

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH 'B', KOLKATA**

[Before Shri P.M. Jagtap, AM and Shri S.S. Viswanethra Ravi, JM]

**I.T.A. No. 868/Kol/2017
Assessment Year: 2012-13**

Sarda Mines Pvt. Ltd.....Appellant
6th Floor, Circular Court,
8, AJC Bose Road,
Kolkata - 700017.
[PAN : AAHCS 2419 R]

D.C.I.T., Cir 5(2) Kolkata.....Respondent
Aayakar Bhawan, P-7, Chowringhee Square,
Kolkata - 69

Appearances by:

Shri A.K. Gupta, FCA appearing on behalf of the Assessee.
Md. Usman, CIT DR appearing on behalf of the Revenue.

Date of concluding the hearing : November 21, 2017

Date of pronouncing the order : December 14, 2017

ORDER

Per P.M. Jagtap, AM

This appeal filed by the assessee is directed against the order of Ld. Principal CIT – 2, Kolkata dated 28.03.2017 passed under section 263 of the Income Tax Act, 1961 and the grounds raised by the assessee therein read as under:

“1. For that the order passed under section 263 of the Income Tax Act, 1961 (in short ‘the Act’) by the Principal Commissioner of Income Tax -2, Kolkata (in short ‘CIT’) dated 28.03.2017 is without jurisdiction and illegal as none of the condition precedent for exercise of the power under section 263 of the Act exists and/or has been satisfied and as such the said order is erroneous and without jurisdiction and liable to be cancelled.

2. For that the order passed by the Assessing Officer was not in any way erroneous or prejudicial to the interest of revenue and as such the CIT would not exercise any power under section 263 of the Act. The CIT erred

in holding that the order of assessment is erroneous and prejudicial to the interest of revenue.

3. For that the CIT erred in setting aside the order of assessment on the ground of disallowance of additional operational and incidental expenses as against various expenses disallowed in the assessment order in as much as the allowance of operational and incidental expenses was gone into in detail in the assessment order and after a detailed enquiry the A.O. disallowed various expenses out of the total operational and incidental expenses.

4. For that full and complete enquiry was made in respect of the allowance/disallowance of operational and incidental expenses and as such the CIT was precluded from setting aside the assessment on this ground in view of the judgement of the Hon'ble Supreme Court of India reported in the case of Malabar Industries Co. Ltd. vs CIT reported in 243 ITR 83.

5. For that the CIT erred in not considering the submission of the appellant in respect of not adopting the sale price of ROM as per M.B. Shah Commission Report in as much as the said report was only indicative, not relating to the appellant and was a general report indicating the average sale price of a different commodity for the entire State of Orissa and was not applicable to the facts of the appellant.

6. For that there is no allegation in the M.B. Shah Commission Report or in the order of CIT that the appellant had received anything more than what has been stated in its profit and loss account and as such the question of substituting undisputed and admitted actual sale price with some indicative average price of a different commodity is illegal, erroneous and perverse.

7. For that further and in any event the CIT failed to appreciate the fact that the product produced and sold by the appellant was entirely different from the finished products for which the indicative price was given in the M.B. Shah Commission Report. The CIT failed to appreciate the fact that substantial expenditure was required to be incurred by the purchaser of the ROMs the commodity produced by the appellant to bring the same to saleable condition for which the price was indicated in the M.B. Shah Commission report and there was also a production loss also in doing so.

2. The relevant facts of the case giving rise to this appeal are as follows. The assessee in the present case is a company which is engaged in mining business. The return of income for the year under consideration was originally filed by it on 30.09.2012 declaring a total income of Rs. 4,67,59,83,600/- under the normal provisions of the Act and book profit of Rs. 3,84,70,61,103/- under section 115JB of the Act. In the assessment completed under section 143(3) vide an order dated 30.03.2015, the total income of the assessee company was determined by the A.O. at Rs. 4,80,68,13,340/- after making the following additions:

1. Disallowance of depreciation & Addl. Depreciation	8,22,02,645/-
2. Disallowance of foreign exchange fluctuation expenses	5,48,910/-
3. Disallowance of Gift expenses	14,27,807/-
4. Disallowance u/s 40(a)(ia)	63,98,253/-
5. Disallowance of compensation	13,80,000/-
6. Revenue expenses treated as capital	3,15,12,126/-

3. The records of the assessment in the case of the assessee for the year under consideration was examined by the Principal CIT and on such examination, he found the following errors in the order of the A.O. passed under section 143(3) which according to him, were prejudicial to the interest of the revenue:

"The total sale of Iron Ore by your company consists of 6589740/- MT of Iron Ore (ROM) & 40315 MT of Dump. The total sales value as per note 16 has been calculated at Rs. 1070,54,67,000/-. Considering the sale price of dump as negligible, the sale price per MT of Iron Ore comes to Rs. 1625 MT (Rs. 1070,54,67,000/6589740 MT)

The average sale price per MT of Iron Ore as per the Hon'ble M.B. Shah Commission Report (page no 103) for the F.Y. 2011-12 has been assigned

at Rs. 8561.07. As such, the total undervaluation of sale comes to Rs. 6936 per MT (8561.07 – 1625). Therefore, the total undervaluation of sales comes to nearly Rs. 4612 crores, resulting in substantial loss of revenue.

From the above Commission report, it was noted that you appear to have a hidden understanding between itself and Ms. Jindal Steel & Power Lt. (JSPL). You were selling all run of mines to JSPL who have established two big plants in its area. All other supporting infrastructure like employees' colony, working pets and others, were created to use for the crushing and sizing plants of JSPL in your leased area. The expenses claimed by you ought to be disallowed as it did not require these infrastructure when the entire set up is owned and managed by JSPL. However, only 50% of the total operational and incidental expenses was disallowed on estimate, resulting in substantial loss of revenue”.

