at page 282 of the report thus:*
>
> > *"Apart from statute, it is elementary that if a party appeals, he is the party who comes before the Appellate Tribunal to redress a grievance alleged by him. If the other side has any grievance, he has a right to file a cross-appeal or cross-objections. But if no such thing is done, the other party, in law, is deemed to be satisfied with the decision. He is, of course, entitled to support the judgment of the first officer on any ground open to him, but he is not entitled to raise a ground so as to work adversely to the appellant and in his favour."*

5.7 The Ld. DR further referred to the decision in the case of **CIT v. Infracon Pvt. Ltd., 2015 64 taxmann.com 472 (Delhi)** wherein it is held that *Rule 27 of the ITAT Rules would not extend to permitting the respondent to expand the scope of an appeal and*

assail the decision on issues, which are not subject matter of the appeal.

5.8 However before us, the Ld. Counsel of the assessee has referred to the decision of the Hon'ble Jurisdictional High Court in the cases of **Peter Vaz v. CIT, [2021] 436 ITR 616 (Bom.)** wherein following substantial question of law was raised before the Hon'ble High Court :

> *"Whether in the facts and circumstances of the present case, it was open to the appellant/assessee to have supported the orders of the Commissioner (Appeals), based on the ground that the jurisdictional parameters prescribed under section 153C of the I.T. Act were not fulfilled, even without the necessity of filing any cross objections?"*

5.9 The Hon'ble Jurisdictional High Court after analyzing the provisions of Rule 27 of the ITAT Rules held *that the issue which was not raised before the Ld. CIT(A) and which goes root of the jurisdiction of the Assessing Officer to initiate the proceedings, can be raised by way of a petition under Rule 27 of the ITAT Rules and the Tribunal should allow the assessee to raised such an issue in the appeal instituted by the Revenue, even without the necessity of filing any cross objections.* The relevant observations of the Hon'ble Court (supra) in the aforesaid decision are as under:

> *"26. To begin with therefore we propose to consider the issue as to whether there was any necessity for the Appellants/assessees to file cross-objections before the ITAT to raise the jurisdictional issue of compliance with*

jurisdictional parameters before any proceedings could be initiated under section 153C of the IT Act.

27. In this case, admittedly, the CIT (Appeals) had decided the matters in favor of the assessees and even set aside the orders made by the Assessing Officers. Therefore, the assessees did not have to institute any further appeals to the ITAT. The Revenue in this case had appealed to the ITAT against the orders made by the CIT (Appeals). Therefore, the issue is, whether the assessees could have raised the issue of non-compliance with jurisdictional parameters set out under section 153C of the IT Act, before the ITAT, even without filing any cross-objections before the ITAT.

28. At least, prima facie, non-compliance with jurisdictional parameters set out under section 153C of the IT Act, if established, will go to the root of the matter and even nullify the very action initiated under section 153C of the IT Act. Based on the material furnished to the assessees, it was the case of the assessees that what was found in the course of search proceedings under section 132 of the IT Act in the premises of the said firm and the said company, were the books of accounts belonging to the said firm and the said company. It is the case of the assessees that no books of accounts belonging to the assessees i.e. Peter Vaz and Edgar Afonso were found in the search proceedings under Section 132 in the premises of the said firm and the said company. Therefore, it was the case of the assessees that no proceedings under section 153C of the IT Act could ever have been initiated against these assessees.

29. Mr. Pardial stressed that the provisions of Section 153C as amended up to the year 2013 required the Assessing Officer to be satisfied that the books of the accounts belonging to the assessees who were proposed be proceeded with under section 153C ought to have been found, as a precondition for any action under section 153C of the IT Act. For this purpose, he compared the provisions of Section 153C as amended up to 2020, in which, there is a significant departure. Amended provisions, which did not apply to the present case, provided that the action under section 153C was competent even if the books of accounts "pertaining to" and belonging to the assessee were found

during the search under section 132 upon a person not referred to in Section 153A of IT Act. He submitted that this was an issue of law and therefore, the ITAT should have permitted the assessees to raise this issue even without the necessity of filing any cross-objections. He referred to Rule 27 of the Appellate Tribunal Rules, 1963 to contend that this Rule gives a right to the Respondent Page | 11 Shri Shaunak Jitendra Parikh, A.Y. 1999-2000 Shri Jay Ketan Parikh, A.Y. 1999-2000 Shri Raj Hiten Parikh, A.Y. 1999-2000 Shri Milan Kavin Parikh, A.Y. 1997-1998 & Shri Milan Kavin Parikh, A.Y. 1999-2000 in an appeal before the ITAT to support the order appealed against on any of the grounds decided against him, even though he may not have appealed against the order.

30. Rule 27 of the Appellate Tribunal Rules, 1963 reads as follows:-

"Respondent may support order on grounds decided against him.

27. The respondent, though he may not have appealed, may support the order appealed against on any of the grounds decided against him."

31. In this case, the assessees merely wanted to support the order made by the CIT (Appeals), which was entirely in their favor. The assessees wished to raise an issue, that was at least prima facie going to the root of jurisdictions initiate proceedings under section 153C of the IT Act. Having regard to the provisions of rule 27 referred to above, the ITAT in our opinion should have permitted the assessees who were Respondents before it, to support the orders of CIT (Appeals) on this ground, even without the necessity of filing any cross-objections.

32. In Dahod Sahakari Kharid Vechan Sangh Ltd. (supra), the Division Bench of Gujarat High Court was deciding whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the assessee needed to file cross-objections despite fully succeeding in appeal and therefore, being unable to challenge the finding of the CIT (Appeals) that the assessee was guilty of concealment of income and/or furnishing inaccurate particulars.

33. In the above case, the CIT (Appeals) recorded a finding that the assessee had concealed particulars of his income or furnished inaccurate particulars of his income but for detailed reasons set out, the CIT (Appeals) quashed the penalty imposed upon the assessee under section 271 of the IT Act. In the appeal filed by the Revenue before the ITAT, the assessee sought to assail the finding of concealment but the ITAT did not permit the assessee to do so, on the ground that the assessee had failed to file any cross-objections.

34. The Division Bench of Gujarat High Court however held that the ITAT committed an error in law in not permitting the assessee to assail the finding of the concealment without filing cross-objections. The Court held that the ITAT apparently lost sight of the fact that the assessee had succeeded before the CIT (Appeals) that had allowed the assessee's appeal and even set aside the penalty in its entirety. Therefore, the assessee did not have to appeal. The position in law is well settled that the cross-objections, for all intents and purposes. would amount to an appeal and the cross objector would have the same rights which an appellant has before the Tribunal. Since the assessee did not have to appeal, the ITAT could not have insisted upon the filing of cross- objections as a precondition for permitting the assessee to assail the finding of concealment.

35. The Division Bench referred to the provisions of section 253 of the IT Act and after analyzing the scheme held that on a plain reading of the provision, it transpires that the party had been granted an option or a discretion to file cross-objections. In case a party having succeeded before the CIT (Appeals) opts not to file cross-objection even when an appeal is preferred by the other Page | 12 Shri Shaunak Jitendra Parikh, A.Y. 1999-2000 Shri Jay Ketan Parikh, A.Y. 1999-2000 Shri Raj Hiten Parikh, A.Y. 1999-2000 Shri Milan Kavin Parikh, A.Y. 1997-1998 & Shri Milan Kavin Parikh, A.Y. 1999-2000 party, from that, it is not possible to infer that the said party had accepted the order or the part thereof which was against the respondent. Since the ITAT drew such an inference that was not supported by the plain language of Section 253, the High Court held that the ITAT was clearly in error.

36. The High Court then referred to Rule 27 quoted above and held that if the inference drawn by the ITAT is accepted as a correct proposition, then, it would render rule 27 of the Appellate Tribunal Rules, 1963 redundant and nugatory. The High Court held that it is not possible to interpret the provision in such a manner. Any interpretation placed on a provision has to be in harmony with the other provisions under the Act or the connected Rules and interpretation which makes other connected provisions otiose has to be avoided. Rule 27 of the Appellate Tribunal Rules is clear and unambiguous. The right granted to the respondent by the said Rule cannot be taken away by the Tribunal by referring to the provisions of Section 253(4) of the IT Act. The ITAT was, therefore, in error in holding that the finding recorded by the CIT (Appeals) remained unchallenged since the assessee had not filed cross-objections.

37. The reference in this regard can also be made to the provisions of section 260A(7) of the IT Act which provides that save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908, relating to appeals to the High Court shall, as far as may apply in the case of appeals under this Section. Now in the context of the provisions of Order XLI Rule 22 of the CPC dealing with the cross-objections, the Hon'ble Supreme Court in the case of S. Nazeer Ahmed (supra) has held that the High Court was clearly in error in holding that the appellant not having filed a memorandum of cross-objections in terms of Order XLI Rule 22 of the Code, could not challenge the finding of the trial Court that the suit was not barred by Order II Rule 2 of the Code. The respondent in an appeal is entitled to support the decree of the trial Court even by challenging any of the findings that might have been rendered by the trial Court against himself. For supporting the decree passed by the trial Court, it is not necessary for the respondent in the appeal, to file a memorandum of cross- objections challenging a particular finding that is rendered by the trial Court against him when the ultimate decree itself is in his favor. A memorandum of cross-objections is needed only if the respondent claims any relief which had been negatived to him by the trial Court and in addition to what he has already been given by the decree under challenge. The Hon'ble Supreme Court, therefore, held that the respondent in the appeal had every right to canvas

the correctness of the finding on the bar of Order II Rule 2 rendered by the trial Court.

38. In the present case, it is not as if the issue of non-fulfillment of jurisdictional parameters of Section 153C was raised but rejected by the CIT (Appeals). Such an issue was not raised before the CIT (Appeals). Having regard to the provisions of Rule 27 of the Appellate Tribunal Rules, 1963 us also the provisions of section 260A(7) read with Order XLI Rule 22 of CPC as interpreted by the Hon'ble Supreme Court in S. Nazeer Ahmed (supra) we think that the ITAT should not have precluded the assessees from raising the issue in the appeals instituted by the Revenue, even without the necessity of filing any cross-objections. Accordingly, the additional substantial question of law is required to be answered in favor of the Appellants/assessees and against the Revenue."

5.10 We find that the issue in dispute raised in the application under Rule 27 of the ITAT Rules of the assessee is identical to the facts in the case of **Peter Vaz (supra**) decided by the Hon'ble Jurisdictional High Court. In the instant case also the issue of completion of the assessment u/s 153A of the Act vis-à-vis section 153C of the Act is involved,which goes to the root of the matter,therefore, following the Hon'ble Jurisdictional High Court (supra), we admitted the applications of the assessee under Rule 27 for adjudication.

6. After admitting the Rule 27 applications, we have heard rival submission of the parties on the merit of issue-in-dispute raised in the Rule 27 application. The contention of the Ld. Counsel of the assessee that addition in respect of suppressed sales has been made on the basis of the diaries seized from the premises of Shri Kumarpal Banda and not from the premises of the assessee

company and therefore, said material could only have utilized in the case of the assessee invoking section 153C of the Act and not otherwise therefore, addition made on the basis of the seized diaries under the proceedings u/s 153A of the Act is without jurisdiction and therefore, deserve to be deleted. In support, the Ld Counsel referred to the decision of Delhi Bench of Tribunal in the case of **Trilok Choudhary (supra).**

6.1 On the contrary, according to the Ld. DR Shri Kumarpal Banda is director of the assessee company and he has been searched as a part of the search of the assessee company and therefore, it cannot be said that Shri Kumarpal Banda was subjected to separate and an independent search. Thus, according to the Ld. DR the diaries found during the course of the search are part of the search proceedings of the assessee company and therefore, the Assessing Officer has validly made the addition in the case of the assessee on the basis of those diaries. He submitted that facts of the case of Trilok Choudhary(supra) are distinguishable.

6.2 We find that when any money, bullion, jewellery or other valuable article or books of account or other documents /material is found during the course of search action of a person and those money, bullion, jewellery or the documents belonged to the searched person then, w.e.f. 1/6/2003 the assessments in the hands of the searched person has to be carried out u/s 153A of the Act. Further, We find that the prior to amendment by way of

Finance Act, 2015 w.e.f. 1/6/2015, where the Assessing officer of searched person is satisfied that any money, jewellery or other valuable articles or documents seized from searched person belonged to third or other person, then the Section 153C of the Act could be invoked in the hand of third or other person for making assessments.

6.3 W.e.f. 1/6/2015 the proceedings u/s 153C can be invoked in the hands of third or other person, if the Assessing officer of searched person is satisfied that:

(a) any money, bullion, jewellery or other valuable article or things seized or requisitioned, belongs to or

(b), any books of account or documents, seized or requisitioned pertains or pertain to , or any information contained therein , relates to

the third person or other person.

