IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH ' C '

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER AND
SHRI JASON P BOAZ, ACCOUNTANT MEMBER

I.T. A. Nos.738 to 741/Bang/2015
(Assessment Years : 2008-09 to 2011-12)

M/s. Bharat Mines & Minerals,
Flat No.101, Pride Elite,
No.10, Museum Road,
Bangalore-560 001. …. Appellant.

Vs.

Dy. Commissioner of Income Tax,
Central Circle 1(2), Bangalore. ….. Respondent.

I.T. A. Nos.983 to 986/Bang/2015
(Assessment Years : 2008-09 to 2011-12)
(By Revenue)

Assessee By : Shri K.R. Pradeep, C.A.
Revenue By : Shri K.V.Arvind, Standing Counsel for Dept.

Date of Hearing : 01.02.2018.
Date of Pronouncement : 10.4.2018.

O R D E R

Per Bench :

These are a bunch of 8 appeals, four by the assessee and cross appeals by revenue directed against the orders of the Commissioner of

Income Tax (Appeals)-11, Bangalore dt.27.2.2015 for Assessment Years 2008-09 to 2011-12.

2. Briefly stated, the facts of the case are as under :-

2.1 A search and seizure action under Section 132 of the Income Tax Act, 1961 (in short 'the Act') was conducted on 19.7.2010. Notices under Section 153A of the Act dt.21.09.2010 were issued to the assessee for Assessment Years 2008-09 to 2011-12 and in response thereto the assessee filed returns of income for these years on 31.1.2012. The assessments for Assessment Years 2008-09 to 2010-11 were completed under Section 153A r.w.s. 143(3) of the Act vide orders dt.30.3.2013 and for Assessment Year 2011-12 the assessment was completed under Section 143(3) r.w.s 153D of the Act vide order dt.30.3.2013. The details of additions /disallowances made by the Assessing Officer are as under :-

(i) Disallowance of claim under Section 10B : Assessment Years 2008-09 to 2011-12.

(ii) Unexplained investment u/s. 69 : A.Y. 2008-09.

(iii) Unexplained payments/unexplained expenditure : A.Y. 2008-09 to 2011-12.

(iv) Unexplained investment in land : A.Y. 2009-10.

(v) Disallowance under Section 37(1) : Belekere Port Export : A.Y. 2010-11.

(vi) Disallowance of loss on Forward Exchange Contracts : A.Y. 2009-10 & 2010-11.

2.2 Aggrieved by the orders of assessment dt.30.3.2013 for Assessment Years 2008-09 to 2011-12, the assessee filed appeals before the CIT (Appeals) – 11, Bangalore. The learned CIT (Appeals) allowed the assessee partial relief in the impugned orders dt.27.2.2015, by upholding all the additions / disallowances made in the orders of assessment for the above 4 years except for deleting the addition made on protective basis on account of unaccounted payments / unexplained expenditure.

3. Aggrieved by the order of the CIT (Appeals) – 11, Bangalore dt.27.2.2015 for Assessment Years 2008-09 to 2011-12, both the assessee and Revenue have preferred cross appeals for these four years before the Tribunal.

3.1 The grounds raised by the assessee in its appeals in ITA Nos.738 to 741/Bang/2015, for Assessment Years 2008-09 to 2011-12 are as under :-

3.1.1 **Assessment Year : 2008-09**.

1. " That the order of the authorities below in so far as it is against the appellant is against the law, facts, circumstances, natural justice, without jurisdiction, bad in law and all other known principles of law.

2. That the total income computed and total tax computed is hereby disputed.

3. The proceedings of search and all other subsequent proceedings are bad in law, without jurisdiction and invalid.

4. The notice u/s 153A and subsequent proceedings are without jurisdiction and bad in law.

5. The order u/s 153A r.w.s. 143(3) is bad in law, time barred and infructuous.

6. That the authorities below erred in not providing sufficient and adequate opportunity to the appellant as required under law, thereby violating the principles of natural justice, hence the order requires to be cancelled.

7. The CIT-Appeals erred in dismissing the ground on validity of search.

8. The AO erred in initiating proceedings u/s 153A and thereafter passing an order in the absence of any abatement as is envisaged in the law.

9. The CIT-Appeals erred in refusing to rely on the decision of the Special Bench in All Cargo Global Logistics Limited on the issue of abatement of assessment.