4. The Principal CIT accordingly issued a notice under section 263 on 10.03.2017 pointing out the above errors to the assessee and seeking the explanation of the assessee in the matter. In reply, a written submission was filed by the assessee on 24th March, 2017 wherein the validity of initiation of proceedings under section 263 by the Ld. Principal CIT was challenged by the assessee by raising the following contentions:

At the outset we state and submit that the proceeding initiated under section 263 of the Act is without jurisdiction and illegal as none of the condition prescribed under section 263 of the Act for revision of the assessment are satisfied and/or are fulfilled. The assessment order passed by the A.O. cannot be considered and termed as erroneous in so far as it is prejudicial to the interest of the revenue. The order passed by the A.O. was in accordance with the law after making due enquiry in respect of various matters arising in the assessment and as such the same cannot be revised under section 263 of the Act.

1. *The notice under reply is proposing to revise the assessment on the ground that:*

A. *Rate at which ROM were sold by our client needs to be substituted with the average sale price as per M.B. Shah Commission Report.*

B. Disallowance in entirety the expenses claimed by the client.

Enquiry in assessment proceedings

2. (a) Dealing with the jurisdictional issue we wish to state on behalf of our client above named that the notice proposes to disallow in entirety of the total operational and incidental expenses against various sums disallowed by the AO in the assessment proceeding. In this connection, we wish to point out that the allowance of expenditure was gone into by the AO in detail in the assessment proceedings. In course of the assessment proceedings the AO issued various notices and letters enquiring about the nature of expenses and their allowability. A notice under section 142(1) of the Act was issued on 25.7.2014 where points No.28 to 32 are in relation to expenses under various heads. Another notice was issued by the AO on 15.10.2014 where in Sl. No.11 details of various expenses such as operational expenses were asked for. Our client in course of the assessment proceedings by various letters furnished numerous details as requested by AO. The letters are dated 10.11.2014, item no.6 and 7, letter dated 21.1.2015 item no.2 and 3, letter dated 9.3.2015 item nos. 9 and 11. It is therefore, clear that various details were asked for and enquiry was made by the AO in course of assessment proceedings which were duly replied. After going through the details of the expenses filed by our client above named and after consideration of all the aspects of the matter including the alleged understanding with Jindal Steel & Powers Ltd. (JSPL) as also alleged in the notice under reply, the AO disallowed various expenditure claimed by our client as can be found at pages 5 to 8 of the assessment order. Accordingly, the AO has applied his mind fully in respect of allowability of the operational and incidental expense and it cannot be, said that the order of assessment in so far as it relates to the disallowance of expenditure was enquired and gone into in the assessment proceedings.

2.(b) It has been repeatedly held by the Hon'ble Supreme Court of India and the Jurisdictional High Court as well as various other High Courts that where the AO in course of assessment proceedings applies his mind to the relevant point and comes to a decision and that decision is not palpably illegal and where two views are possible the same cannot be revised under section 263 of the Act. In this connection, we rely on the judgement of the Hon'ble Supreme Court of India in the case of Malabar Industrial Co. Ltd. vs. CIT reported in 243 ITR 83. Reliance is also placed on the decision of Calcutta High Court in the case of CIT s. Philips India

Ltd. reported in [2015] 237 Taxmann 538 and latest judgement of Supreme Court in the case of CIT vs. Reliance Communication Ltd. reported in [2016] 76 Taxmann.com 276. In addition of this there are innumerable judgements of various High Court laying down the same principle of law. Copies of the above judgements are annexed hereto and marked as Annexure 1,2, and 3 respectively.

2.(c) It is therefore, submitted that the legal position is well settled that where an issue has been gone into detail by the AO in course of the assessment proceeding and the decision taken by him is a possible view the same cannot be revised under section 263 of the Act."

5. In the written submission dated 24th March, 2017, the assessee also made a detailed submission on merit in reply to both the points raised by the Ld. Principal CIT in the notice issued under section 263 as under:

4.b) The notice has referred to and/or solely relied on the M B Shah Commission Report as far as substitution of value of sale price of ROM is concerned. You have also stated in para 5 of the notice under reply that there appears to be a hidden understanding between our client and M/s Jindal Steel & Power Ltd. The details of the understanding, allegedly if any, has not spelt out and the same is totally vague. It is difficult to comprehend that how that alleged if any, has not understanding affects the allowance of expenditure. No material or evidence has been referred to in the notice under reply to substantiate the said allegation. Various other erroneous facts and adverse inferences based on surmises and conjectures have also been mentioned In para 5 of the notice under reply. The proposed disallowance of the additional expenditure in addition to the amounts already disallowed in the assessment is based on certain alleged nexus and/or understanding between our client and JSPL though none has been furnished or explained in the notice under reply. In this connection, reliance is placed on the judgement of the Guahati High Court in the case of (IT vs. George Williamson (Assam) Ltd. reported in 250 ITR 747 in which it has been held that there must be some material either intrinsic in the order of assessment itself or otherwise before the CIT to order reassessment or enquiry into the matter. The Commissioner of Income Tax must have some material on the file which may compel him to

pass an order under section 263 of the Act that the matter needs to be further enquired into. For this reasons it was held by the Gauhati High Court that the order passed by the Commissioner of Income Tax nowhere mentioned as to what was the material with him to order enquiry into the matter by the Assessing Authority and as such the quashing of 263 order by the Tribunal was justified. A copy of the above judgement is annexed hereto and marked as Annexure - 4.