6.4 The assessing officer of searched person is required to be hand over the said assets or material or documents to the Assessing Officer having jurisdiction over such other person, in accordance with the provision of section 153C of the Act. Thus, for invoking section 153C of the Act the Assessing Officer of the searched person has to first satisfied that the material or assets seized during the course of the searched person belongs to third person. In the case before us, the issue in dispute is whether the three diaries

(labeledas A-2 to A-4) seized from the residence of Shri Kumarpal Banda, which is basis in the addition of suppressed of sale in the case of the assessee, have been found during the course of search on the assessee or not. There is no dispute on the fact that Shri Kumarpal Banda is director of the assessee-company and his residence has been searchedas part of the search proceedings in the case of the assessee company and therefore, said material is part of the search conducted and carried out on the assessee. Hence, the Assessing Officer has validly used said seized documents for making addition in the case of the assessee u/s 153A of the Act. It may be noted that assessee himself has declared undisclosed income of more than Rs.10 crores on the basis of those diaries in the return of income filed for assessment year 2015-16, thus the assessee has himself has treated those diaries as part of the search action carried out on the assessee. As far as the decision in the case of Trilok Choudhary (sura) is concerned, we find that the addition in the case of Trilok Choudhary for items given on marriage of his daughter and found from the premises of Sh Ashok Chaudhary was made. The Tribunal (supra) has noted that search in the case of Trilok Choudhary is independent of the search carried out at the Premise of Sh Ashok Choudhary. There was no link of both searches and thus Tribunal held that material found during search of one person cannot be used in the assessment of third person without invoking section 153C of the Act. Thus, facts of Trilok Choudhary (supra) are distinguishable.In the facts and

circumstances of the case, we reject the contention of the Ld. Counsel of the assessee that assessment in respect of diaries should have been made invoking section 153C of the Act. In the result, the issue-in-dispute raised in grounds under Rule 27 application is dismissed.

7. In the cases of appeal of M/s GM Modular P ltd for AY 2014-15 to 2018-19, the Ld. CIT(A) has adjudicated the legal issue of validity of the assessment invoking decision of the Hon'ble Jurisdictional High Court in the case **Continental Warehousing Corporation 374 ITR 645 (Bom)**wherein it is held that in case of unabated assessment no addition could have been made except with the aid of the incriminating material found during the course of the search of the assessee.

7.1 In the assessment year 2015-16, the Ld. CIT(A) has upheld the existence of the incriminating material qua the addition of undisclosed income based on suppression of the sales, whereas for AYs 2014-15 and 2016-17 to 2018-19, held that no incriminating material exist qua the addition of suppression of sales.

Appeal: ITA No. 3034/Mum/2022 for AY 2015-16

7.2 Therefore, now, we take up the appeal of assessment year 2015-16 for adjudication. The grounds of appeal raised by the Revenue for assessment year 2015-16 are accordingly reproduced as under:

1. Whether on the facts and circumstances of the case and in law, the Ld CIT(A)-48, Mumbai is right in holding that nO incriminating material was found to sustain the addition.

2. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A)-48, Mumbai is right in deleting the entire additions of Rs.45,38.03,980/- made in the assessment order only on the ground that no incriminating material was found to sustain the addition without appreciating the facts that the assessment order was passed after carefully analysing the seized material and evidences found during the course of search and survey proceedings and seized..

3. "Whether on the facts and circumstances of the case and in law, the Ld. CIT(A)-48, Mumbai is right in deleting the entire additions of Rs. 45,38,03.980/- made in the assessment order without appreciating the facts that the assessment was made on the basis of various incremental documents were found and seized from the residence of Mr. Kumarpal Banda, the director of the company M/s GM Modular Pvt. Ltd at 2203.22nd Floor, Oberoi Springs, Link Road Andheri (W), Mumbai-400053, labeled as Annexure A-2, A-3 and A-4 Statement of Mr.Kumarpal Banda, the director of the company M/s GM Modular Pt Ltd was recorded Us 132/4) of the Income-tax Act, 1961 during the search proceedings"

4. "Whether on the facts and circumstances of the case and in law, the Ld. CIT(A)-48, Mumbai is right in holding that no incriminating material was found to sustain the addition without appreciating the fact that the assessee himself submitted before Ld. CIT(A) that on the basis of incriminating material found during the course of search which were labeled as Annexure A-2, A-3 and A-4 the assessee had offered a sum of Rs. 10, 14,21.500/- on the gross transactions in the refurn of income filed uls. 153A for AY 2015-16.

5. Whether on the facts and circumstances of the case and in. law, the Ld.CIT(A)-48, Mumbai is right in allowing the appeal filed by the assessee by relying on the decision of the Hon'ble Bombay High Court in the case of CIT

vs.Continental WarehousingCorporation 2015 374 IT 645] ignoring the fact that appeal is pending before the Hon'ble Supreme Court of India on this issue of power conferred by section 153A of the Act' which was not adjudicated upon',

7.3 During the course of hearing, the Ld. Departmental Representative (DR) filed revised grounds of the appeal challenging all the additions deleted by the Ld. CIT(A). The grounds raised by the Revenue relate to following additions, which were made by the Assessing Officer:

(i) addition of rupees 41,83,30,486/- for unaccounted business turnover appearing in diaries A-2 to A-4, computed applying gross profit rate on such unaccounted turnover,

(ii) accommodation entry of unsecured loan of rupees 2,40,00,000/- held as unexplained cash credit under section 68 of the Act

(iii) unexplained expenditure under section 60 9C of the act for(a) interest on accommodation entry of unsecured loan of rupees, 31,22,296/- (b) commission for arranging accommodation entry of unsecured loan of ₹ 60,000/-

(iv) disallowance of unverified labour services of ₹ 78, 27, 700/-

(v) personal expenditure of Rs. 63, 496/-

8.0 Regarding the additions of accommodation entry of unsecured loan [items no. (ii) and (iii) above] , the Assessing Officer recorded

the information in respect of unsecured loan parties and observed as under:

(i) EssarIndia Ltd:

Kolkata Investigation Directorate in its Investigation report (Ref:F.NO 75A/2015-16/257-273 dated 27.04.2015 of Pr.DIT (Inv.), Kolkata)had given the finding that the company M/s Esaar(India) Ltd is a penny scrip and it is being used to provide accommodation entries to various beneficiaries through rigging of shares. The name of the company also features in the list of confirmed shell companies as circulated by FlU IND. The Entry operators and Exit providers recorded during 133A of the Income tax Act, have accepted that the scrip of Esaar(India) Ltd has been used for providing accommodation entries. Mr. Kumarpal Banda, the director of the company M/s GM Modular Pvt Ltd in his statement recorded us 132(4) of the Income-tax Act, 1961 on 14.11.2019, has accepted that the loans taken from M/s Esaar(India) Ltd are not genuine. Further an opportunity was given to the assesseei.e. Mr.Jayantilal Jain, Promoter of M Group on 12.01.2020, to produce the party to verify its claim that the unsecured loan is genuine. But the assessee failed to produce the party and thus has failed to discharge its onus to explain the source of credit.

(ii)Mora Industries Ltd:

The registered address of the company MIs Morya Industries Ltd is C 313, Morya House, New Link Road, Andheri (W), Mumbai- 400053.Mr. Kumarpal Banda, the director of M/s GM Modular Pt Ltd in his statement recorded u/s 132(4) of the Income-tax Act, 1961 on 14.11.2019, has admitted that loans taken from M/s MoryalndustriesLtdis not genuine. An opportunity was given to the assessee i.e. Mr. Jayantilal Jain, Promoter of GM Group on 12.01.2020 to produce the party to verify its claim that the unsecured loan is genuine. But theassessee failed to produce the party and thus failed to discharge its onus to explain the source of credit."

(iii) NCL Research and Financial Services Ltd –

The company is a proven penny scrip as per the report of Kolkata Investigation Directorate(Ref: F. No 75A/2015-16/257-273 dated 27.04.2015 of Pr.DIT (Inv.), Kolkata). Statement of Mr. Mahavir Prasad Saraswat one of the director of the company Ms NCL Research and Financial Services Ltd was recorded u/s 131 of the Income-tax Act. 1961 on 27.05.2015 by DDIT(In) Kolkata. He was asked about the business activities of the company, questions about the books of accounts of the company and the number of AGM attended. He was not able to answer these questions. He has agreed that he is just a dummy director in the company and has no knowledge about the business of the company. A statement of Mr. Vijay Poddar, the director of Ms NCL Research and Financial Services Ltd was also recorded u/s 131 of the Income-tax Act, 1961 on 27.05.2015 during the process of Survey u/s 133A of the Income-tax Act, 1961 at the registered premises of the company. In reply to Q.56 Mr. Vijay Poddar had accepted that the company is a penny stock company and is in the business of providing accommodation entries. A survey action us 133A of the Income-tax Act. 1961 was carried out at the registered address of the company on 13.11.2019. Statement of Mr. Mayank Singh, the CFO of the company was recorded us 131 of the Income-tax Act, 1961 on

15.11.2019. Mr. Mayank Singh in his statement has accepted that Mr. Goutam Bose is now the Managing Director of the company. Statement of Mr. Goutam Bose was recorded by DDIT (Inv) Kolkata on 27.05.2015. Mr. Goutam Bose in his statement has accepted that he is a dummy director in the company and has no idea about the affairs of the company. An opportunity was given to the assessee i.e. Mr. Jayantilal Jain, Promoter of GM Group on 12.01.2020, to produce the party to verify its claim that the unsecured loan is genuine. But the assessee failed to produce the party and thus failed to discharge its onus to explain the source of credit.

(iv) Tanaya Vincom P Ltd :

A survey action us 133A of the Income-tax Act, 1961 was carried out in the premises of the company M/s TanayaVincomPt Ltd on 13.11.2019. The survey authorization could not be served as the company was not found at the premises. Efforts were also made to record the statement of

Mr. Sandip Kumar Jain and Mr. Om PrakashSaraswat, Directors of the company but the same were not traceable at the address provided in the IT. An opportunity was given to the assessee i.e. Mr. Jayantilal Jain, Promoter of GM Group on12.01.2020, to produce the party to verify its claim that the unsecured loan is genuine. But the assessee failed to produce the party and thus failed to discharge its onus to explain the source of credit.

***(v) Ojas Assets Reconstruction Ltd** :*

The company was Non filer for the assessment year in which loan has been given. The company is said to be transacting in huge transaction to the tune of Rs.37 lacs and still a non filer adds credence to the fact that this could be merely a book entry. The identity of the lender is not established.Mr. Kumarpal Banda, the director of M/s GM Modular Pt Ltd in his statement recorded u/s 132(4) of the Income-tax Act, 1961 on 14.11.2019 has submitted that they have accepted loan entries from the company M/s Ojas Assets Reconstruction Ltd. The family members of the group have also declared the amount taken as LTCG in the company scrip in Income Declaration Scheme-2016 (IDS-2016).An opportunity was given to the assesseei.e. Mr. Jayantilal Jain, Promoter of GM Group on 12.01.2020 to produce the party to verify its claim that the unsecured loan is genuine. But the assessee failed to produce the party and thus failed to discharge its onus to explain the source of credit

8.1 The Ld. CIT(A) following the jurisdictional High Court in the case of **Continental warehousing Corporation (supra)** deleted the additions on the ground that there was no incriminating material found during the course of the search qua those additions. The relevant funding of the Ld. CIT(A) is reproduced as under:

"6.19 Conclusion-The aforesaid detailed discussion with respect to various judicial decisions clearly laid down the following principles -

(i)the assessments which have been concluded u/s 143(3) of the Act and not pending at the time of search proceedings, do not abate.

(ii) for this purpose, intimation w/ 143(1) would constitute an assessment, relying on the decision of Hon'ble Bombay High Court in CIT V/s Gurinder Singh Bawa (79 taxmann.com 398)

(iii) the proceedings us 153A of the Act do not empower the Assessing officer to re-adjudicate the settled issues again, unless fresh incriminating material for the relevant year is found during the course of search proceedings.

(iv) the Assessing officer does not have jurisdiction to make additions/disallowances which are not based on relevant incriminating material found during the course of search proceedings.

(v) in the case of completed/un-abetted assessments, where no incriminatingmaterial is found during the course of search, the assessment w/s 1534 of the Act is to be made on originally assessed/returned income and no addition or disallowance can be made de hors the incriminating evidence for the relevant year are recovered during the course of search.

(vi)Any admission or confession needs corroboration with evidence. In order to make a genuine and legally sustainable addition on the basis of admission or confession during search action, it is necessary that some incriminating material must have been found to correlate the undisclosed income with such statement.

(vii)Any statement recorded under section 132(4) cannot be considered as incriminating material found in the course of search as these are recorded to elicit more information/explanation of the search person on the incriminating documents/gold/jewellery found during search.

6.20 After carefully going through the remand report & assessment order, written submission & rejoinder filed by the appellant, it is observed that the remaining five additions i.e., on account of accommodation entry of unsecured loan us 68 of Rs. 2,40,00,000/-, unexplained expenditure us. 69C related to

interest on accommodation entry of unsecured loan of Rs. 31,22,296/-& commission for arranging accommodation entry of unsecured loan of Rs.60,000/, disallowance of unverified labour services of Rs.78,27,700/- and personal expenditure of Rs. 4,63,496/- are not connected with any incriminating documents found/seized during the search proceedings at the business/residential premises of the assessee's group concerns. As far as these five (5) additions are concerned, neither there is mention of any Annexure to the panchanama prepared at the time of search proceedings, reflecting detection or seizure of any incriminating document nor mention of any statement recorded during the search proceedings which can remotely be connected with any incriminating document found and/or seized during the search action at the premises of the appellant or it's group concerns. Considering the totality of thefacts and circumstances, I am of the considered view that these five (5) additions cannot survive de hors the incriminating evidences as held in the above binding judicial decisions. The AO is accordingly directed to delete the impugned additions made in the assessment order. Thus, the ground of appeal no. 1 & 2 are allowed to the extent of these five (5) additions only."