10. The authorities below erred in disallowing the deduction u/s 10B amounting to Rs. 177,81,93,334/-.

11. The authorities below erred in refusing to rely on the binding decision of the jurisdictional High Court in Sami Labs Ltd in 334 ITR 157.

12. The authorities below erred in changing his opinion on the issue of allowance u/s 10B in the absence of any new information which was not already considered in the initial year.

13. The AO erred in calculating the disallowance u/s 10B as an alternative to Ground No.10 above amounting to Rs.79,79,24,397/-.

14. The authorities below erred in holding that purchases of iron ore amounting to Rs.32,63,88,468/- did not qualify for deduction u/s 10B.

15. That the AO erred in making addition based on the conditional disclosure given u/s 132(4) given by the assessee.

16. The authorities below erred in holding that the machinery purchased was used and also in arriving at the quantum as in excess of 20%.

17. The authorities below erred in holding that the use of the machinery purchased from M/s Ritwik Projects Pvt. Ltd. disentitles the assessee from the claim for deduction u/s 10B.

18. The authorities below erred in adding Rs. 79,68,350/- as unexplained investment u/s 69 of the IT Act.

19. The authorities below erred in relying on material and statements without furnishing the same to the assessee before passing the assessment order.

20. The authorities below erred in relying on statements without providing opportunity to cross examine.

21. The authorities below erred in relying on material seized from others in framing the order u/s 153A r.w.s 143(3) without following the procedure as is envisaged u/s 153C.

22. Without prejudice the AO erred in not granting reduction by telescoping the additions.

23. That the approval granted u/s153D is not as per law.

24. The appellant denies the liabilities for interest under sections 234A, 234B & 234C. Further prays that the interest if any should be levied only on returned income limited to the time of filing the original return.

25. No opportunity has been given before levy of interest under sections 234A, 234B & 234C of the I T Act.

26. Without prejudice to the appellant's right of seeking waiver before appropriate authority, the appellant begs for consequential relief in the levy of interest under sections 234A, 234B & 234C of the Act.

27. For the above and other grounds and reasons which may be submitted during the course of hearing of this appeal, the assessee requests that the appeal be allowed as prayed and justice be rendered."

3.1.2 **Assessment Year : 2009-10**.

1. " That the order of the authorities below in so far as it is against the appellant is against the law, facts, circumstances, natural justice, without jurisdiction, bad in law and all other known principles of law.

2. That the total income computed and total tax computed is hereby disputed.

3. The proceedings of search and all other subsequent proceedings are bad in law, without jurisdiction and invalid.

4. The notice u/s 153A and subsequent proceedings are without jurisdiction and bad in law.

5. The order u/s 153A r.w.s. 143(3) is bad in law, time barred and infructuous.

6. That the authorities below erred in not providing sufficient and adequate opportunity to the appellant as required under law, thereby violating the principles of natural justice, hence the order requires to be cancelled.

7. The CIT-Appeals erred in dismissing the ground on validity of search.

8. The AO erred in initiating proceedings u/s 153A and thereafter passing an order in the absence of any abatement as is envisaged in the law.

9. The CIT-Appeals erred in refusing to rely on the decision of the Special Bench in All Cargo Global Logistics Limited on the issue of abatement of assessment.

10. The authorities below erred in disallowing the deduction u/s 10B amounting to Rs. 125,17,76,128/-.

11. The authorities below erred in refusing to rely on the binding decision of the jurisdictional High Court in Sami Labs Ltd in 334 ITR 157.

12. The authorities below erred in changing his opinion on the issue of allowance u/s 10B in the absence of any new information which was not already considered in the initial year.

13. The AO erred in calculating the disallowance u/s 10B as an alternative to Ground No.10 above amounting to Rs.9,51,28,026/-.

14. The authorities below erred in holding that purchases of iron ore amounting to Rs.40,34,89,645/- did not qualify for deduction u/s 10B.

15. That the AO erred in making addition based on the conditional disclosure given u/s 132(4) given by the assessee.

16. The authorities below erred in holding that the machinery purchased was used and also in arriving at the quantum as in excess of 20%.

17. The authorities below erred in holding that the use of the machinery purchased from M/s Ritwik Projects Pvt. Ltd. disentitles the assessee from the claim for deduction u/s 10B.