5. Now we deal with the various points mentioned in the notice serially.

5.A. (i) It has been stated in paras 3 and 4 of the notice under reply that average sale price per MT of Iron Ore as per Hon'ble M B Shah Commission report (page 103) for the financial year 2011-12 has been assigned at Rs. 8561.07 and the sale price declared by our client IS Rs . 1625/- per MT. Thus, there is under valuation of sale at 6,936/- Per MT and the total undervaluation of sale comes to nearly 4,612 crores resulting in substantial loss of revenue. A perusal of the notice as stated above will show that the undervaluation of sale of Rs. 4,612 crores is based on MB Shah Commission Report (Page 103). Copy of pages 102 and 103 of the M B Shah Commission Report are annexed hereto and marked as Annexure - 5. The heading-of the said' page is "Corporate Social Responsibility". It states that the total approximate production and the sale value of Iron Ore extracted from the years 2005-06 to 2011-12 in the State of Odisha is summarised as under:

<i>Year</i>	<i>Average Sale price of Iron Ore in Rs./Tonne</i>	<i>Total production of Iron Ore (in thousand MT)</i>	<i>Total Sale value (in Crores)</i>
<i>2011-12</i>	<i>8561.07</i>	<i>66529</i>	<i>56955.94</i>

A perusal of the aforesaid report will show that it is not regarding our client on the sale price. In the context of Corporate Social Responsibility, the Shah Commission has given the average sale price of Iron Ore and the total production of Iron Ore in the whole State of Odisha and nothing more. The said report does not state that the sale price at which the production of our client was sold or that there was understatement of sale

value. The addition as suggested does not have any leg to stand upon as there is no allegation in the said report at all, as regards the value at which our client has sold. It also does not contain any allegation as to our client having undervalued its sale. The undervaluation as alleged by you is only based on page 103 of the M B Shah Commission Report which cannot be relied upon for making the said alleged addition on the ground of undervaluation of sale, in as much as nothing of this nature is stated or provided in the said report on the said page.

(ii) Further and in any event and without prejudice to the above to understand the issues better. it is pertinent to give a little background of the business being done by our client:

(a)The mines were earlier run by SLML Sarda Association of Persons (AOP) which was subsequently transferred to Sarda Mines Pvt Ltd. (our client) in June 2006 as per process and permission of the State Govt. of Odisha. The SLML Sarda AOP was in the business of excavation of Iron Ore ROM (Run of Mines) and'. in the busi ness of crushing the aforesaid iron ore to make calibrated Lumps which is sold in the market.

The aforesaid crushing was earlier done on a job-work basis by JSPL. Because SLML Sarda AOP did not have appropriate capital and expertise to run the business and a lot of mining lease area was being occupied by accumulated fines which at that time had limited market, they decided to se" ROM and. lumpy Iron ore (which is not calibrated and is in the raw state) to JSPL at a fixed price to minimise the business risk. By doing this SLML Sarda AOP reduced its operating expenses by cutting down on marketing costs and considerably reduced their market risk by having an assured buyer, Also, the fact that, iron ore fines could be utilised by JSPL in its integrated steel plant, led to movement of the stored fines thus giving more area for mining operations. A copy of the letter requesting Dy. Director Mines (DDM) for permission to sell ROM to JSPL and the permission. duly granted on 05.04.2004 are annexed hereto and marked as Annexure - 6. Thus, SIML Sarda AOP received permission from the State Government of Orissa to sell ROM/Iron Ore Lump (which is not calibrated and is in the raw state) to JSPL which was contingent upon various conditions notable amongst which ,was payment of royalty at the highest rate prescribed for FE 65% iron ore lumps .

(b) It may be noted that when the mining lease was transferred from SLML Sarda AOP to our client, they accepted all the liabilities and

conditions of the transferor (clause 2.4 of the transfer deed). Thus, our client continued with the business model of selling ROM to JSPL to take full benefit of the scientific & systematic mining practices, better and efficient utilisation of economic resources and minimise its risk as far as possible. This was also one of the binding conditions for transfer of mining lease based on which the transfer was allowed by the State Government.

To further elaborate the difference, a detailed write up of the various terms is as under:

RoM As per Mineral Concession Rule, 2016, Rule 2 (f), RoM (run-of-mine) means the raw unprocessed or uncrushed iron ore in its natural state obtained after blasting or digging, from the mineral zone of the leased area". It is normally a mix of finer particles as well as bouldery material. Contents may vary in size from 1 mm to 1500 mm (geological classification basis of size of material). Finer particle percentage in the RoM at Odisha may vary from 30- 40% to even 60-70% in volume.

(ii) Iron Ore Lump(RoM)

Iron ore Lump as per definition of ROM contains boulders, lumps, fines etc. Classified based on size and used as a terminology, wherein lumpy ore percentage is more, may be in range of 70-80% but in raw form. This category of Iron Ore ROM is well recognised by the IBM, Govt of India. This fact is clear and evident from the Mineral Conservation & Development Rule, 1988. Under Rule 45(3) (b) (i), every lessee must submit Annual return in H1. In Part V (General geology & Mining) of the Annual return in H1, IBM has specially mentioned different types of ore as,

(i) Lump

(ii) Fines

(iii) Friable

(iv) Granular

(v) Platy

(vi) Fibrous

(vii) Powdery etc.

These are unprocessed or uncrushed ore, which cannot be used directly for steel making. It requires further crushing & processing to convert it to calibrated lump ore (CLO) and fines to be used in the steel industry which involves substantial capital input.