8.2 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. It is the contention of the learned departmental representative that Assessing Officer has referred to information and observations during the course of the search including the confessional statement of Sh Kumarpal Banda, who is director of the assessee company and also sh Jayantilal Jain, who is one of the main promoters of the assessee company. The learned departmental representative also referred to the information gathered in respect of the unsecured loan parties in period prior to search and post search period and also survey carried out independently under section 133A of the Act. The learnedcounsel of the assessee on the

other hand submitted that sh Kumar Pal Banda has already retracted from his statement and there was no corroborating material to his statement. Regarding the statement of the Jayantilal Jain, it was submitted that same was recorded in post search proceeding and not part of search proceeding. Regarding surveys under section 133A of the Act also he submitted that same were conducted independently and cannot be said as part of the search proceeding in the case of the assessee.

8.3 On perusal of the observation of the Assessing Officer reproduced above, we find that he has referred mainly to the information gathered in respect of unsecured loan parties in proceedings carried out prior to the search the case of the assessee. For example, in the case of 'Essar India Ltd', the Assessing Officer has referred to the letter of Principal director of Income-tax (Investigation) alleging the Essar India Ltd as accommodation entry provider,which is dated 27/04/2015, i.e. much prior to the date of the search in the case of the assessee. Similarly in the case of 'NCL Research and financial services Ltd', the Assessing Officer has referred to the statement of 'Mr Gautam Bose' recorded on 27/05/2015 by the Deputy director of Income-tax (Inv), Kolkatta. The relevant information being not found or seized during the course of the search in the case of the assessee ,therefore cannot be invoked for making addition in the assessment year under consideration being unabated assessment as held by the

jurisdictional High Court in the case of continental warehousing Corporation (supra). The Assessing Officer has further supported the addition of unsecured loan relying on the confessional statement of Sri, Kumar pal Banda, which was retracted later on. In the case of **PCIT v. Best Infrastructure (India) Pvt. Ltd. 2017 (8) TMI 250,**it is held that a confessional statement made during the course of the search cannot be held to be an incriminating material on the stand-alone basis unless supported by corroborating evidences. In the case of the assessee no incriminating information or observations have been gathered by the search team. The Assessing Officer has also referred to statement of sh Jayanti Lal Jain that he failed to produce the parties during the course of the search to discharge his onus. But said statement has been recorded in post search proceedings on 12/01/2020 and therefore cannot be said to be even part of the search proceedings. The information gathered in other independent survey under section 133A of the Act in the case of 'Tanaya Vincom P Ltd' is also not part of the search proceedings in the case of the assessee.

8.4 On the issue of confessional statement of Sri Kumar Pal Banda and statement of Sri Jayantilal Jain, the coordinate bench of the Tribunal in the case of a sister concern of assessee namely **M/s G-Ninemodular p Ltd in ITA No. 3214/Mum/2022** and othersheld it to be non-incriminating,relying on the decision of

hon'ble Delhi High Court in the case of Best Infrastructure p Ltd (supra), observing as under:

> *8. We have heard rival submission of the parties on the issue-in-dispute and perused the relevant material on record. We find that the Hon'ble Bombay High Court in the case of* ***Continental Warehousing Corporation (supra)****, held that in case of non-abated assessment i.e. where no assessment proceedings are pending, no addition could have been made without the aid of the incriminating material. The Ld. CIT(A) has deleted the addition of Rs.1,75,00,000/- based on the ratio of the decision of the Hon'ble Bombay High Court (supra) and other decisions cited by him. For the assessment year under consideration, no assessment was pending as on the date of the search and therefore it is a case of non-abated assessment and therefore, we have to only examine the issue whether there was any incriminating material found during the course of the search qua the additions made. In the year under consideration the Assessing Officer has made three additions, firstly of ₹1,75,00,000/- on account of accommodation entry of unsecured loan under section 68 of the act, secondly for the interest of ₹14,45,626/- in respect of said accommodation entry of unsecured loan, thirdly, on account of commission paid of ₹75,000/-for arranging accommodation entry of unsecured loan. All the three additions are related to the single issue of unsecured loans held as unexplained cash credit under section 68 of the Act. Therefore, the issue-in-dispute before us is whether any incriminating material qua the addition of unsecured loan made by the Assessing Officer, was found during the course of search action. The arguments of ld DR are not acceptable due to following reasons:*
>
> *8.1* ***Firstly****, the Ld. DR has referred to the statement of Shri Kumar Pal Banda recorded on 14.11.2019, in which*

he stated that part of the unsecured loan was not genuine and settled in cash. The Ld. Counsel has submitted that the said statement has already been withdrawn. No other corroborative evidence or seized material has been found during the course of the search which could indicate that those unsecured loans are not genuine. The Ld. Counsel has referred to the decision of the Hon'ble Delhi High Court in the case of ***PCIT v. Best Infrastructure (India) Pvt. Ltd. 2017 (8) TMI 250.****The relevant finding of the Hon'ble Delhi High Court (supra) is reproduced as under:*

"38. Fifthly, statements recorded under Section 132 (4) of the Act of the Act do not by themselves constitute incriminating material as has been explained by this Court in Commissioner of Income Tax v. Harjeev Aggarwal (supra). Lastly, as already pointed out hereinbefore, the facts in the present case are different from the facts in Smt. Dayawanti Gupta v. CIT (supra) where the admission by the Assessees themselves on critical aspects, of failure to maintain accounts and admission that the seized documents reflected transactions of unaccounted sales and purchases, is non-existent in the present case. In the said case, there was a factual finding to the effect that the Assessees were habitual offenders, indulging in clandestine operations whereas there is nothing in the present case, whatsoever, to suggest that any statement made by Mr. Anu Aggarwal or Mr. Harjeet Singh contained any such admission."

8.1.1 In the case of ***B Kishore Kumar (supra),*** *the statement/confession of assessee was duly corroborated with incriminating material/documents found during the course of search and therefore, such statement was accepted by the Hon'ble High Court as basis for confirming the addition. The relevant finding of the Hon'ble High Court is reproduced as under:*

5. We have perused the orders passed by the Tribunal and the authorities below. Though the assessee was at pains to make out an issue that he has made certain submissions and those submissions were not considered by the Assessing Officer and therefore, the Assessing Officer has misdirected himself in determining the tax liability, on going through the order of the Tribunal, we find that the case of the assessee was decided on the basis of his own sworn statements dated 29.8.2006 and 10.10.2006 and admitted documents. We extract that portion of the order as has been recorded by the Assessing Officer in paragraph (11), which clinches the whole issue:

11. Therefore, reliance is placed on the admission of the assessee at the time of search, which is reproduced as under:

Sworn statement of Shri Kishore Kumar dt. 29.8.2006:

'Qn.11: I am showing you the three print-out of amounts totaling to Rs.52,73,920 (Rs.3,31,336 + Rs.15,05,158 + Rs.34,37,427). Please explain this?

Ans: These are the details of loans given by me to various parties as mentioned in the printouts. This is a separate business carried out by me which was not included in the income-tax returns filed by me.

Qn.12: Please explain the source for the total outstanding amounts which are given by you?

Ans: The loans totaling to Rs.52,73,920 given to various parties as per the list were from my undisclosed income. I agree to pay the relevant income-tax dues for the above declared undisclosed income.' Sworn statement of Shri Kishore Kumar dt. 10.10.2006 (in Tamil):

'Qn.1: I am showing you Ann/BL/B&D/S-3 and sl.No.5, which are telephone index books wherein amounts given in cash to various persons were found recorded. Whom do they belong to? In whose handwriting it is write? What do these amounts represent?

Ans: They belong to me. Signature is mine and the notings relate to loans given by me on various dates. This constitutes my separate finance business. There are no regular books for this. According to the documents shown, as on date outstanding loans to be recovered

is in the range of Rs.25 Lakhs to 30 Lakhs. The rate of interest is 18% (i.e. Rs.1.50 per 100 per month). The interest income is also not shown in the accounts. The borrowers have committed defaults in repaying the loans and more than 50% of the outstandings are to be treated as bad debts. All the advances were not disclosed in the returns filed.'This has been relied upon by the Tribunal in full force.

6. With regard to the undisclosed income of Rs.52,73,920/- supported by printouts, in the sworn statement dated 29.8.2006, the assessee says that he had separate business income which was not included in his income tax returns. Therefore, admission of undisclosed income of Rs.52,73,920/- is categoric and undisputed. The assessee in the sworn statement made on 10.10.2006, stated that outstanding loans to the tune of Rs.25 Lakhs to 30 Lakhs are to be recovered with interest at the rate of 18%. This is a clear admission. This amount has also been calculated and added as undisclosed income. When there is a clear and categoric admission of the undisclosed income by the assessee himself, in our considered opinion, there is no necessity to scrutinize the documents. The document can be of some relevance, if the undisclosed income is determined higher than what is now determined by the department. Moreover, it is not the case of the assessee that the admission made by him was incorrect or there is mistake. In fact, when there is a clear admission, voluntarily made, by the assessee, that would constitute a good piece of evidence for the Revenue.

7. The learned counsel for the assessee relied upon a decision of the Delhi High Court in Commissioner of Income Tax v. Girish Chaudhary, [2008] 296 ITR 619 to plead that loose sheets of papers should not be taken as a basis for determining undisclosed income. However, in the case on hand, loose sheets found during the search are not the sole basis for determining the tax liability. It is a piece of evidence to prove undisclosed income. The printout statements of undisclosed income is not disputed by the assessee and in his sworn statements it is accepted. In fact, he admitted that outstanding loans to be recovered are in the range of Rs.25 Lakhs to 30 Lakhs. We find no error in the procedure followed by the Assessing Officer on admitted facts. The entire exercise by the department to bring to tax undisclosed income, we find has been generous and simple. There appears to be no confusion in the quantification of the tax liability and we uphold the order of the Tribunal.

8.1.2 The decision in the case of B Kishore Kumar (supra) is therefore distinguishable on facts. In view of decision of the Hon'ble Delhi High Court in the case of Best Infrastructure p Ltd (supra), it is undisputed that merely on the basis of the confession u/s 132(4) of the Act, without any other corroborative material found, no addition could be made treating the statement u/s 132(4) of the Act as incriminating material.

8.2 ***Secondly****, the learned DR has referred to the statement of Sri Jayantilal Otmaljain dated 30/11/2019 to support that same constitute incriminating material. On perusal of the copy of said statement, which is produced before us by the learned departmental representative, we find that he was questioned to comment on the confession of Sri Kumarpal Banda of unsecured loan parties being not genuine, but he simply replied that at the time he was not able to reply as he had to check it. The relevant question and answer is reproduced for ready reference:*

"Q.17 Mr. Kumarpal Banda in his statement in reply to Q.30 & 31 has stated that unsecured loans from various parties in different financial years have been settled later in cash and they are not genuine. The same is reproduced as under for your convenience.

Q.30 Kindly explains the name of the parties form which unsecured loan has been taken by the company M/s. G.M Modular Pvt. Ltd. Also explain the creditworthiness and genuineness of unsecured loan taken by M/s. G.M Modular Pvt. Ltd.

Ans. Sir, M/s. G.M Modular Put. Ltd. has taken loans from various parties in different financial years and the same have been settled later.

However I can recollect the following names of parties from which the unsecured loan is taken and they are not genuine:-

1. M/s. Essar india Ltd.

2. M/s. Matarani Commodities Pvt. Ltd.

3. M/s. Morya Industries Ltd.

4. M/s. NCL Research Financial Service Ltd.

5. M/s. Shivam Investment & Consultancy Ltd.

6. M/s. Ojas Assets Reconstruction Company Ltd.

Q.31 On what basis you are saying that the loans from the above mentioned parties is not genuine.

Ans. Sir, I confirm that the above mentioned parties from which the unsecured loan has been taken by M/s. G.M Modular Pvt. Ltd are not genuine as they are settled in cash during repayment to these parties.

Please offer your comments.

Ans: Sir, at present I am not able to comment as I have check it."

8.3 He was further asked to provide contact details of the parties from whom unsecured loans were taken by the assessee company and other entities of the group, in response to which also he replied that at the time he was not able to provide the details as he had to check it.

8.5 Regarding the issue whether the information gathered during independent survey u/s 133A of the Act constitute as the

incriminating material found during the course of search, the Tribunal in the case of **M/s G-Nine modular p Ltd in ITA No. 3214/Mum/2022** and others Observed as under:

> *8.5 We note that in the case of 'Ella Fintex Co. P ltd', the assessee was intimated regarding negligible profit of said company and directors of the said company being non-filer of ITR. Further it was intimated that the area in which said unsecured loan party located was a well-known hub of shell companies. In our opinion, certain information regarding the unsecured loan party gathered by the investigation wing pre search period and thereafter confronted the same to the key person of the assessee company during the course of search, cannot be said that incriminating material was found during the course of the search qua the addition. Similar observations have been made in respect of the other unsecured loan parties. Further, independent survey was carried out in the case of* ***'Ella Fintex Co Pvt Ltd'*** *and* ***'KathakaliVincom P Ltd'*** *on 13/11/2019 and those parties were not found at the registered address, however this fact of nonavailability of those parties at the registered address was only communicated to sh Jayantilal Jain in post-search proceeding on 12/01/2020 and therefore also it cannot be said that said information was confronted to the assessee*

during the course of search proceeding. Regarding, the unsecured loan party namely ***'NCL Research and Financial Services ltd'****, the Assessing Officer observed that in the information gathered by the Kolkata investigation report dated 27/04/2015, said party has been referred. Further during the survey action, the CFO of the company under section 131 of the Act dated 15/11/2019 stated that Mr Gautam was the managing director of the said company, but that fact in itself is not any incriminating material. In case of the other unsecured loan parties i.e* ***Ojas Assets Reconstruction Ltd*** *and* ***TanayaVincom P Ltd*** *also there is no reference of any incriminating material except statement of Sri Kumarpal banda and sh Jayantilal jain, which we have already dealt above.*

8.6 Further, we agree with the contention of the Ld. Counsel of the assessee that those survey proceedings are independent action though carried out simultaneously. Those inquiries are not part of the search proceedings u/s 132 of the Act. The ld DR referred to decision in the case of ***CIT v. Sky Infra Pvt. Ltd. by the Tribunal in order dated 28.02.2023****, to support that information found in simultaneous survey could be treated as incriminating material. But we find that in said case of CIT v. Sky Infra*

Pvt. Ltd. (supra) , inquiries were carried out by the Inspectors of the income-tax department as part of the search proceedings itself, therefore facts of said case are distinguishable.