18. The authorities below erred in adding Rs. 58,70,000/- as unexplained investment in land.

19. The authorities below erred in disallowing loss on forward exchange contract amounting to Rs.23,82,85,725/-.

20. The authorities below erred in relying on material and statements without furnishing the same to the assessee before passing the assessment order.

21. The authorities below erred in relying on statements without providing opportunity to cross examine.

22. The authorities below erred in relying on material seized from others in framing the order u/s 153A r.w.s 143(3) without following the procedure as is envisaged u/s 153C.

23. Without prejudice the AO erred in not granting reduction by telescoping the additions.

24. That the approval granted u/s153D is not as per law.

25. The appellant denies the liabilities for interest under sections 234A & 234B. Further prays that the interest if any should be levied only on returned income limited to the time of filing the original return.

26. No opportunity has been given before levy of interest under sections 234A & 234B of the I T Act.

27. Without prejudice to the appellant's right of seeking waiver before appropriate authority, the appellant begs for consequential relief in the levy of interest under sections 234A & 234B of the Act.

28. For the above and other grounds and reasons which may be submitted during the course of hearing of this appeal, the assessee requests that the appeal be allowed as prayed and justice be rendered."

3.1.3 **Assessment Year : 2010-11**.

1. That the order of the authorities below in so far as it is against the appellant is against the law, facts, circumstances, natural justice, without jurisdiction, bad in law and all other known principles of law.

2. That the total income computed and total tax computed is hereby disputed.

3. The proceedings of search and all other subsequent proceedings are bad in law, without jurisdiction and invalid.

4. The notice u/s 153A and subsequent proceedings are without jurisdiction and bad in law.

5. The order u/s 153A r.w.s. 143(3) is bad in law, time barred and infructuous.

6. That the authorities below erred in not providing sufficient and adequate opportunity to the appellant as required under law, thereby violating the principles of natural justice, hence the order requires to be cancelled.

7. The CIT-Appeals erred in dismissing the ground on validity of search.

8. The AO erred in initiating proceedings u/s 153A and thereafter passing an order in the absence of any abatement as is envisaged in the law.

9. The CIT-Appeals erred in refusing to rely on the decision of the Special Bench in All Cargo Global Logistics Limited on the issue of abatement of assessment.

10. The authorities below erred in disallowing the deduction u/s 10B amounting to Rs. 271,69,21,004/-.

11. The authorities below erred in refusing to rely on the binding decision of the jurisdictional High Court in Sami Labs Ltd in 334 ITR 157.

12. The authorities below erred in changing his opinion on the issue of allowance u/s 10B in the absence of any new information which was not already considered in the initial year.

13. The AO erred in calculating the disallowance u/s 10B as an alternative to Ground No.10 above amounting to Rs.18,10,25,763/-.

14. The authorities below erred in holding that purchases of iron ore amounting to Rs.26,83,72,016/- did not qualify for deduction u/s 10B.

15. That the AO erred in making addition based on the conditional disclosure given u/s 132(4) given by the assessee.

16. The authorities below erred in holding that the machinery purchased was used and also in arriving at the quantum as in excess of 20%.

17. The authorities below erred in holding that the use of the machinery purchased from M/s Ritwik Projects Pvt. Ltd. disentitles the assessee from the claim for deduction u/s 10B.

18. The authorities below erred in applying sec 37(1) on the alleged export of iron ore.

19. The authorities below erred in disallowing Rs. 38,39,38,960/- u/s 37(1) of the IT Act.

20. The authorities below erred in disallowing loss on forward exchange contract amounting to Rs. 18,92,70,495/-.

21. The authorities below erred in relying on material and statements without furnishing the same to the assessee before passing the assessment order.

22. The authorities below erred in relying on statements without providing opportunity to cross examine.

23. The authorities below erred in relying on material seized from others in framing the order u/s 153A r.w.s 143(3) without following the procedure as is envisaged u/s 153C.

24. Without prejudice the AO erred in not granting reduction by telescoping the additions.

25. That the approval granted u/s153D is not as per law.

26. The appellant denies the liabilities for interest u/s 234B. Further prays that the interest if any should be levied only on returned income limited to the time of filing the original return.

27. The appellant denies the liabilities for interest u/s 234D of the Act.

28. No opportunity has been given before levy of interest u/s 234B of the I T Act.

29. Without prejudice to the appellant's right of seeking waiver before appropriate authority, the appellant begs for consequential relief in the levy of interest u/s 234B of the Act.