This terminology of Iron Ore Lump (type of ROM) has also been recognised in the Mineral Year Book being published by IBM every year, wherein grade wise reserves/resources of Iron Ore (Hematite) in India is, estimated.

(iii) Calibrated Lump Ore (CLO)

This category of lump ore is obtained after processing /crushing of RoM iron ore into crusher plant and ranges in size from 5 mm to 40 mm, which has commercial value and is the raw material for ORI plant for Steel making.

(iv) Fines

Fines are produced during drilling and blasting operations and are a part of ROM. Further fines are produced when ROM is processed to produce CLO by the process of crushing and screening (together termed as processing). Fines serve as raw material for Sinter plant or pellet plant used for steel making .

(d) Your attention is also invited to a letter issued by the Government of India, Ministry of Mines, Indian Bureau of Mines dated 26.11.2009 addressed to our client relating to the filing of the return of production. A copy of the said letter dated 26.11.2009 is annexed hereto and marked as Annexure - 7. Para 1 and 2 of the said letter are very relevant and important for our present purpose which are set out hereunder:

"1. The ROM ore quoted by you in the return with grades cannot be accepted as a MCOR grade ore. There is no provision for ROM ore as separate MCDR grade in Rule 45. Hence this ROM data cannot be published.

2. You have stated that you have got separate crusher plant within the mine site operated by M/s. JSPL to whom you are selling the ROM ore. But from our MCDR return point of view the graded ore processed in the crusher plant should only be reported in the Part 11 and Part V of MR & AR respectively. The PMV should invariably quoted for these graded ore only. Hence, you should procure the data on PMV from the JSPL for the

purpose of reporting in the returns. On similar lines, the consignee wise despatches of processed grades and sale value has to be furnished in the returns (monthly and annual)".

(e) The letter is issued by Government of India, Ministry of Mines which is a nodal authority as far as the mining matters are concerned. It states that the ROM excavated by our client is not MCDR grade ore as per the Rule. It also accepts the fact that the separate crusher plant within the mine site is operated by JSPL to whom our client is selling the ROM. It also directs our client that only the graded ore processed in the crusher plant is required to be reported and the PMV (Pit Mouth Value) should be quoted for these graded ores. Thus, it is clear that the Government of India, Ministry of Mines itself considers that the ROM produced by our client is clearly different from the MCDR grade ore which is required to be reported to the Government and which is sold in the market. The PMV of the said ROM cannot be the value of the finished product obtained after series of processes of crushing and screening. This will also be clear from Form F1 and Form H1, copy of which is annexed hereto and marked as Annexure 8, required to be filed under Rule 45 of MCDR 1988 referred to in the said letter.

(f) A perusal of the said para will show that the production by our client is not what is sold in the market which is produced by JSPL. The price given in the M B Shah Commission Report is of the finished product /processed ore and not the product which is mined by our client and which undergoes a series of processes before the same can be brought to the stage in which it is sold. For using the said ROM produced by our client JSPL must make substantial value addition and suffer production loss in converting the ROM to the saleable product. In Orissa ROM processing yields only about 30-35% lumps and balance is fines of various quality based on level of impurities. Accordingly, there cannot be any basis for increasing the sale price as has been proposed in as much as the figure taken by the Shah Commission report is entirely of different material altogether which is neither produced by our client nor sold. Accordingly, there is a basic mistake in adopting the said figure given in the M B Shah Commission report. Further it is submitted that the addition based on average rates of Orissa without any finding that our client has received anything more than what has been disclosed is illegal, perverse and arbitrary. There cannot be one rate for all types of Iron Ores in Orissa and the report itself suggests that the rates are not actual and clearly uses the word

"approximate". Further as stated above, the M. B. Shah Commission is not questioning the rates charged by our client and as such question of adopting the said rates for making the proposed addition is illegal, erroneous and perverse. No discrepancy has been found in the value disclosed by our client and even the notice under reply does not allege that the price charged by our client is not correct or that there is discrepancy in the same or that anything more has been received by our client than what is disclosed. The law does not permit any addition on surmises and conjectures which are not substantiated with any evidence or material.

5.B. (i) As regards increase in the disallowance of entire operational and incidental expenses against disallowance of various expenses made by the AO in the assessment order, we submit on behalf of our client above-named that there is no basis or material given in the notice under reply to justify any further disallowance. The disallowances made in the assessment proceedings are already under appeal pending adjudication before CIT(A)-2, Kolkata. It is an admitted fact that crusher plant was installed by JSPL in the area with the consent of the State Government. The proposed additional disallowance is simply based on the assumption that certain supporting infrastructure were created to use for the crushing and sizing plant of JSPL and the expenses claimed by our client ought to be disallowed as it will not require these infrastructure-c when the entire set up is owned and managed by JSPL. No material or evidence has been brought on record in respect of various erroneous assumption of facts made as stated above. Our client is not claiming any expenditure on crushing or any subsequent process. The expenses being claimed by our client is on account of the following:

(i) Extraction of ROM from the earth: this involved removal of overburden development of mine and pit as per rules specified, drilling and blasting for ore excavation.

(ii) Transportation of overburden and ROM to storage area and crushing and screening plant respectively.

(iii) Operation and maintenance of pipe conveyor from the dispatch point to the railway siding at Deojhar. JSPL was being charged Rs. 20 per ton for transporting of CLO and fines.

(iv) Benefication plant: this is washing of fines to upgrade the Fe content and making it commercially viable.

For the purpose, our client requires various machineries, equipment and infrastructure in addition to skilled manpower labour and other materials. A detailed procedure involved in extraction of ROM is annexed hereto as Annexure - 9 for your ready reference.