8.7 Further, the information gathered during independent survey actions was not confronted to the assessee during the course of search proceedings and it was only confronted in post search proceedings on 20/01/2020.

8.8 For invoking sustaining addition in proceedings u/s 153A of the Act in case of non-abated assessments , the prerequisite is that incriminating material should be found during the course of search at the premises of the assessee qua the adition. If any material is found during the course of search of third party or material is found during the course of other actions i.e. like survey or by the action of other agencies, then, the provisions to deal with those materials or observations, are different from the provisions u/s 153A of the Act.

8.6 Respectfully, following above finding of the Tribunal (supra), we hold that there is no incriminating material qua the addition of unsecured loans u/s 68 of the Act and related additions of interest and commission expenses thereon for obtaining those unsecured loans.

9.0 Regarding unverified labour job work expenses, also the Ld. Assessing Officer made observation as under:

"4) Addition on account of unverified labour-Job Work:-

(i)M/s GM Modular Pt Ltd and Mis Goldmedal Electricals Pvt Ltd are among the leading manufacturers of the switches, cables and other electrical accessories in India. The main persons of the company MIs GM Modular Pvt Ltd and M/s Goldmedal Electricals Pt Ltd are Shri JayantilalOtmal Jain and Shri JugrajOtmal Jain respectively. The both of the concerns are runned by family members. During the course of Search action us 132 of the Income-fax Act, 1961 in the office premises of Ms Goldmedal Electricals Pvt Ltd and subsequent verification of documents, it is clearly established that certain purcases from the following parties remained unexplained:-

Sl. No.	Name of Supplier
1.	Walambia Plastics Pvt Ltd
2.	Arihant Polymer
3.	Bijal Polymer
4.	Aashirwad Polymer
5.	Hirasons
6.	Satyam Plast
7.	Shreenath Enterprises
8.	Innovative Turnomatics
9.	Bhavna Electrical Industries
10.	JMK Petrochem
11.	Shyam Enterprise
12.	Arihant Industries
13.	Shivam Enterprises

1. During course of furher verification, It was found that there are 3 common parties who features in the list of vendors of the company M/s GM Modular Pvt Ltd. The same are M/s Hirasons, M/s Satyam Plast and M/s Shivam Enterprise.The statements of employees and Director responsible for making purchases and responsible for mainting stock were recorded and the same was confronted wherein it is clearly established that certain purchases remains unverified due to lack of supporing documentary evidences. This fact was confronted to ShriJayantilal Jain, promoter of the company M/s GM Modular Pvt. Ltd and he was not able to provide any explanation for the same. The assessee vide letter dated 28.08.2020 has submitted that the company Ms GM Modular Pt Ltd has done Job work/ Labour as well as purchases from the above said three parties.The submissions made by the assessee are perused. Invoices were examined on test check basis and in view of the submission of assesseee a

verification of these purchases have been made from the documents available and submitted by the assesse and it is unearthed that the purchase and labour / job work charges claimed against three parties namely M/s Hirasons, M/s Satyam Plast and M/s ShivamEnterprise are not verifiable for certain years. The summary of the chart is as under :

FY	**AY**	**Unverified Purchase amount (in Rs.)**	**Unverified Lavour job work (in Rs.)**
2012-13	2013-14	-	26,91,945
2013-14	2014-15	-	26,98,730
2014-15	2015-16	-	78,27,700
2015-16	2016-17	-	1,88,77,132
2016-17	2017-18	2,77,66,390	1,86,71,188
2017-18	2018-19	36,36,12,754	2,47,63,799
2018-19	2019-20	9,47,53,780	4,73,42,487
Total Purchases & Labour/Job Work Unverified		**68,61,32,923**	**7,55,30,494**

In view of the above, the assessee was show caused vide notice dated 20.01.2021as to why the unverified Purchase and Labour/job work as per the above assessment year wise should not be considered as unverified expenditure and should not be disallowed and added to your total income."

9.1 The Assessing Officer further in para 4.2 of the assessment order held the job work charges paid to 3 firms namely M/s Hirasons, M/s Satyam Plast and M/s Shivam Enterprse as nongenuine based on the statement of 'Sh Rahul Dinesh Jha', an employee of the assessee company recorded on 14/11/2019 during the course of the survey proceedings. The Assessing Officer has reproduced relevant question-and-answer in impugned assessment order. But we find that in his statement, he has nowhere admitted that those job work charges were not genuine. He simply stated that original bills were maintained at head office at Andheri. During

the course of search action, the statement of Sri Rahul Dinesh was confronted to sh Jayantilal Jain, promoter of the company, but he took time for responding. Thus, the statement of shri Rahul Dinesh and Jayantilal are not incriminating information qua the addition. Therefore, same cannot be basis for making addition in the year under consideration being year of unabated assessment.

10.0 The Assessing Officer has also made disallowance under section 36(1)(va) of the Act amounting to Rs.4,63,496/- for payment deposited to employees contribution to provident fund (PF) and employees State insurance (ESI) on the basis of the information under tax audit report(TAR). The Ld. CIT(A) has deleted the addition holding it not to be based on the incriminating material. There is no reference of incriminating materials in relation to disallowance qua section 36(1)(va) of the Act.

11.0 In the facts and circumstances of the case, we are of the opinion that the Assessing Officer has neither made any reference of incriminating material found during the course of search not Ld. DR brought to our notice any incriminating material qua these additions and therefore, we do not find any error in the order of the Ld. CIT(A) in concluding that additions are not justified any case of non-abated assessment otherwise then the aid of the incriminating material has held by the Hon'ble Bombay High Court in the case of Continental Warehousing Corporation (supra), Accordingly, we uphold the finding of the Ld. CIT(A) that there was no incriminating

material qua the additionsof (i) accommodation entry of secured loan alongwith interest and commission thereon (ii) addition on account of unverified labour job work and (iii) disallowance under section 36(1)(va) of the Act.

12. Now, we take up the grounds of the appeal related to the addition of unaccounted business income assessed based on diaries found from Sh Kumarpal Banda.

12.1Brief facts qua the issue-in-dispute of addition in respect of unaccounted business turnover are that during the course of the search at the residence of Mr. Kumar Pal Banda,the director of the company, documents labeledas "Annexure A-2, A-3 and A-4" are seized. Shri Kumar Pal in his statement recorded u/s 132(4) of the Act stated that the Annexure A-2 contains entries of cash transaction made to employees and Annexure A-3 and A-4 contains ledger entries in respect of certain individual firms. Mr. Jayanti Lal Jain, the promoter of the GM Group stated that entries in those documents i.e. A-2 to A-4 , were not recorded in the books of accounts of the assessee company for financial year 2014-15 i.e. assessment year 2015-16. He acknowledged that in the entries appearing in the seized documents double digits were suppressed while recording the actual transactions. The Assessing officer analysed the diaries and held that the assessee carried unaccounted business and transactions recorded in those diaries are related to that unaccounted business. The assessee in the

return of income filed in response to notice u/s 153A for AY 2015-16,offered undisclosed income of Rs.10,14,21,500/- applying net profit rate on the gross sales transactions appearing in the said seized documents, whereas the Assessing Officer applied gross profit rate on the unaccounted sale transactionsof Rs. 275,73,04,969/-recorded in diaries for AY 2015-16 and made addition of the unaccounted income of Rs.51,97,51,986/-.

12.2 On further appeal, the Ld. CIT(A) following the judicial precedents , restricted the addition to the extent of the net profit on unaccounted sales, which was offered by the assessee in return of income and therefore, the addition made by the Assessing Officer was deleted observing as under:

> *"5.4 In my considered view, the only question to be decided here is whether on \ the unaccounted turnover (as reflected from the seized documents for F.Y 2014-15 related to AY 2015-16), net profit percentage or gross profit percentage will be applied. This question is no more res integra and already settled with the plethora of judicial decisions. The decisions are reproduced as below-*
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> *Hon'ble Jurisdictional High Court in the case of CIT Vs. Shri Hariram Bhambhani [2015 (2) TMI 907 Bombay High Court], wherein net profit rate was applied to unaccounted sales. The relevant head notes of the decision are in-below: reproduced here*
>
> *Income from undisclosed sale - Tribunal upholding the order of the CIT(A) directing AO to tax 4% net profit on unaccounted sales of 7 35 lakhs – entire*
>
> *sales which are unaccounted cannot be undisclosed income of the assessee, particularly as the purchase had been accounted for held by tribunal - Held that:- Grievance of the Revenue that*

Section 69C of the Act is to be invoked and entire amount of undisclosed sales has to be brought to tax is unacceptable as we are unable to appreciate how Section 69C of the Act which speaks of unexplained expenditure is all at relevant for this appeal.

We are not concerned with any unexplained expenditure in this case.

CIT(A) and Tribunal have came to the concurrent finding that the purchases have been recorded and only some of the sales are unaccounted.

Thus, both the authorities held that it is not the entire sales consideration which is to be brought to tax but only the profit attributable on the total unrecorded sales consideration which alone can be subject to income tax.

The view taken by the authorities is a reasonable and a possible view.Decided against revenue.

Hon'ble M. P. High Court in the case of Man Mohan Sadani Versus Commissioner of Income-Tax 2007 (10) TMI 246 - MADHYA PRADESH HIGH COURT. The relevant head notes of the decision are reproduced here-in-below:

Entire sale proceeds should not be regarded as profit or treated as undisclosed income of the assessee-On the contrary, it is the net profit rate which has to be adopted in such cases-held that the entire sale proceeds of the assessee should not be added to his income

Hon'ble Kolkata Tribunal in the case of Dinanath Ornament Stores C/O., D.J.

Shah And Co Versus ITO [2019 (6) TMI 160 - ITAT Kolkata], after relying on the aforesaid judgments, has held that net profit rate should be adopted instead of gross profit to assess the income from undisclosed sales. Further, the Hon'ble Tribunal has also held that the net profit rate shall be that which the assesseehad disclosed in its regular books of account the said Assessment Year on recorded sales. The relevant headnotes of the decision are as below:

Assessment of suppressed sales - Gross profit or net profit - HELD THAT: As relying on MAN MOHAN SADANI [2007 (10) TMI 246 - MADHYA PRADESH HIGH COURT), BALCHAND AJIT KUMAR. (2003 (4) TMI 76 - MADHYA PRADESH HIGH COURT] and SHRI HARIRAM BHAMBHANI (2015 (2) TMI907 BOMBAY HIGH COURT] we direct the AO to assess the income from undisclosed sales in question by applying the net profit rate in place of the

"gross profit rate" as undisclosed sales. The net profit rate shall be that which the assessee had disclosed in its regular books of account for the said Assessment Year on recorded sales. In the result, this ground of the assessee is allowed in part.

5.5 Respectfully following the binding decision of the Hon'ble Jurisdictional High Court and other judicial pronouncements,I do not have any option but to held that under the existing circumstances, addition, if any, is required to be madeon the basis of net profit ratio instead of gross profit ratio, as shown in the regular books of accounts.Accordingly, the AO is directed to apply the net profit ratio on the unaccounted sales of Rs.275,73,049.69/-, which is relevant to AY2015-16 and not Gross profit ratio. If after applying net profit ratio, the computed amount exceeds the disclosed unaccounted income of Rs.10,14,21,500/-, the excess will only be the net addition. This ground is decided accordingly. The ground no. 3 is treated as Allowed for statistical purposes."

12.3 The Revenue is aggrieved with the addition deleted. Since, the Ld. CIT(A) has not deleted the addition on the ground of no incriminating material and therefore, issue before us in respect of this addition is whether for determination of the undisclosed income,'gross profit rate' should be applied over the unrecorded transactions or 'net profit rate' should be applied over the unrecorded transactions. In the case, there is no dispute on the quantum of turnover recorded in the seized documents. Only dispute between the parties is in respect whether for determination

of undisclosed income gross profit rate should be applied or net profit rate should be applied. Before us, the Ld. DR submitted that assessee is engaged in the business of manufacturing of electrical switches and accessories. The turnover recorded in the seized documents is also in respect of items manufactured by the assessee. According to the Ld. DR, the assessee has already claimed indirect expenses in its books of account in respect of both transactions, i.e. sale transaction recorded in books of accounts as well as in respect of sale transactions recorded in seized documents and therefore, no additional benefit of the indirect expenses corresponding to the transactions recorded in the seized documents should be allowed to the assessee. He submitted that in the seized documents, there is no evidence to suggest that any separate indirect expenses were incurred by the assessee for carrying out trading transactions recorded in the seized documents i.e. transactions not recorded in regular books accounts. He submitted that the decisions relied upon by the Ld. CIT(A) are factually distinguishable and in case where indirect expenses corresponding to the unrecorded trading activity are not recorded in the regular books accounts, in such cases for allowing the benefit of the estimated indirect expenses, net profit rate might be invoked on the trading turnover recorded out the books of accounts, but where there are no evidence to suggest that any indirect expenses have been incurred by the assessee for carrying out transactions out of books of accounts, only gross profit rate can be applied.