30. The levy of interest u/s 234D is against the express provisions of the law.

31. For the above and other grounds and reasons which may be submitted during the course of hearing of this appeal, the assessee requests that the appeal be allowed as prayed and justice be rendered."

3.1.4. **Assessment Year 2011-12**.

1. " That the order of the authorities below in so far as it is against the appellant is against the law, facts, circumstances, natural justice, without jurisdiction, bad in law and all other known principles of law.

2. That the total income computed and total tax computed is hereby disputed.

3. The proceedings of search and all other subsequent proceedings are bad in law, without jurisdiction and invalid.

4. The order u/s 143(3) r.w.s. 153D is bad in law, time barred and infructuous.

5. That the authorities below erred in not providing sufficient and adequate opportunity to the appellant as required under law, thereby violating the principles of natural justice, hence the order requires to be cancelled.

6. The CIT-Appeals erred in dismissing the ground on validity of search.

7. The authorities below erred in disallowing the deduction u/s 10B amounting to Rs. 212,38,08,115/-.

8. The authorities below erred in refusing to rely on the binding decision of the jurisdictional High Court in Sami Labs Ltd in 334 ITR 157.

9. The authorities below erred in changing their opinion on the issue of allowance u/s 10B in the absence of any new information which was not already considered in the initial year.

10. The authorities below erred in holding that certain purchases of iron ore did not qualify for deduction u/s 10B.

11. The authorities below erred in holding that the machinery purchased was used and also in arriving at the quantum as in excess of 20%.

12. The authorities below erred in holding that the use of the machinery purchased from M/s Ritwik Projects Pvt. Ltd. disentitles the assessee from the claim for deduction u/s 10B.

13. The authorities below erred in disallowing loss on forward exchange contract amounting to Rs. 15,58,03,235/-.

14. The authorities below erred in relying on material and statements without furnishing the same to the assessee before passing the assessment order.

15. The authorities below erred in relying on statements without providing opportunity to cross examine.

16. That the approval granted u/s153D is not as per law.

17. The appellant denies the liabilities for interest under sections 234A, 234B & 234C. Further prays that the interest if any should be levied only on returned income limited to the time of filing the original return.

18. No opportunity has been given before levy of interest under sections 234A, 234B & 234C of the I T Act.

19. Without prejudice to the appellant's right of seeking waiver before appropriate authority, the appellant begs for consequential relief in the levy of interest under sections 234A, 234B & 234C of the Act.

20. For the above and other grounds and reasons which may be submitted during the course of hearing of this appeal, the assessee requests that the appeal be allowed as prayed and justice be rendered."

Assessee's appeal for A.Y. 2008-09 (ITA No.738/Bang/2015).

4. Before us, apart from putting forth oral arguments, the counsels on both sides have filed written submissions which are extracted hereunder.

4.1 **Assessee's submissions.**

" ITA 738/B/15 –AY 2008-09

The assessee's premises were subjected to search purportedly u/s 132 of the Income Tax Act on 19/07/2010 at three places. The said search was initiated presumably under a warrant of authorization in the name of M/s Bharat Mines and Minerals. The highlights of the search proceedings and other events in relation to search was that the premises at No.101, Pride Elite, Museum Road, Bangalore was subjected to search, the ingress to which was at 9.30a.m on

19/07/2010 and outgress was at 3.15a.m on 20/07/2010 and the search was stated to be temporarily closed as mentioned in panchanama drawn dated 19/07/2010. On the said date certain books of accounts and other documents which were found and seized vide annexure to the panchanama marked as A/BMM.CO Pages-1 & 2 and C/BMM.CO/INR Page-1. Thereafter in continuation of earlier warrant the assessee's premises was again searched on 09/09/2010 and the search proceeding came to be closed on 15/09/2010 vide panchanama drawn on the even date or the said date.

The premises at Singhi Sadan, Infantry Road, Cantonment, Bellary was subjected to search,the ingress to which was at 9.45a.m on 19/07/2010 and outgress was at 12.30a.m on 20/07/2010 and the search was stated to be temporarily closed as mentioned in panchanama drawn dated 19/07/2010. On the said date certain books of accounts and other documents which were found and seized vide annexure to the panchanama marked as A/BMM OFF pages 1 & 2.Thereafter in continuation of earlier warrant the assessee's premises was again searched on 12/08/2010, 13/08/2010, 20/07/2010 and the search proceeding came to be closed on 16/09/2010 vide panchanama drawn on the even date or the said date.