(ii) A perusal of the said process involved in extraction of ROM from earth will show that huge infrastructure and use of machines and equipment in addition to labour are required for doing the same by our client. Details of all the operational and other expenses were filed in course of the assessment proceeding with the AO and he has gone through the same. The factor of excavation of ROM is not denied by AO or by any other authorities such as CEC or Shah Commission or even by you in the notice under reply. It is submitted that it is inconceivable to excavate such huge quantity of ROM without incurring any cost at all. Further the fact that the mine was being operated by our client and all the activities except crushing was done by them has also been taken note of by the M.B. Shah Commission. The relevant finding is at pages 167 to 170 of the said report and are annexed hereto and marked as Annexure - 10. It will show that there was inspection by a senior level committee made by the State Government who witnessed that all the mining related activities were being done by our client. The Director of Mines visited the mines of our client and verified the working of our client. It was reported by the Director of Mines that our client has undertaken the mining operation and have employed technical personnel and installed adequate machineries and tools for systematic and scientific mining. The report also notes the creation of various infrastructure and maintenance of ledgers and records and held that the mining activities are carried out by development of mine faces, by removing the over burden and raising of ROM. The most significant part of the said finding is that "except involvement of JSPL in crushing and sizing of ore on job contract basis, all other mining activities are being undertaken by our client.

(iii) It is therefore, submitted that there is no basis or material and none has been brought on record which could justify any additional disallowance."

6. On the submissions made by the assessee challenging the validity of the initiation of proceedings under section 263, no finding on conclusion was specifically recorded by the Principal CIT in his impugned order. As regards the detailed written submission filed by the assessee raising various contentions on merit on both the points raised in the notice under section 263, the Ld. Principal CIT summarised the same in brief in his impugned order and proceeded to set aside the order of reassessment dated 30.03.2015 passed by the A.O. by exercising his powers under section 263 after recording his observations as under:

It was contended that full enquiry was made by the Assessing Officer while passing the order of assessment and the assessment order could not be revised in view of the judgement of the Hon'ble Supreme Court in the case of Malabar Industrial Co. Limited vs. CIT reported in 243 ITR 83 and other judgements also. On merit it was contended that the price indicated in the M.B. Shah Commission Report cannot be adopted blindly as the same is not relating to the assessee and is the average sale price of the entire state of Orissa. It was also submitted that the assessee is selling the Run of Mines (ROM) only and the value addition of crushing, sizing the same and other process to make it into a calibrated lumps ore is done by JSPL. It was submitted that substantial expenditure has to be incurred by JSPL for the value addition and only 30 to 35% of ROM yields in calibrated Lump ore and as such the price indicated by M.B. Shah Commission report cannot be applied. It was also submitted that the product sold by assessee is different than the product for which indicated sale price is given in the report and that the same was given in a different context. It was argued that there is no allegation in the notice also that the assessee has received anything more than disclosed in the accounts.

I have considered the submissions and the written objections filed in my view the Assessing Officer failed to consider various aspects as well as M.B. Shah Commission report and accepted the price disclosed by the assessee without any enquiry. Thus, the assessment order is erroneous & prejudice to the interest of revenue in this respect.

Next point is regarding the disallowance of the operational and incidental expenses. The AO while passing the order of assessment did not consider that the JSPL had established crushing plant in the mining area and all the supporting infrastructure were created to use for the crushing and sizing plant owned by them. He should have therefore, enquired about this and disallow the expenses when the entire set up was owned and managed by JSPL. It was submitted in course of hearing as well as in written objection that the assessee is not claiming any expenditure in respect of any activities after the ROMs are brought up to the pit head. Only the expenses in mining are incurred and claimed by the assessee. It was also submitted that even on inspection the Government of Orissa has found that the assessee was running the mines on its own with its staff, equipment, machinery etc. and the same has been also noted in the M.B. Shah Commission Report which was also filed. It was therefore, stated that full enquiry was made by the Assessing Officer in course of assessment proceeding and he had asked various queries in respect of the operational and incidental expenses which was duly replied along with full details from time to time in course of the assessment proceeding. A detailed note on the expenses incurred by the assessee and the procedure involved in extraction of ROM undertaken by it was also annexed with the object and explained.

I have gone through the submissions of the assessee and the various supporting documents filed along with letter dated 24.03.2017.

I hold that the Assessment order passed by the Assessing Officer is erroneous and as such prejudicial to the interest of the revenue as the Assessing Officer did not consider and adopt the high price indicated in the M.B. Shah Commission Report in respect of the sale of ROM and also did not consider the allowance of expenditure in the light of the hidden understanding between the assessee and the JSPL and whether the said expenditure were required to be incurred by the assessee resulting in a substantial loss to revenue. I therefore, set aside the order of assessment order 30.03.2015 in respect of the aforesaid two points and direct the Assessing Officer to pass a fresh order of assessment. The Assessing Officer should consider the matter afresh in detail, make appropriate enquiries and give adequate opportunity to the assessee and pass a fresh order in accordance with law on the aforesaid two points.”

7. The Principal CIT accordingly set aside the order passed by the A.O. under section 143(3) dated 30.03.2015 on the issues raised by him in the notice under section 263 and directed the A.O. to pass a fresh order of assessment on the said issues in accordance with law after making appropriate enquiries and after giving adequate opportunity of hearing to the assessee. Aggrieved by the order of the Ld. Principal CIT passed under section 263, the assessee has preferred this appeal before the Tribunal.