12.4 On the contrary, the Ld. Counsel of the assessee relied on the order of the Ld. CIT(A) and submitted that profit on the transactions recorded in seized documents should be restricted to the net profit only. In support of his contentions, he relied on the decision of the in the case **ACIT v. M/s SSOM and SSSMD Industries IT(SS) A Nos. 16 & 271/CTK/2014 and CO No. 34/CTK/2014**. He also relied on the decision of the Kolkata Bench of the Tribunal in the case of New **Barh Jewellers v. ITO in ITA No. 1302 & 1303/Kol/2017**.

12.5 We have heard rival submission of the parties on the issue in dispute and peruse the relevant material on record. As far as the issue of the existence of incriminating material qua the addition is concerned, same is not in dispute before us. The only dispute is in respect of the application of gross profit rate adopted by the Assessing Officer on the unaccounted business turnover as against the net profit rate adopted by the assessee. We find that in the instant case in the seized diaries, evidence of indirect expenses incurred for salary, transport et cetera are recorded, which shows that for carrying out this unaccounted business, the assessee separately incurred indirect expenses. The Assessing Officer while working out the profit based on the transactions in the seized diaries has applied gross profit rate, which means only purchases and direct expenses have been reduced from the unaccounted sales for working out unaccounted profit and no deduction has been

given for expenses incurred for salary and other indirect expenses. In the case of the assessee the unaccounted business being similar to the accounted business, and therefore the profit from the unaccounted business can also be measured applying same yardstick and for that purpose, comparison of the net profit declared in the books of accounts is one of the best available yardstick. The Tribunal in the case of New Barh Jewellers (supra) for estimating profit on the unaccounted business directed to apply net profit rate observing as under:

> *"8. The last ground that is agitated before us is the issue of taxation of excess stock found by the revenue during the course of survey. During the course of survey done u/s 131 of the Act, for the Assessment Year 2009-10, the survey team found difference between the physical stock and the book stock. The physical stock was more than the stock recorded in the books. The difference was assessed as income. The ld. Counsel for the assessee relied on the judgment of the Hon'ble Jurisdictional High Court in the case of Principal Commissioner Of Income vs M/S. Subarna Rice Mill in ITAT 196 of 2015, GA 4047 of 2015, judgment dt. 20/06/2018 and argued that in such a situation, only the gross profit on such stock can be taxed. This judgment was followed by the ITAT Kolkata Bench in the case of DCIT vs. Smt. Madhu Chhanda Sirkar reported in 2018 (9) TMI 1775 - ITAT Kolkat, wherein this Bench of the Tribunal at para 15, 16 & 17 held as follows:-*
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> *"15. We have heard the representative of both the parties and perused the materials available on record. We find from the records that the entire amount has been added on the basis of the undisclosed stock of the business. The question arises as to whether the discrepancy in stock addition or the gross profit embedded therein is to be considered for addition. The issue has been settled by the following judgement relied upon by the representatives of the assessee passed by the jurisdictional High Court with the following observations :-*

"The assessee's appeal before the Commissioner (Appeals) failed and by an order of August 25, 2014, the assessment order of March 28, 2013 was upheld. The Commissioner looked into the facts, the statements made by or on behalf of the assessee and the books of the assessee that had been looked into at the time of survey which the assessee subsequently claimed I.T.A. No. 1290/Kol/2017 Assessment Year: 2007-08 I.T.A. No. 1291/Kol/2017 Assessment Year: 2009-10 Barh Jewellers had been lost or destroyed and, in respect whereof, no complaint had been lodged by the assessee. On facts, the Commissioner (Appeals) found no grounds to interfere with the quantum of excess stocks discovered by the assessing officer in course of the survey. The Commissioner also agreed with the assessing officer as to the quantum of income which had escaped assessment."

There are two aspects to the order impugned dated June 30, 2015 passed by the Appellate Tribunal: the factual findings of the Commissioner (Appeals) as appear to have been interfered with by the Appellate Tribunal; and, the direction given for taking sales of rice and bran into account before arriving at the additional income which could be said to have escaped assessment.

Before the Commissioner (Appeals), the assessee had relied on a document signed by an official of the Food Corporation of India that evidenced the stock figures at the relevant point of time. The Commissioner (Appeals) dealt with such aspect of the matter in great detail and by referring to the admitted statements of the representatives of the assessee, which were not sought to be controverted at any point of time on behalf of the assessee, concluded that it was the physical verification of the stocks undertaken by the Assessing Officer in course of the survey operation that was to be given primacy. Indeed, the Commissioner (Appeals) found that there was no evidence that the FCI official who had issued the certificate had undertaken any physical verification of the stock at the rice mill of the assessee and the document appeared to have been filled up by the assessee and merely signed by the FCI official. Such part of the order of the Commissioner (Appeals) was unexceptionable and could not have been interfered with by the Appellate Tribunal. Indeed, no reasons have been furnished by the Appellate Tribunal in disregarding the physical verification of the stocks carried out by the Assessing Officer. Further, the area of

the godown as indicated in the FCI certificate was of no consequence since the Assessing Officer found stocks piled outside the godown at the time of the survey.

Accordingly, to the extent that the Appellate Tribunal accepted the quantum of additional stocks on the basis of the certificate issued by the concerned FC! official, such order is unacceptable and is set aside. The order of the Commissioner (Appeals) in such regard is restored. The additional quantum as discovered during the course of the survey operation win fasten to the assessee. However, the other aspect of the matter was dealt with by the Appellate Tribunal on a point of principle and such matter does not call for any interference.

According to the Appellate Tribunal the value of the entire quantity of additional stocks that were discovered in course of the survey operation could not be regarded as the additional income of the assessee and amenable to tax. There was a specific ground taken before the Appellate Tribunal which was a legal question, as to whether the undisclosed purchase could be taken as the additional income without reference to the possible sale of the paddy when converted.

The assessee refers to a judgment of the Gujarat High Court reported at 388 ITR

377. The principle enunciated in such judgment is that when undisclosed purchases of such nature are discovered, it is only the profit embedded in the transaction which can be added to the total income. The Gujarat High Court relied on some of its previous judgments to hold that "not the entire purchase price but only the profit element embedded in such purchases can be added to the income of the assessee."

In the circumstances and particularly since the factual findings rendered by the Commissioner (Appeals) as to the quantum of additional stocks have now been restored, the order impugned on the methodology for the ascertainment of the income which escaped assessment would pass muster.

I.T.A. No. 1290/Kol/2017 Assessment Year: 2007-08 I.T.A. No. 1291/Kol/2017 Assessment Year: 2009-10 Barh Jewellers The Appellate Tribunal merely directed the gross profit that the additional purchase was capable of generating to be regarded

as the additional income for tax to be assessed on such basis. Such view of the Appellate Tribunal does not call for any interference. Accordingly, ITAT NO.196 of 2015 and GA N0-4047 of 2015 are disposed of by modifying the judgment and order of the Appellate Tribunal dated June 30, 2015 as indicated.

There will be no order as to costs."

16. The coordinate Bench of this Tribunal held as follows :-

"5. Now comes the equally Important question as to whether the-entire discrepancy in stock addition or only the profit element embedded therein is to be considered for the impugned addition. We find this issue to be no more res integra as co-ordinate bench of this tribunal in M/s Subarna Rice Mill vs. ITO ITA No.1781/Ko1/2014 decided on 30.06.2015 holding only the profit element liability to be added in such circumstances; stand upheld by hon'ble jurisdictional high court's recent judgment dated 20.06.2018 in ITAT 196 of 2015 GA NoA047 of 2015. We therefore conclude that the impugned former addition of the entire discrepancy in stock deserves to be deleted. We accordingly accept assessee's former substantive ground challenging correctness thereof. Its latter substantive ground stands declined in view of our foregoing discussion. We confirm the gross profit addition of Rs.6,94,832/- in these peculiar facts and circumstances."

17. Respectfully relying upon these judgments we observe that only the gross profit can be added to the income of the assessee and not the entire undisclosed stock. We thus delete the addition made by the authorities below."

9. Consistent with the view taken therein, and as no contrary judgment is brought to our notice by the revenue, we direct the Assessing Officer to tax only the gross profit embedded in the excess stock found for the Assessment Year. The balance addition is hereby deleted. In the result this ground of the assessee is allowed in part."

12.6 Similarly the Coordinate bench of Tribunal in the case of SSSOM and SSSMD industries (supra), directed to apply net profit rate on the undisclosed sales observing as under:

> *"10. The ratio of the judgment in CIT vs. Balchand Ajit Kumar (supra) is that the total undisclosed sales of Rs.1,58,75,339/- in this case could not be recorded as profit of the assessee. The net profit rate had to be adopted and once it was adopted, it could not be said that there was perversity of approach. Whether the rate was low or high would depend on each case. While following the aforesaid decision rendered by Hon'ble Madhya Pradesh High Court in CIT vs. Balchand Ajit Kumar (supra), the ld. CIT (A) estimated the profit @ 22% and worked out addition to the total income of the assessee to the tune of Rs.34,92,575/-.*
>
> *11. Following the law laid down by Hon'ble Madhya Pradesh High Court in CIT vs. Balchand Ajit Kumar (supra), we are of the considered view that total sales of Rs.1,58,75,339/- cannot represent the income of assessee on account of undisclosed sales which is price received by the seller of the goods for the acquisition of which the assessee has already incurred the cost. So, in the given circumstances, the only way out is to adopt the net profit by the Revenue authorities, but the same has to be adopted judiciously in the facts and circumstances of the case. In the instant case, there is not an iota of evidence on file as to how the net profit is estimated at exorbitant rate of 22%. Assessee cannotbe compared broadly with M/s. Bhaskar Traders which has shown gross profit @ 22%. So, keeping in view the net profit shown by the assessee in the earlier year @ 16%, we do not find any evidence on record to reach at the conclusion that in the next year, net profit is increased by 6%. So, in these circumstances, we find it appropriate to estimate the net profit @ 16% on the undisclosed sales of Rs.1,58,75,339/-."*

12.7 In view of above discussion, we do not find any error in the order of the Ld. CIT(A) in applying net profit rate for computation of unaccounted profit from the unaccounted business transactions recorded in the seized diaries qua the year under consideration.

Accordingly, we uphold the finding of the Ld. CIT(A) on the issue in dispute.

13.0 The ground nos. 1to 4 of the appeal of the revenue are accordingly dismissed. The ground No. 5 has been raised merely for the reason that revenue had filed appeal before the Hon'ble Supreme Court against the decision of the Hon'ble Bombay High Court in the case of continental warehousing Corporation (supra). Since the said decision of the Hon'ble Bombay High Court has not been stayed by the Hon'ble Supreme Court and therefore same being in operation, we are bound to follow the same. Accordingly, the ground No. 5 of the Revenue is also dismissed.

Appeal : ITA No. 3033/Mum/2022 for AY 2014-15

14.0 Now, we take up the appeal of the assessee for assessment year 2014-15. The grounds raised by the Revenue are reproduced as under:

1. *Whether on the facts and circumstances of the case and in law, the Ld CIT(A)-48, Mumbai is right in holding that no incriminating material was found to sustain the addition.*
2. *2. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A)-48, Mumbai is right in deleting the entire additions of Rs.34,47.72,080/- made in the assessment order only on the ground that no incriminating material was found to sustain the addition without appreciating the facts that the assessment order was passed after carefully analysing the seized material and evidences found during the course of search and survey proceedings and seized..*

3. *3. "Whether on the facts and circumstances of the case and in law, the Ld. CIT(A)-48, Mumbai is right in deleting the entire additions of Rs.34.47.72.080% made in the assessment order without appreciating the facts that the assessment was made on the basis of various incremental documents were found and seized from the residence of Mr. Kumarpal Banda, the director of the company M/s GM Modular Pvt. Ltd at 2203, 22nd Floor, Oberoi Springs, Link Road, Andheri (W). Mumbai-400053, labeled as Annexure A-2, A-3 and A-4 Statement of Mr.Kumarpal Banda, the director of the company M/S GM Modular Pt Ltd was recorded us 132(4) of the Income-tax Act, 1961 during the search proceedings".*
4. *"Whether on the facts and circumstances of the case and in law, the Ld. CIT(A)-48, Mumbai is right in holding that no incriminating material was found to sustain the addition without appreciating the fact that the assessee himself submitted before Ld. CIT(A) that on the basis of incriminating material found during the course of search which were labeled as Annexure A-2, A-3 and A-4 the assessee had offered a sum of Rs. 10, 14.21.500/- on the gross transactions in the return of income filed us. 153A for AY 2015-16".*
5. *Whether on the facts and circumstances of the case and in law, the Ld.CIT(A)-48, Mumbai is right in allowing the appeal filed by the assessee by relying on the decision of the Hon'ble Bombay High Court in the case of CIT vs. Continental Warehousing Corporation(2015 374 IT 645] ignoring the fact that appeal is pending before the Hon'ble Supreme Court of India on this issue of 'power conferred by section 153A of the Act which was not adjudicated upon'.*

14.1 In the year under consideration, the Ld. CIT(A) held that there was no incriminating material qua the any of the additions made and therefore being unabated assessment year, no addition could have been made without the aid of an incriminating material. The relevant finding of the Ld. CIT(A) is reproduced as under:

"6.19 Conclusion-The aforesaid detailed discussion with respect to various judicial decisions clearly laid down the following principles -

(1)the assessments which have been concluded us 143() of the Act and not pending at the time of search proceedings, do not abate.

(ii)for this purpose, intimation u/s 143(1) would constitute an assessment, relying on the decision of Hon'ble Bombay High Court in CIT V/s Gurinder Singh Bawa (79 taxmann.com 398)

(iii)the proceedings us 153A of the Act do not empower the Assessing officer to re-adjudicate the settled issues again, unless fresh incriminating material for the relevant years found during the course of search proceedings.