The premises at Office and Mines at Ranjithpura, Sandur, Bellary was subjected to search, the ingress to which was at 9.30a.m on 19/07/2010 and outgress was at 2.00a.m on 20/07/2010 and the search was stated to be temporarily closed as mentioned in panchanama drawn dated 19/07/2010. On the said date certain books of accounts and other documents which were found and seized vide annexure to the panchanama marked as A/BMM/C1 pages 1 to 6.Thereafter in continuation of earlier warrant the assessee's premises was again searched on 20/07/2010, 21/07/2010 and the search proceeding came to be closed on 15/09/2010 vide panchanama drawn on the even date or the said date. All the panchanams are found in PB pages 325 to 416.

The assessee during the course of search filed a conditional disclosure u/s 132(4) making a declaration of Rs.31,03,03,635/-, Rs.4,16,43,774 & Rs.16,70,04,649/- for the assessment years 2008-09, 2009-10 & 2010-11 respectively (PB page 8). The assessee received a notice u/s 153A dt. 21/09/2010 from the DCIT, central circle 1(2) and was served on the assessee on 28/09/2010 directing the assessee to file his return of income for AY 2008-09 (PB page 15). The assessee filed a return of income on 31/01/2012 declaring an income of

Rs.37,19,43,650/- with the following caption at the top of the return."Without prejudice and subject to our letters" which included the aforesaid Rs.31,03,03,635/- (PB page16).

The brief facts and background are explained hereunder:

The assessee is a partnership firm carrying on the business of mining and iron ore export through an undertaking approved as a 100% EOU. For the AY 2008-09 the assessee filed the regular return of income declaring total income of Rs.6,16,40,020/- on 06/10/2008 (PB page1). In the original return the assessee had made a claim for deduction u/s 10B in respect of the undertaking known as M/s Bharat Mines & Minerals which was established in pursuance of the legal agreement executed between Dinesh Kumar Singhi and Development Commissioner of CSEZ dt. 03/06/2003 and their confirmation letter dt. 04/07/2003.Shri. Dinesh Kumar Singhi has been claiming the deduction u/s 10B in his individual assessment for the years 2004-05 to 2006-07. The department had dealt his claim for various years and the details of which are:

The claim for AY 2005-06 being the second year was allowed by the AO in an order u/s 143(3) dt. 29/03/2006 whereas in an order passed u/s 153A r.w.s 143(3) dt. 11/03/2013, the claim u/s 10B was disallowed. The claim for AY 2006-07 being the third year of working of the undertaking was allowed by an order u/s 143(3) dt. 31/12/2008. However the same has been disallowed by a change of opinion by order u/s 153A r.w.s 143(3) dt. 13/03/2013. The claim for AY 2007-08 being the fourth year of working of the undertaking was allowed by an order u/s 143(3) dt. 18/12/2009. However the same has been disallowed by a change of opinion by order u/s 153A r.w.s 143(3) dt. 14/03/2013.

As explained, sec 153A notice was issued on 21/09/2010 and the assessee filed the return on 31/01/2012. Thereafter notice u/s 143(2) dt. 21/05/2012 and notices u/s 142(1) dt. 10/07/2012, 29/08/2012, 05/10/2012, 19/12/2012, 07/01/2013 & 05/03/2013 were issued seeking several details which was duly filed by the assessee. The assessment came to be concluded u/s 153A r.w.s 143(3) on 30/03/2013 disallowing the claim of Rs.177,81,93,334/- u/s 10B and also making additions of Rs.17,51,50,444/- and thus determining the total income at Rs.232,52,87,428/-.