8. The learned counsel for the assessee at the outset invited our attention to the copy of show cause notice issued by the Ld. Principal CIT placed at page no 1 and 2 of his Paper Book and submitted that there was no allegation made by the Principal CIT that there was any failure on the part of the Assessing Officer to make proper and sufficient enquiries on the points raised by him while completing the assessment. He submitted that the order of assessment passed by the A.O. was alleged to be erroneous of the Ld. Principal CIT on merit of the said issues and accordingly a detailed submission was filed by the assessee in response to the notice under section 263 to show that the claim of the assessee on said issues was correct on merit and there was no error in the order of the A.O. in accepting the same. He invited our attention to the copy of written submission filed by the assessee in this regard before the Ld. Principal CIT and contended that the Ld. Principal CIT however has not given any specific finding or observations thereon in his impugned order for not accepting the same. He contended that the Ld. CIT has simply set aside the order of

assessment passed by the A.O. on the ground of lack of enquiry by the A.O. without rejecting the submissions made by the assessee on merit and without giving any more opportunity of being heard to the assessee, which is not permissible in law. In support of this contention, he relied on the decision of Hon'ble Delhi High Court in the case of ITO vs D.G. Housing Project Ltd. (343 ITR 329) as well as the decision of Co-ordinate Bench of this Tribunal in the case of Infinity Infotech Park Ltd. 58 ITR (Trib) 486.

9. The learned counsel for the assessee also raised arguments in support of the assessee's case on both the issues raised by the Ld. Principal CIT in the notice issued under section 263 in order to show that the claim of the assessee on the said issues was in accordance with law on merit and there was no error committed by the A.O. in allowing the said claims. In this regard, he mainly reiterated before us the submissions made on behalf of the assessee before the Ld. Principal CIT in writing during the course of proceedings under section 263. He emphasised that the main issue was raised by the Ld. Principal CIT in the notice under section 263 alleging the under charging of sale price by the assessee on the basis of M.B. Shah Commission report. He submitted that the issue relating to the under charging of sales prices by the assessee to JSPL however was not at all the subject matter of the enquiry conducted by the Shah Commission. In this regard, he invited our attention to the relevant portion of the commission report to point out that as per the terms of the reference to the commission, the issue of under pricing of sales price by any

mining company was not at all referred to the commission for the enquiry. He also referred to the relevant details of total production and sales value of iron ore in the State of Orissa during the years 2005-06 to 2011-12 as given in the report and submitted that the same were summarised in the Shah Commission report while considering the issue of corporate social responsibility of the mining companies. He submitted that the said details given approximately in the report thus were in different context and no conclusion as regards the under charging of sales price can be drawn on the basis of the same.

10. The Ld. Counsel for the assessee contended that the average sale price of Rs. 8501/- per ton given in the report for the entire State of Orissa was in respect of iron ore while the product sold by the assessee to JSPL was mother earth of iron ore called as "Runs Of Mines" (ROM) which is materially different from the iron ore. In this regard, he relied on the decision of Orissa High Court rendered in the case of the assessee in the context of value added tax [W.P. (C) No. 24421 of 2012 dated 26.04.2017] to submit that ROM which is otherwise called as mother earth of iron ore consisting of raw unprocessed ores in its natural state is obtained after blasting or digging was excavated and handed over to M/s. JSPL. He submitted that the same consisting of large boulders, fragments and fines along with other contaminants/impurities then was crushed and downsized by JSPL in their crusher plant. After crushing and sizing in the screen, the Calibrated Lump Ore (CLO) is obtained and the same is further

processed by way of washing and beneficiation so as to produce usable fines and slime material. He submitted that huge quantity of residuary mixed with low grade fines as generated in this entire process and on an average only 25% to 30% CLO i.e. iron ore was produced, while the rest 70% to 75% representing low grade fines had no market at all. He contended that the material sold by the assessee to JSPL i.e. ROM thus was entirely different from the iron ore i.e. CLO and the allegation made by the Ld. Principal CIT of under charging of sales price by the assessee to JSPL on the basis of average selling rate of iron ore was totally baseless. He contended that this position was accepted by the Hon'ble Orissa High Court while deciding the issue in the context of value added tax and relief was also given to the assessee on that basis. He also relied on the decision of Panaji Bench of this Tribunal in the case of M/s. Velingkar Bros. (ITA No. 18/Pnj/2014 dated 30.05.2014 wherein the difference between ROM and processed iron ore was highlighted by the Tribunal in paragraph no 2.5 of its order and the case made out by the A.O. of under invoicing or under pricing was rejected.

11. The learned counsel for the assessee contended that there was in any case no material whatsoever available on record to show that there was any actual suppression of sale price by the assessee and in the absence of the same, there was no provision in the Act permitting the Assessing Officer to enhance the sales price as held by Hon'ble Delhi High Court in the cases of CIT vs Discovery Estates Pvt. Ltd. 356 ITR 159. He contended that the errors in the order of the A.O. as

allegedly pointed out by the Ld. CIT in the notice under section 263 thus were not in existence as explained and established by the assessee in the detailed written submission filed before the Ld. CIT during the course of proceedings under section 263 and the Ld. CIT was not justified in setting aside the order of assessment made by the A.O. by exercising his revisionary powers on the ground of lack of enquiry without giving any finding or decision on the merits of the issues raised by him in the notice under section 263.

12. The Ld. CIT DR, on the other hand, submitted that the order of assessment was passed by the A.O. without making enquiries or verification which should have been made by him as found by the Ld. Principal CIT on examination of the relevant assessment records and the Ld. Principal CIT, therefore, was fully justified in the revising the said order by exercising the powers under section 263. He contended that the order of assessment passed by the A.O. thus was found by the Principal CIT to be erroneous as well as prejudicial to the interest of the revenue on this specific ground calling for revision under section 263. In this regard, he relied on Explanation 2 to Section 263 inserted by the Finance Act 2015 with effect from 01.06.2015 which provides that for the purposes of Section 263, an order passed by the A.O. shall be deemed to be erroneous in so far as it is prejudicial to the interest of the revenue if the same, in the opinion of the Principal CIT or CIT, is passed without making enquiries or verifications which should have been made.