(iv) the Assessing officer does not have jurisdictionTO makeadditions/disallowances which are not based on relevant incriminating material found during the course of search proceedings.

(v) in the case of completed/un-abetted assessments, where no incriminating material is found during the course of search, the assessment us 153A 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 for the relevant yearare recovered during the course of search.

(vi) Any admission or confession needs corroboration with evidences. In order tothe assessee, was added to the total income of the appellant for the year under consideration.

From the above, it is apparent that this addition is not linked with any incriminating material found during the search pertaining to AY 2014-15. The addition is based on the seized record related to AY 2015-16.

(i) Addition of unsecured loans u/s. 68 of the Act amounting to Rs. 2,00,00,000/-

From the assessment order, it is also observed that the appellant, during F.Y. 2013-14 relevant to AY 2014-15 had shown unsecured loans from two parties namely, M/s

Kamalakshi Finance Corporation (Rs. 50,00,000/-) and M/s NCL Research and Financial Services Ltd (Rs. 1,50,00,000/-). The loan taken from these two parties are treated by the AO as nongenuine. The appellant also submitted during the assessment proceedings that there exists no incriminating material which suggests that the unsecured loans were bogus and accordingly no addition in this regard could have been made.

Since the loan from these two parties form part of the regular books of accounts, in my considered view, there is no basis to treat it forming part of incriminating material found during the course of search proceedings.

(iii) Disallowance of interest expenses of Rs. 10,02,740/- paid to lender by treating the same as unexplained expenditure us. 69C of the Act:

Regarding this addition, it is observed that during the year under consideration, the appellant had claimed interest expense to the tune of Rs. 10,02,740/- paid on the outstanding unsecured loans to two lenders M/s Gromo Trade &Consultancy Services Ltd. and M/ NCL Research and Financial Services Ltd. The interest expenses have been disallowed by the AO us 69C of the Act.Clearly this addition is also not linked with any incriminating material found during the search pertaining to AY 2014-15.

6.21 Hence, only conclusion that can be drawn is that the figures related to these additions are either extrapolation or germinate from regular books of accounts and not forming part of any incriminating material found and seized during the search actionwhich can be relevant to AY 2014-15. Considering the totality of the facts and circumstances, I am of the considered view that these additions cannot survive de hors the incriminating evidences held in the above binding judicial decisions. The AO is accordingly directed to delete the impugned additions made in the assessment order. Thus, the ground of appeal no. 1 & 2 are allowed."

14.2 The Ld CIT(A) held that there was no incriminating material qua the addition of unsecured loans, unverified job work expense

etc. The Ld CIT(A) further with respect to the addition of profit of unaccounted business observed that qua the year under consideration no incriminating material was found and the addition was made by the by AO by extrapolating the material pertaining to AY 2015-16. Before us also the learned DR could not substantiate or brought on record any incriminating material qua the additions, and hence following the ratio in the case of continental warehousing Corporation(supra), no addition could have been made in the case of the assessee for assessment year under consideration. The grounds of the appeal of the Revenue accordingly dismissed.

ITA Nos. 3035 to 3037/Mum/2022 for AY 2016-17 to 2018-19:

15.0 In assessment year 2016-17 to AY 2018-19, facts and circumstances and grounds raised being identical to AY 2014-15 , the relevant grounds are adjudicated mutatis mutandis to the grounds adjudicated in assessment year 2014-15.

ITA NO. 3038/Mum/2022 for AY 2019-20

16.0 Now, we take up the appeal of the Revenue for assessment year 2019-20. In the assessment order passed for the year under consideration under section 153A of the Act, the Assessing Officer has made following three additions/disallowances:

(a) disallowance for unverified purchases of ₹ 9,47,53,780-

(b) disallowance for unverified labour expenses of rupees for, 73, 42, 487/-

(c) disallowance for employee's contribution to PF/ESI deposited after due date under relevant act amounting to ₹ 26, 72, 885/-

16.1 In the grounds raised before us, the Revenue has challenged finding of the Ld. CIT(A) in respect of the disallowance of unverified purchases of ₹9,47,53,780/- and disallowance of employee's contribution to PF/ESI amounting to ₹26,72,885/-.

17.0 The facts in brief qua the ground Nos. 1 (one) and 2(two) of the appeal are concerned, we find that during the course of the search proceeding in the case of M/s Goldmedal Electrical's private limited(i.e.a concern related to assessee), the search team found that purchases from certain parties were remained unverified. Out of those parties, three parties namely M/s Hirasons, M/s Satyam Plast and M/s Shivam Enterprise also featured in the list of the vendors of the assessee company. During the course of the search in the case of the assessee statement of Sh Rahul Dinesh Jha , an employee of the assessee was recorded, wherein he stated that bills of purchases from aforesaid entities were directly entered into accounting system used by the godown staff. This statement of sh Rahul Dinesh was confronted toSh Jayantilal Jain, promoter of the assessee company, but he failed to substantiate the purchases from those parties. During the course of the assessment proceeding, the Assessing Officer issueda detailed show cause notice as why the

purchases from said parties during the period from assessment year 2014-15 to AY 2020-21, might not be disallowed. The assessee substantiated the purchase with purchase invoice, copies of stock register, delivery challan from supplier, bank statement of assessee company, ledger confirmation from those parties. After considering the submission of the assessee, the Assessing Officer bifurcated the purchases from those parties for the period prior to introduction of e-way bill under the GST and post the period the introduction of e-way bill under the GST. Relevant table of purchases reproduced by the Assessing Officer on page 40 of the assessment order is extracted as under:

Name	Financial Year	With Eway Bill (After July 2018)	Without Eway bill (July 2017 to June 2018)	Before July 17 Before GST	Total
		After Introduction of E Way bill	In GST Prior to E-way Bill	Before GST	
Hirasons	2016-17			11,01,16,363	
	2017-18	-	15,23,55,280/-	6,27,10,588	
	2018-19	15,61,09,770	1,70,54,525		
	2019-20	5,68,10,363			
Total		21,29,20,133	16,94,09,805	17,28,26,951	55,51,56,889
Satyam Plast	2016-17			11,76,50,027	
	2017-18		8,78,97,813	3,49,32,034	
	2018-19	13,59,66,299	3,46,01,997		
	2019-20	9,50,11,571			
Total		23,09,77,870	12,24,99,810	15,25,82,061	50,60,59,740
Shivam	2016-17				
	2017-18	84,568	2,57,17,039		
	2018-19	9,19,47,619	4,30,97,258		
	2019-20	7,15,55,191			
Total		16,35,87,378	6,88,14,297	0	23,24,01,675
Grand total		60,74,85,381	36,07,23,911	32,54,09,012	1,29,36,18,304

16.2 Out of the above purchases from three parties, the Assessing Officer verified the purchases of ₹60,74,85,381/-for the period of

post introduction of the e-way bill as corresponding transport of the goods was duly verified from thewebsite of GST portal. The relevant finding of the Assessing Officer is reproduced as under:

> *"(ix) The analysis of these purchases have been made as under:*
>
> *1. Purchases from 3 parties for FY 2017-18 onwards for which E way Bill is available is of an amount Rs. 60,74,85,381/-:*
>
> *The E way bill mentions the transport details like transporter name with Vehicle Numbers. The numbers given in the E way bill were verified form the Transport Ministry website of Vahan on test check basis and the said vehicles were found to be Goods vehicle. E way Bill is a contemporary document and is generated from the website of GST portal. E way Bill is a contemporary document and is generated from the website of GST portal. The E way Bill is a contemporary document which hasbeen introduced by Government as an efficient way of tracking of goods shipped through transport. Thus, being a contemporary document it is generated for transport of goods and thus cannotbe generated post facto. The same vehicle is verified form the Transport Ministry website of Vahan and the vehicle was found to be Goods vehicle. The same was done on test check basis. Further for these purchases transporter invoices were produced by the assessee.*
>
> *Thus there exists a third party evidence in the nature of E way bill for delivery of goods and therefore the purchase of an amount Rs.60.74 crores is taken as verified."*

16.3 But regarding the balance purchases of Rs. 68, 61,32,923/-, the Assessing Officer rejected the sameas unverified due to absence of watchmen inward register, absence of e-way bill and certain minor discrepancies in the stock register. The Assessing Officer accordingly rejected the purchases relevant to the assessment year under consideration amounting to ₹9,47,53,780/- holding the same

is unverified. The relevant finding of the Assessing Officer is reproduced as under:

> *"b) Purchases for which no E way Bill is available for an amount Rs.68,61,32,923/- -*
>
> *i)Goods purchased from M/s Hirasons for an amount of Rs.34,22,36,756/-:*
>
> *Purchases fromHirasons are like vibro ding dong bell, PXSF 12 00 7 white with a narration CASAVIVA Glossy White, JS 04 103 with narration Slim Surface box, Round plate, Fan junction Plate, Medium, Junction plate, etc. The stock register has been examined but cannot be accepted because of the reason that in stock register of month of October 2016 for 16Amp Axton 3 pin top with indicator it is seen that issue is of quantity 3450 whereas the receipt is of 2700. The copy of the same is reproduced below:*

GM MODULAR PVT LTD.
6/7 SHREE HARI Industrial Estate
Sativali Road, Village Valiv
VASAI EAST DIST.PALGHAR 401 208

Ledger Page 1/1
From : 01/10/2016 Print Date :14 August, 2020 01:20 P
To : 31/10/2016

Product : GM 3304 16 Amp Axton 3 Pin Top With Indicator Color : WHITE

Date	Document No	Remarks	Receipts	Issues
01-10-2016	-	**Opening Balance**		
19-10-2016	00899/16-17	HIRASONS	2700	
20-10-2016	01675	JBD TRADING CO PVT.LTD		300
20-10-2016	01676	BRIGHT ELECTRICAL - VASAI		600
20-10-2016	01679	INDUS CORPORATION		300
22-10-2016	01540	GRAVITY ELECTRICALS PVT LTD		50
22-10-2016	01537	Deepak Electric & Electronics Co		200
22-10-2016	01691	IMPERIAL SHAH STORES		1200
22-10-2016	01691	IMPERIAL SHAH STORES		1800
26-10-2016	00968/16-17	HIRASONS	2700	
27-10-2016	01837	NEW DELHI SPARE CENTER		200
31-10-2016	-	**Closing Balance**	750	

> *(i) Considering the above inconsistencies the stock register is not relied upon to corelate sales with purchases made. The invoices were checked on sample basis. It did not contain verification stamp from stores department. For these purchases, assessee submitted thatwatchmen Inward register is not available. There is no proof of delivery of*

goods in absence of watchman inward register and E way bill . Thus in absence of verifiable document for delivery of Goods the purchase of Rs.34,22,36,756/-remains unverified and thus unexplained.

(ii)Goods purchased from M/s Satyam Plast for an amount of Rs.27,50,81,870/-:

The invoices were checked on sample basis. It did not contain verification stamp from stores department. For these purchases, assessee submitted that watchmen Inward register is not available. There is no proof of delivery of goods in absence of watchman inward register and E way bill. Thus in absence of verifiable document for delivery of Goods the purchase of Rs.27,50,81,870/-remains unverified and thus unexplained.

ii) Goods purchased from Ms Shivam Enterprises for an amount of Rs.6,88,14,2971-:

The invoices were checked on sample basis. It did not contain verification stamp from stores department. For these purchases, assessee submitted that watchmen Inward register is not available. There is no proof of delivery of goods in absence of watchman inward register and E way bill. Thus in absence of verifiable document for delivery of Goods the purchase of Rs.6,88, 14,297/-remains unverified and thus unexplained.

Thus as discussed above, purchases of Rs.68.58 Crores out of total purchase of Rs. 129.36 Crores is to be considered as unexplained in the case of M/s GM Modular Pvt Ltd.

(x)It is seen that from these 3 parties assessee has claimed to avail labour services and paid charges of Rs.7,55,30,494/- to these 3 parties in the case of GM Modular Prt Ltd. No supporting documents have been submitted for these. Hence the amount of Rs.7,55,30,494/- is considered unexplained in the case of M/s GM Modular Pvt Ltd.

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(xi)The assesse vide its submission dated 11.03.2021 has tried to explain the genuiness of the transactions, however it has failed in subbstanting the claim of purchases/labour work as the asssesse could not make rebuttal of discrepancies pointed above in respect of documentation and records of the purchases. The assesse failed in producing third party evidences in respect of claim of purchases. Statements of concerned persons clearly establish the deviation/discrepancies in respect of recording of purchases in the books of the assessee. The assessee failed in submitting watchman inward register and E-way bills. None of the satisfactory documents were produced by assessee in respect of labour services/job work. All the relevant extract/documents requested by the asessee were supplied to the assesseee, however it has failed in proving the genuineness of purchases held to be bogus in above paras with supporting documentary evidences maintained in the case of genuine purchases.

(xii)Thus Purchase addition Summary in the case of M/s GM Modular Pvt Ltd is tabulated as under:

FY	AY	Unverified Purchases amount (in Rs)	Unverified Labour/Job Work (in Rs)
2012-13	2013-14	-	26,91,945
2013-14	2014-15	-	26,98,730
2014-15	2015-16	-	78,27,700
2015-16	2016-17	-	1,88,77,132
2016-17	2017-18	22,77,66,390	1,86,71,188
2017-18	2018-19	36,36,12,754	2,47,63,799
2018-19	2019-20	9,47,53,780	4,73,42,487
Total Unverified Purchases & Labour Job Work		68,61,32,923	7,55,30,494

(xiii) Thus an amount of Rs.9,47,53,780/- and Rs.4,73,42,487/- on account of unverified purchases and unverified labour/job work respectively is disallowed and added to the total income of the assessee for AY 2019-20.

16.4 On further appeal, the assessee filed details submission before the ld CIT(A). The ld CIT(A) called for comments of the Assessing Officer on those submissions. After considering the submission of

the assessee, the Ld. CIT(A) has given his comment on the observation of the Assessing Officer and deleted the addition of observing as under:

> *5.7 It is observed that during the year under consideration, the Appellant had made following payments to three parties on account of purchases, in the following manner:*
>
> *(i) M/s. Shivam Enterprises- Rs.4,30,97,258*
>
> *(ii) M/s. Satyam Plast- Rs. 3,46,01,997*
>
> *(iii) M/s. Hirasons- Rs. 1,70,54,525*
>
> *TOTAL Rs. 9,47,53,780*
>
> *5.8 The impugned disallowances were made as in the opinion of the AO, the purchases were unverified expenditure. The issue has been discussed in para 1.2, of the assessment order in the following manner-*
>
> *"(i Various statements recorded in the case of Gold Medal Group and discrepancies pointed out in respect of recording of above purchases clearly establish that these Groups are involved in recording non-genuine purchases/labour job work in its books of accounts. It was found that there are 3 common parties who feature in the list of vendors of the company M/s GM Modular Pvt Ltd which is group concern of M/s G Nine Modular Pvt Ltd.The same are M/s Hirasons, M/s Satyam Plast and M/s Shivam Enterprise.The statement of Shri Rahul Dinesh Jha, an employee of M/s GM Modular Pvt Ltd was recorded on 14.11.2019 during the course of Survey at Vima Building No. B, Plot No. 93, Survey No. 66, His No. 1/1, Waliv Village, Vasai (E)-401208."*
>
> *Comment on the Observation of the A0: The AO has heavily relied on the statement of Shri Rahul Dinesh Jha, which is also quoted in the order. On carefully going through the statement of Shri Rahul Dinesh Jha, I find that he has stated that the bills of M/s Hirasons, M/s Satyam Plast and M/s Shivam Enterprise are directlyentered into the accounting system used by the godown. No where in the statement, Shri*

Rahul Dinesh Tha has admitted that the bills pertaining to these three parties are non-genuine. The AO has not made clear as to how this method of entering into the accounting software one can draw conclusion that the purchases are non-genuine.

5.9 Thereafter, in page no. 42, the AO, while concluding the issue has submitted that

"b) Purchases for which no E way Bill is available for an amount Rs.68,61,32,923/-

i)Goods purchased from M/s Hirasons for an amount of Rs.34,22,36,756/-:

Purchases from Hirasons are like vibro ding dong bell, PXSF 12 00 7 white with a narration CASAVIVA Glossy White, JS 04 103 with narration Slim Surface box, Round plate, Fan junction Plate, Medium Junction plate, etc. The stock register has been examined but cannot be accepted because of the reason that in stock register of month of October 2016 for 16Amp Axton 3 pin top with indicator it is seen that issue is of quantity 3450 whereas the receipt is of 2700. The copy of the same is reproduced below:

Table on page no. 43

(i) Considering the above inconsistencies the stock register is not relied upon to corelate sales with purchases made. The invoices were checked on sample basis. It did not contain verification stamp from stores department. For these purchases, assessee submitted that watchmen Inward register is not available. There is no proof of delivery of goods in absence of watchman inward register and E waybill. Thus, in absence of verifiable document for delivery of Goods the purchase of Rs.34,22,36,756/-remains unverified and thus unexplained.

ii)Goods purchased from M/s Satyam Plast for an amount of Rs.27,50,81,870/:

The invoices were checked on sample basis. It did not contain verification stamp from stores department. For these purchases, assessee submitted that watchmen Inward

register is not available. There is no proof of delivery of goods in absence of watchman inward register and E way bill. Thus inabsence of verifiable document for delivery of Goods the purchase of Rs.27,50,81,870/-remains unverified and thus unexplained.

iii) Goods purchased from M/ Shivam Enterprises for an amount of Rs.6,88,14,297/-:

The invoices were checked on sample basis. It did not contain verification stamp from stores department. For these purchases, assessee submitted that watchmen Inward register is not available. There is no proof of delivery of goods in absence of watchman inward register and E way bill. Thus in absence of verifiable document for delivery of Goods the purchase of Rs.6,88,14,297/-remains unverified and thus unexplained.

Thus as discussed above, purchases of Rs.68.58 Crores out of total purchase of Rs. 129.36 Crores is to be considered as unexplained in the case of M/s GMModular Pvt Ltd."

*Comment on the Observation of the AO:-**

5.9.1 The entire purchase of Rs.34,22,36,756/- from M/s Hirasons, M/s Satyam Plast for an amount of Rs.27,50,81,870/- and M/ Shivam Enterprises for an amount of Rs.6,88,14,297/-have been disallowed on the pretext of

(i) One instance of discrepancy in the stock register

(ii) Absence of Watchman inward register and E waybill for these purchases

5.9.2 Regarding inconsistencies in the stock register, the appellant has submitted a detailed explanation and documents before the AO, to substantiate reasons for difference. According to the appellant, the appellant had received an order on 22.10.2016 from M/s. Imperial Shah Stores which was inadvertently booked in the stock register based on delivery order generated, however the actual delivery and invoicing against the same was done in the month of Nov' 2016 on 07.11.2016. Due to this error, the issue quantity for one item was more than receipt quantity. Before

the undersigned too, the appellant has submitted the documents to substantiate the difference. In this regard, I agree with the appellant that a stray inconsistency in the stock register cannot form the basis to arrive at a conclusion that the entire purchase is non-genuine. Moreover, a plausible explanation has been given by the appellant which is just rejected by the AO without giving reasons for the same.

Moreover, the discrepancy is with respect to just 750 units which is apparently very little in comparison to the total purchases. I am of the considered view that even with this small discrepancy, entire purchases cannot be disallowed. It is also pointed out by the appellant that although the discrepancy is w.r.t M/s Hirasons only, the entire purchase from the three parties were disallowed. Certainly there is merit in this argument of the appellant too.

5.9.3 As far as non-production of Watchman register and absence of verification stamp from stores department are concerned, the appellant has submitted that the company didn't have the policy/procedure of maintaining watchmen inward registers and the same was not maintained by the company. The procedures as followed by the management of the company are uniformly followed throughout the organisation for all the purchases made over the period of time and hence watchmen register is not maintained as the same is not mandated under any law and the management didn't feel suitable to maintain the same. The watchmen register was started to be maintained by the company from 01.10.2018 which was verified by the search party during search/survey action. However, cognizance of the same cannot be drawn to the purchases/transaction/ business done by the appellant company prior to that period comparing the same with that.

5.9.4 In my considered view, if before 01.10.2018, the management of the appellant company had uniform policy of not maintaining watch man register and the same was uniformly followed throughout all departments/ sections of for all purchases made over the period, the absence of such registers cannot form the basis for disallowance, if other registers viz, sale and purchase registers, stock registers support impugned purchases. Tagging requirement of stock

registers with these three parties only and overlooking other parties is, in my opinion, is not justifies.

5.9.5 As far as electronic way bill viz. E-Way Bill is concerned, the appellant has submitted before the AO that this was introduced from 03rd Jun, 2018 by the amendment in the GST laws and it was made compulsory to issue E-way bill fortransporting the goods above Rs.50,000/-. According to the appellant, the

observation of the AO that no e-way bill was produced in respect of the transaction of purchase of goods before the amendment is certainly unjustified and cannot be accepted. Prior to 03.06.2018, for transport of goods and all purchase-sales transactions entered the business didn't have the requirement of preparing the E-ways bills. I find merit in these arguments of the appellant.

5.9.6 It is also strange that for the period prior to e-way bills' requirement, all purchases from these three parties are treated by the AO, as non-genuine.

However, after the scheme of -way bills was introduced during the relevant F.Y. itself, the purchases from the same three parties have been treated as genuine. Can it be said that before a cut off date, all purchases from a party is bogus & non-genuine and after the cut off date, the same party becomes genuine just because the scheme of e-way bills was introduced by the Central Govt. In my considered view, such a stand of the AO cannot be approved.

5.10 The final conclusion of the AO is in page 44 of the assessment order, wherein he states as under-

"(xi)The assessee vide its submission dated 11.03.2021 has tried to explain the genuineness of the transactions, however it has failed in substantiating the claim of purchases/labour work as the assessee could not make rebuttal of discrepancies pointed above in respect of documentation and records of the purchases. The assessee failed in producing third party evidences in respect of claim of purchases. Statements of concerned persons clearly establish the deviation/discrepancies in respect of recording of purchases in the books of the assessee. The assessee failed in

submitting watchman inward register and E-way bills. None of the satisfactory documents were produced by assessee in respect of labour services/job work. All the relevant extract/documents requested by the assessee were supplied to the assessee, however it has failed in proving the genuineness of purchases held to be bogus in above paras with supporting documentary evidences maintained in the case of genuine purchases."

Comment on the Observation of the AO:-

5.10.1 In this regard, the appellant has submitted that it has already furnished the numerous documents and details available with the appellant company before theAO to substantiate the claim of the aforesaid expenditures incurred. These documents are again submitted during the appellate proceedings. Briefly these are.

i.Purchase Invoices as received from the Vendors: It is explained that based on the requirements as placed in the PO by the appellant company, they sent the goods to the required warehouse/factors premises of the assessee company along with the copy of the Tax Invoice incorporating the details of the goods sold by the vendor, Vehicle details through which goods is transported, premises at which goods is transported etc.

ii.Stock register of each of the stocks purchased from alleged concerns:

According to the appellant, once the Goods are received at the premises of the assessee company, an entry is being made in the Material Inward Register maintained by the stock keepers maintaining the details of the goods and materials received at the premises. The copy of the stock inward and outward registers as maintained by the appellant company reflecting the movement of goods.

iii.Delivery Challan/ Stock in from Supplier report: The delivery challan as issued by the alleged vendor while transporting the goods incorporating the details of vehicles through which the goods are imported, vehicle no., transporters name etc.

iv. Bank Statements of the Appellant company: On successful receipt of the goods from the parties, the assessee company within the decided credit period makes the payment to the vendors.

v. Ledger Confirmation from the three parties: The copies of the duly signed ledger confirmations from the three parties reflecting and confirming the transactions.

According to the appellant, the after producing the above documents, the appellant company has discharged its onus to prove the genuineness of the transaction.

5.10.2 In my considered view, after submitting the above documents, the onus is on the AO to point out the defects in these documentary evidences, which the AOhas failed to do so. Only citing a solitary instance of discrepancy, will not establish any thing, once the reason for such difference has been successfully explained before the AO. In this regard, the reliance of the appellant in the judicial decisions viz., Hon'ble Supreme Court in the case of CIT vs. Odeon Builders (P.) Ltd.(20191 IlO taxmann.com 64 (SC), Innovators Façade Systems Pvt. Ltd. VS. ACIT [ITA No.5450, 3451 & 5452/Mum/20151, M/s. Adeshwer Enterprise Versus Dcit, Central Circle-01 Thane, ITA Nos.4335 to 4338/Mum/2017, are in order,

5.11 Conclusion- Considering the totality of the facts and circumstances of the issues involved, as discussed in the preceding paragraphs, in my considered view, the addition of Rs. Rs.9,47,53,780/- on account of unverified purchases deserved to be deleted. The AO is directed accordingly. Thus ground of appeal no. 1 is Allowed."

16.5 We have heard rival submissions of the parties on the issue in dispute and perused the relevant material on record. We find that purchases from the three parties, namely **M/s Hirasons, M/s Satyam Plast and M/s Shivam Enterprises** for the period from April to June of the relevant financial year, have been held to be unverified by the Assessing Officer for the reason that no e-way bill

corresponding to those purchases were found. The Assessing Officer has noticed that no inward register of watchmen in respect of those purchases was found. Before the Assessing Officer, it was explained by the assessee that requirement of e-way bill was made applicable under the GST rules from 03/06/2018 only and therefore prior to that there was no requirement of maintaining e-way bill under the relevant law. Regarding the inward watchman register also it was explained by the assessee that at the relevant time there was no policy/procedure of maintaining watchmen inward Register. The Assessing Officer disregarded the submissions. We find that Ld. CIT(A) after taking into those submissions has correctly deleted the disallowance made by the Assessing Officer. We do not find any infirmity in the finding of the Ld. CIT(A) on the issue in dispute, and accordingly, we uphold the same. The ground Nos. 1(one) and 2 (two) of the appeal of the Revenue accordingly dismissed.

17.0 In ground No. 3 (three), theRevenue has challenged the deletion of disallowance of employee's contribution to PF/ESI amounting to ₹26,72,885/- deposited after the due date of the payment under the relevant act. The Ld. CIT(A) deleted the disallowance of observing as under:

> *"7.2 In my considered view the issue under consideration, for AY 2019-20, is if the employee contribution towards PF is paid before the due date of filling of return of income, whether the same would be allowed as expenses and can be allowed under section 36 (1)(va). The issue is covered by the Jurisdictional High Court decision in the case of CIT vs.*

Ghatge Patil Transports Ltd. [2014 (10) TMI 999 - Bombay High Court] and Hon'ble Karnataka High Court decision in the case of CIT v. Spectrum Consultants India (P.) Ltd. [2014] 49 taxmann.com 29 (Karnataka). These decisions are already quoted in the submission of the he appellant, which is not produced for the sake of brevity. Hence, the A.O is directed to allow Rs. 26,72,885/- as contribution received from employees towards ESI and EPF and ground of appeal no. 3 is Allowed."