13. The Ld. CIT DR also contended that although the Shah Commission report was apparently available with the Assessing Officer when he passed the order of assessment, the adverse findings of the said report were not taken into consideration by the A.O. while completing the order of the assessment which made the said order erroneous as well as prejudicial to the interest of the revenue as rightly held by the Ld. Principal CIT. He submitted that even the disallowance out of expenses claimed by the assessee was made by the A.O. arbitrarily without looking into the relevant facts of the case and without making any detailed enquiry. He contended that there was thus no application of mind on the part of the A.O. while passing the order of assessment and the Ld. Principal CIT was fully justified in treating the same as erroneous as well as prejudicial to the interest of the revenue. He contended that similarly the sales price of Rs. 1625 per MT charged by the assessee company to JSPL was accepted by the A.O. without making any enquiry which he should have made keeping in view the average selling price given by the Shah Commission in its report.

14. The Ld. CIT DR contended that the A.O. is not only an adjudicator but also an investigator and it is, therefore, his duty to keep his eyes open and examine the relevant issues which are necessary for the purpose of assessment. He contended that the A.O. however had utterly failed to make the enquiries and verifications which were necessary for the purpose of assessment and passed the order of assessment without application of mind. He contended that it

was thus a case of lack of enquiry by the A.O. which made the order of reassessment passed by him erroneous as well as prejudicial to the interest of the revenue. He also contended that the Ld. Principal CIT by his impugned order passed under section 263 has not decided any issue on merit and has mainly set aside the order of the A.O with a direction to him to conduct the necessary enquiries and pass fresh assessment. He contended that the order of assessment passed by the A.O. contained specific errors as pointed out by the Ld. Principal CIT which were prejudicial to the interest of the revenue and the same therefore was rightly revised by the Ld. Principal CIT by his impugned order passed under section 263. He, therefore, strongly supported the order passed by the Ld. Principal CIT under section 263 and urged that the same may be upheld.

15. We have considered the rival submissions and also perused the relevant material available on record including the case laws and relevant statutory provisions referred to and relied upon by both the sides in support of their arguments. In the present case, the order of assessment was passed by the A.O. under section 143(3) of the Act. On examination of the relevant assessment records, the Ld. Principal CIT however found the same to be erroneous on merits and accordingly a notice under section 263 was issued by him to the assessee pointing out the errors in the order of the A.O. The errors so pointed out by the Ld. Principal CIT in the notice issued under section 263 are already extracted by us in paragraph no 3 of this order and a perusal of the same shows that the order of assessment passed by the

A.O. was found to be erroneous by the Ld. Principal CIT on merit and in the reply filed to the notice issued under section 263, a detailed submission was made by the assessee to show that there were no such errors in the order of the reassessment made by the A.O. on merits. Although the Ld. Principal CIT in his impugned order passed under section 263 summarised the submissions made by the assessee in brief, he did not give any finding or conclusion thereon and without arriving at any conclusion to show how the order of the A.O. was erroneous on merit, he simply set aside the same on the ground that the A.O. failed to consider various aspects and did not apply his mind fully to the facts of the case. For instance, the main issue raised by the Ld. Principal CIT in the notice issued under section 263 on the basis of M.B. Shah Commission report was relating to the alleged under-charging of sale price by the assessee to JSPL. In this regard, it was submitted by the assessee vide its written submissions dated 24th March, 2017 filed during the course of proceedings under section 263 that the average sale price of Rs. 8561 per ton given in the Shah Commission Report was for Calibrated Lump Ore (CLO) which is materially different from the product sold by the assessee to JSPL namely Run of Mine (ROM). It was explained that ROM contains boulders, lumps, fines etc and only after crushing and processing of ROM in the plant, CLO is obtained. It was also pointed out that the yield of CLO from ROM is only in the range of 25% to 30% while the residuary material obtained in the process in the range of 70% to 75% has no market value. It was further submitted that the average rate of CLO / Iron Ore given in the Shah Commission Report was for

the entire State of Orissa and it was mentioned in the context of 'Corporate Social Responsibility' and not in the context of allegation of under-charging of sales price by the assessee company to JSPL. All these submissions made by the assessee, which were relevant to meet the objection of the Ld. Principal CIT regarding the alleged under valuation of sales to JSPL by the assessee company, however, were neither considered nor dealt with by the Ld. Principal CIT and without arriving at any conclusion or finding to show how the order of the A.O. was erroneous on this issue, he simply set aside the same on the ground that the A.O. failed to consider various aspects and did not apply his mind fully to the facts of the case.