17.1 We have heard rival submissions of the parties on the issue in dispute and perused the relevant material on record. In view of the decision of the Hon'ble Supreme Court in the case of **Checkmte services p ltd in Civil Appeal No. 2833 of 2016,** an assessee is not eligible for deduction under section 36(1)(va) of the Act in respect of the employee's contribution to PF/ESI deposited after the due date prescribed under the relevant Acts. Therefore, respectfully following the decision of the Hon'ble Supreme Court (supra), the finding of the Ld. CIT(A) on the issue in dispute is set aside and the disallowance made by the Assessing Officer is sustained. The ground No. 3 of the appeal of the Revenue is accordingly allowed.

ITA No. 3211/Mum/2022 for AY 2014-15 M/s G Trade and capital venture ltd:

18.0 Now we take up the appeal of the revenue in ITA No. 3211/Mum/2022 in the case of M/s G Trade and capital venture ltd for assessment year 2014-15. The grounds raised by the revenue reproduced as under:

1. *Whether on the facts and circumstances of the case and in law, the Ld. CIT(A)-48, Mumbai is right in holding that no incriminating material was found to sustain the addition.*
2. *Whether on the facts and circumstances of the case and in law, the Ld. CIT(A)-48 Mumbai is right in deleting the entire additions of Rs.2,72,63,970/- made in the assessment order only on the ground that no incriminating material was found to sustain the addition without appreciating the facts that the assessment order was passed after carefully analyzing the seized material and evidences found during the course of search and survey proceedings and seized.*
3. *Whether on the facts and circumstances of the case and in law, the Ld. CIT(A)-48, Mumbai is right in deleting the entire additions of Rs.2,72,63,970/- made in the assessment order without appreciating the facts that the identity, genuineness and creditworthiness of the lenders were not established after giving ample opportunity to the assessee.*
4. *Whether on the facts and circumstances of the case and in law, the Ld. CIT(A)-48, Mumbai is right in allowing the appeal filed by the assessee by relying on the decision of the Hon'ble Bombay High Court in the case of CIT v. Continental Warehousing Corporation [2015 374 ITR 645] ignoring the fact that appeal is pending before the Hon'ble Supreme Court of India of this issue of 'power conferred by section 153A of the Act which was not adjudicated upon.*

19.0 Briefly stated facts of the case are that assessee was also subjected to search action under section 132 of the Act on 13/11/2019 along with the other assesses of the group and notices for the relevant assessment years including the assessment year under consideration were issued under section 153A of the Act. In the assessment made for the year under consideration under section 153A of the Act on 08/08/2021, the Assessing Officer made following additions:

"3.1 In the assessment made, the AO has made various additions to the returned income, which are as under:

1. *Addition on account of accommodation entry of unsecured loan u/s 68 of Rs.2,50,00,000/-.*
2. *Addition on account of unexplained expenditure u/s 69C on account of interest on accommodation entry of unsecured loan of Rs.18,30,674/-.*
3. *Addition on account of unexplained expenditure u/s 69C on account of commission for arranging accommodation entry of unsecured loan of Rs.62,500/-.*
4. *Addition u/s 43B of I.T. Act of Rs.3,70,800/-.*

Against these additions/disallowances, the appellant is in the present appeal".

20.0 the Ld. CIT(A) has deleted the additions mainly on the ground that the year under consideration being unabated assessment, no addition could have been made without the aid of the incriminating material. The Ld. CIT(A) has summarised the submission of the assessee and the finding of the Assessing Officer as under:

"6.1 I have carefully considered the facts of the case, submissions of the Appellant, the observations of the A contained in the assessment order and the other materials on record on this issue. In this Ground, the appellant has contended that the assessment order passed u/s 153A r.w. 143(3) of the Act for the impugned assessment year is bad in law as -

(i)there were no assessment proceedings pending as on the date of search action us 132 of the Act which is a prerequisite for assessing the income escaped to tax.

(ii)there is no nexus between the additions made in the assessment order to that of incriminating material found/seized pursuant to the search action.

6.2 The sum and substance of these grounds raised by the appellant is that the additions made in the assessment order

are not based on or connected with any incriminating documents found or seized during the search proceedings. Moreover, as on the date of search action us 132 of the Act, there were no pending assessment proceedings for the impugned AY, which got abated.

6.3 It is observed that the AO has remained silent on the issue of any incriminating material found and/or seized during the search action, based on which the impugned additions are made. The Id. ARs, on the other hand, has emphatically stated that the impugned additions are not based on any material found/seized during the course of search action at the premises of the appellant.The appellant has also relied on a no. of judicial decisions on this issue.

6.4 On perusal of the impugned assessment order, it is evident that the Ad has not referred to any seized material found during the course of search to make the impugned additions. The original return of income, in this case was filed on 30.11.2014. The due date for issuing notice us 143(2) was 30.09.2015, which had already expired on the date of search i.e., 13.11.2019. Since, the proceedings for A.Y. 2014-15 had not abated, the contention of the Id. ARs that the AO was empowered to make additions based on the incriminating material found and seized during the course of search operation, appears to be true, as held in a no. of judicial decisions including the decision of jurisdictional High Court."

20.1 Thereafter, the Ld. CIT(A) has relied on the decision in the following cases:

a. Continental warehousing Corporation
b. Vimal Kumar Rathi
c. Murli Agro Gurider singh
d. All Cargo Logistics
e. Meeta Gutgatia
f. Kabul Chawala

g. Saumya Construction

h. Allied perfumers

i. Jasmin K Ajmera

j. Jay Ketan Parikh

20.2 The Ld. CIT(A) then deleted the addition observing as under:

"6.15 Conclusion-The aforesaid detailed discussion with respect to various judicial decisions clearly laid down the following principles -

(i) the assessments which have been concluded u/s 143(3) of the Act and not pending at the time of search proceedings, do not abate.

(ii) for this purpose, intimation us 143(1) would constitute an assessment, relying on the decision of Hon'ble Bombay High Court in CIT V/s Gurinder Singh Bawa (79 taxmann.com 398)

(iii)the proceedings us 153A of the Act do not empower the Assessing officer to re-adjudicate the settled issues again, unless fresh incriminating material for the relevant year is found during the course of search proceedings.

(iv)the Assessing officer does not have jurisdiction to make additions/disallowances which are not based on relevant incriminating material found during the course of search proceedings.

(v) in the case of completed/un-abetted assessments, where no incriminating material is found during the course of search, the assessment us 153A 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 for the relevant year are recovered during the course of search.

(vi)Any admission or confession needs corroboration with evidences. In order to make a genuine and legally sustainable addition on the basis of admission or confession during search action, it is necessary that some incriminating material must

have been found to correlate the undisclosed income with such statement.

(vii) Any statement recorded under section 132(4) cannot be considered as incriminating material found in the course of search as these are recorded to elicitmore information/explanation of the search person on the incriminating documents/gold/jewellery found during search.

6.16 Conclusion- In the present case, additions have been made on account of accommodation entry of unsecured loan of Rs.2,50,00,000/-, as unexplained expenditure us. 69C due to interest on accommodation entry of unsecured loan of Rs. 18,30,674/-, as unexplained expenditure us. 69C due to commission for arranging accommodation entry of unsecured loan of Rs.62,500/- and as addition u/S. 43B of Rs. 3,70,800/-. As stated above, the AO has not brought on record through the assessment order or through any communication regarding any incriminating document or material found or seized during the Search and Seizure action us 132 of the Act, which can be linked /correlated with the impugned additions made. Considering the totality of the facts and circumstances of the issues involve, I am of the considered opinion that these additions cannot survive de hors the incriminating evidences as held in the above binding judicial decisions. The A is accordingly directed to delete the impugned additions made in the assessment order. Thus, the grounds of appeal no. 1 & 2 are allowed."

20.3 Before us the learned departmental representative relied on the finding of the Assessing Officer in respect of the addition for unsecured loans which were held by the Assessing Officer as accommodation entry and added under section 68 of the Act. In respect of the other additions also he relied on the finding of the Assessing Officer.

20.4 We have heard rival submissions of the parties on the issue in dispute and perused the relevant material on record. We find that

the Assessing Officer made the addition relying on following observations:

> *"(ii) Essarindia Ltd: - Kolkata Investigation Directorate in its Investigation report (Ref: F.No 75A/2015-16/257-273 dated 27.04.2015 of Pr.DIT (Inv.), Kolkata)had given the finding that the company M/s Esaar(India) Ltd is a penny scrip and it is being used to provide accommodation entries to various beneficiaries through rigging of shares.The name of the company also features in the list of confirmed shell companies as circulated by FlU IND. The Entry operators and Exit providers recorded during 133A of the Income tax Act, have accepted that the scrip of Esaar(India) Ltd has been used for providing accommodation entries. Mr.Kumarpal Banda, the director of the company M/s GM Modular Pt Ltd in his statement recorded u/s 132(4) of the Income-tax Act, 1961 on 14.11.2019, in reply to Q.30 and Q.31 has accepted that the loans taken from Ms Esaar(India) Ltd are not genuine. Further an opportunity was given to the assesseei.e. Mr.Jayantilal Jain, Promoter of GMGroup on 12.01.2020, Mr.Jugraj Jain, Promoter of Goldmedal Group on 27.11.2019 and Mr. Kapil Jain, Director of M/s Goldmedal Electricals Pt Ltd on 11.01.2020 to produce the party to verify its claim that the unsecured loan is genuine. But the assessee failed to produce the party and thus has failed to discharge its onus to explain the source of credit.*
>
> *1. Kamalakshi Finance Corporation/ Gromo Trade and Consultancy Ltd:*
>
> *The SEBI has passed order u/s 11, 11(4) and 11B of the Securities and Exchange Board of India Act, 1992 on 20thFebruary, 2015in the matter ofM/s Kamalakshi Finance Corporation (Now known as Gromo Trade and Consultancy Ltd) for making illegal gains and to convert ill gotten gains into genuine one. An opportunity was given to the assesseeie. Mr. Jayantilal Jain, Promoter of GM Group on 12.01.2020, Mr.Jugraj Jain, Promoter of Goldmedal Group on 27.11.2019 and Mr.Kapil Jain, Director of M/s Goldmedal Electricals Pt Ltd on*

11.01.2020 to produce the party to verify its claim that the unsecured loan is genuine. But the assessee failed to produce the party and thus failed to discharge its onus to explain the source of credit.

The assessee vide its submission dated 03.02.2021 has tried to explain the Identity, genuineness and creditworthiness of the transactions of loan, however the same is not acceptable as the facts remains that the promoter of G.M. Group has failed in producing the lenders for verification. Further, the lender parties have accepted in their statement that they are involved in providing accommodation entries. All the relevant extract/documents were supplied/communicated to the assessee to substantiate the claim of genuineness of loan, however it has failed in discharging its onus. The parties are not available on their addresses. The assessee failed in producing the parties for verification.

The financial credentials as discussed above also indicate that the lenders have no creditworthiness to provide such huge amount of loan.

Merely filing of return by lenders are not sufficient to prove their creditworthiness.

In view of the above findings/report, it is clear that the identity of the loan creditor as well as creditworthiness and genuineness of the transaction is not established. In view of the same, amount of Rs. 2,50,00,000/- is added to the total income of the asssessee as unexplained cash credit u/s 68 of the Income Tax Act.

Penalty proceedings u/s 271(1)(c)are initiated for furnishing inaccurate particulars Income leading to concealment of Income."

20.5 We find that there is no reference of any incriminating material found during the course of the search action in the assessment order qua the additions made. In case of unsecured loan parties namely M/s Essar India Ltd, information received from income tax investigation Department of Kolkata dated 27/04/2015

has been referred. No other incriminating material has been found in relation to said party. In respect of similar observations in the case of GM Modular private Limited for AY 2015-6 in ITA No. 3034/Mum/2022, we have held that said information do not constitute incriminating material. In respect of the other party namely M/s Erudite Shares and Securities p Ltd, an independent survey was carried out u/s 133A of the Act, and therefore cannot be considered for the purpose of incriminating material found during the course of the search. In the case of the assessee, the Ld DR also referred the statement of sh Kumar pal Band and Jayantila Jain as constituting incriminating material. We have already given the detailed finding in respect of the unsecured loan parties in the case ofGM Modular private Limited for AY 2015-6 in ITA No. 3034/Mum/2022 as why the statement of Sh Kumarpal Banda and Jayantilal Jain do not constitute incriminating material found in the course of the search in the case of the assessee. To have consistency in our finding on the issue in dispute, in the instant appeal also, we uphold the finding of the Ld. CIT(A) that there existed no incriminating material qua the additions and hence no addition could have been made without the aid of incriminating material in the instant assessment year being unabated assessment. The grounds of the appeal of the revenue accordingly dismissed.

21. In the result, applications under Rule 27 of the assessee for all the relevant assessment years in the case of GM Modular P Ltd are dismissed and the appeals of the revenue for assessment year 2014-15 to assessment year 2018-19 are dismissed whereas appeal for assessment year 2019-20 is allowed partly. The appeal of the revenue in the case of G Trade and Capital Venture p ltd for AY 2014-15 is also dismissed.

Order pronounced in the open Court on 31/05/2023.

Sd/-	**Sd/-**
(KULDIP SINGH)	**(OM PRAKASH KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai;
Dated: 31/05/2023
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

BY ORDER,

//True Copy//

(Assistant Registrar)
ITAT, Mumbai