16. In the case of ITO vs D.G. Housing Project Ltd. 343 ITR 329 cited by the learned counsel for the assessee, Hon'ble Delhi High Court has held that in cases of wrong opinion or finding or merits, the CIT has to come to the conclusion and himself decide that the order is erroneous by conducting necessary enquiry, if required, before order under section 263 is passed. It was held that the CIT cannot remand the matter to the Assessing Officer to decide whether the findings recorded are erroneous. It was further held that in some cases, the CIT can also show and establish that the facts on record or inferences drawn from the facts on record per se justified and mandated further enquiry or investigation, but the Assessing Officer had erroneously not undertaken the same. However, the said finding must be clear, unambiguous and not debatable and the matter cannot be remitted for a fresh decision to the Assessing Officer to conduct further

enquiries. It was held that in such matters, to remand the matter/issue to the Assessing Officer would imply and mean that the CIT has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide this aspect/question. In the case of Infinity Infotech Park Ltd. vs DCIT 58 ITR (Trib) 486 cited by the learned counsel for the assessee, there was no allegation in the show cause notice issued under section 263, as it is in the present case, that there was failure on the part of the Assessing Officer to make proper and adequate enquiries before completing the assessment and the allegation was that the Assessing Officer has formed a wrong opinion or finding on merits. In reply to the notice issued under section 263, the assessee filed a detailed reply on January 12, 2017. On the very same day, the commissioner passed an order under section 263 setting aside the order of the A.O. on the ground of lack of enquiry. In these facts and circumstances involved in the case of Infinity Infotech Park Ltd. (supra), the Coordinate Bench of this Tribunal held that the Ld. CIT before exercising jurisdiction under section 263 of the Act by setting aside the order of the Assessing Officer ought to have given his own specific findings on the submissions made by the assessee and without doing so, the CIT could not exercise jurisdiction under section 263. It was also held by the Tribunal that the Ld. CIT was not justified to invoke jurisdiction under section 263 of the Act on the ground of lack of enquiry by the Assessing Officer without putting the assessee on notice. Reliance in support of this conclusion was placed by the Tribunal on the decision of Hon'ble Delhi High Court in the case of ITO vs D.G. Housing Project

Ltd. (supra) and the order passed by the CIT under section 263 was quashed.

17. In the present case, the relevant facts involved are materially similar to the case of Infinity Infotech Park Ltd. (supra) in as much as notice under section 263 pointing out the errors in the order of the A.O. was issued by the Ld. Principal CIT on 10.03.2017 and a detailed reply to the said notice was filed by the assessee on 24.03.2017 submitting that there were no errors as alleged in the notice under section 263 in the order of assessment passed by the A.O. on merits. Immediately thereafter i.e. on 28.03.2017, the Principal CIT passed the impugned order under section 263 without giving any finding or conclusion as to how the order of the A.O. was erroneous on merits in respect of issues raised in the notice under section 263 and set aside the same on the ground of lack of enquiry by the A.O. without putting the assessee on notice. In our opinion, the ratio of the decision rendered by the coordinate bench of this Tribunal in the case of Infinity Infotech Park Ltd. (supra) thus is squarely applicable in the present case and applying the same, we hold that the impugned order passed by the Ld. Principal CIT under section 263 is liable to be quashed.

18. At the time of hearing before us, the CIT DR in this context has relied on Explanation 2 to Section 263 inserted in the statute by the Finance Act, 2015 with effect from 01.06.2015 in support of the revenue's case. As per the said explanation, an order passed by the

Assessing Officer shall be deemed to be erroneous in so far as prejudicial to the interest of the revenue for the purpose of section 263 if in the opinion of the Principal CIT or CIT the same is passed without making enquiries or verification which should have been made. The learned counsel for the assessee however has contended that there being no allegation made by the Ld. Principal CIT in the notice issued under section 263 about lack of enquiry by the A.O., Explanation 2 to Section 263 is not applicable in this case. It is observed that in the case of Sterling Biotech Ltd. vs Principal CIT (ITA No. 2750/M/2015 dated 29.06.2016), Mumbai Bench of this Tribunal has already considered the effect of Explanation 2 to Section 263. In the said case, the contention raised on behalf of the assessee was that the Ld. Principal CIT, before holding an order to be erroneous, should have conducted necessary enquiries or verification in order to show that the finding given by the Assessing Officer is erroneous and the view taken by the A.O. is unsustainable in law and this contention of the assessee was found to be duly supported by the law interpreted by the various High Courts including Hon'ble Delhi High Court. Reliance in this regard was placed on behalf of the revenue on Explanation 2 to Section 263 inserted by Finance Act 2015 with effect from 01.04.2015. The Tribunal however did not find merit in the same by holding that the said explanation cannot be said to have overridden the law interpreted by Hon'ble Delhi High Court. It was observed by the Tribunal that if the revenue's contention is accepted, then the CIT can find fault with each and every assessment order without conducting any enquiry or verification in order to establish

that the assessment order is not sustainable in law and order for revision. It was also observed that the Ld. CIT then can force the A.O. to conduct the enquiries in the manner preferred by him thus prejudicing the independent application of mind of the A.O. which could not be the intention of the legislature in inserting Explanation 2 to Section 263. It was held that it would lead to unending litigation and there would not be any point of finality in the legal proceedings.

19. In view of our decision rendered above on the preliminary legal issue quashing the impugned order of Ld. Principal CIT passed under section 263, we do not consider it expedient to go into other grounds raised by the assessee on merits, as the issues involved therein have become academic in nature. In any case, the Ld. Principal CIT, vide his impugned order has not decided any of the issues raised by him on merits.

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

Order Pronounced in the Open Court on 14th December, 2017.

Sd/-

(S.S. Viswanethra Ravi)
JUDICIAL MEMBER

Sd/-

(P.M. Jagtap)
ACCOUNTANT MEMBER

Dated: 14/12/2017

Biswajit, Sr. PS

Copy of order forwarded to:

1. Sarda Mines Pvt. Ltd., 6th Floor, Circular Court, 8, AJC Bose Road, Kolkata – 17.

2. DCIT, Cir 5(2), Aayakar Bhawan, Kolkata – 69.

3. The CIT(A)

4. The CIT

5. DR

True Copy,

By order,

Sr. P.S. / H.O.O.
ITAT, Kolkata