The details of disallowance are as hereunder:

1. Disallowance u/s 10B Rs. 177,81,93,334/-
2. Unexplained investments u/s 69 Rs.79,68,350/-
3. Unaccounted payments/unexplained expenditure Rs. 16,71,82,094/-

Exfacie the proceedings culminating into order of assessment dt.30/03/2013 is illegal and not as per law. This is the fifth year of undertaking on which deduction u/s10B has been claimed. The order of assessment is invalid having regard to the factual matrix explained already and especially in the absence of any incriminating material. The CIT-A who heard the appeal has confirmed the addition in respect of 1 and 2 above and deleted the protective addition in Sl no.3 above. Each of the addition is discussed hereunder:

I. Disallowance u/s 10B – Rs.177,81,93,334/-

The AO has erred in disallowing the claim u/s 10B amounting to Rs.177,81,93,334/- for the reasons he has mentioned in the assessment order for the AY 2005-06 dt.11/03/2013 and AY 2006-07 dt.13.03.2013 in the case of Dinesh Kumar Singhi. Shri. Dinesh Kumar Singhi has filed his objection by filing appeal and the result of the appeal for AY 2005-06 & AY 2006-07 on this issue will be relevant. In any case the issue cannot be dealt afresh as the claim is for fifth year in respect of an undertaking on which the issue of deduction u/s10B was already resolved in favour of the assessee. The Hon'ble High Court of Karnataka in Sami Labs Ltd vs ACIT (334 ITR 157) – PB page 60 and Hon'ble Delhi HC in CIT vs International Tractors (CLPB page 206) has held that once the claim for initial year is settled the same cannot be revisited on the same set of facts and law. The CIT-A however has confirmed the action of the AO on this issue by holding as under:

''the facts as are applicable in the case of Sri Dinesh Kumar Singhi for AY 2005-06 to 2007-08 are applicable in respect of the appellant firm for AYs 2008-09 to 2011-12''

On this issue it is submitted that the arguments/submissions advanced in the case of Dinesh Kumar Singhi for the AY 2005-06 to AY 2007-08 may kindly be adopted for the impugned AY in appeal.

The AO discussion on the alternative argument found in para A.3 in page 9 and para 7 from page 6 to page 33 of the asst. order of Dinesh Kumar Singhi for AY 2006-07 becomes otiose and not relevant since no disallowance has been made. Further the discussion by the AO does not reckon the fact that the

assessee had already taken note of various issues and considered purchases which in his view were not subjected to manufacture at the assessee's manufacturing plant for which 10B has been claimed. However no separate addition has been made on this ground as the entire 10B claim was disallowed. In this regard it may kindly be noted that the purchase invoices listed for the impugned year paragraph 7 pages 6 to 33 of the assessment order in Dinesh Kumar Singhi for AY 2006-07 lists various instances of the alleged inaccuracy. In this regard it is submitted that the discussion by the AO does not bring out anything clinching to show that the claim by the assessee is incorrect. The purchase invoice are not incriminating in nature as the same has been maintained during the course of regular assessment. Without prejudice, the assessee vide its letter dt.09.09.2010 (PB page 8) has already reworked and reduced its claim to the extent of purchases of Rs.32,63,88,469/- and reworked the claim u/s 10B while filing the return in pursuance of section 153A. The discussion by the AO has not reckoned this aspect and consequently no action is required. Consequently the discussion by the AO in pages 6 to 33 of asst. order of Dinesh Kumar Singhi for AY 2006-07 which is relied on in the impugned assessment becomes academic in nature especially since no addition has been made on this count.

II. Unexplained investments u/s 69 – Rs.79,68,350/-

The AO erred in invoking section 69 and made an addition of Rs.79,68,350/- on the alleged unaccounted purchases. Firstly, purchases are not investment on which sec 69 can be invoked. Secondly, there is no investment, be it purchases or otherwise so as to warrant an addition. The material relied on by the AO does not lead to any conclusion that the assessee has made any payment or made any purchases over and above that is recorded in the books of accounts. The reply filed by the assessee (PB page 127) has been rejected for no tenable reason.

The appellant has filed a copy of the billing (PB – II page 417 to 440) made by M/s.Ambika Ghorpade during the year consisting of Sale of Iron ore at the pithead Rs.10,71,68,170/- and sale of iron ore waste dump Rs.2,40,30,012/-. The addition is in respect of iron ore fines on the apprehension that 7774MT valued at Rs.79,68,350/- has not been billed. However it could be seen in PB page 417 that on 30.06.2007 6000MT were billed and on 16.07.2007 5000MT were billed and these two bills are found in page 422 and 423 of the paperbook

and in page 422 of PB it is mentioned that the billing was in respect of period 15-30 June 2007. Once these details are reckoned which has not been considered by the AO, the addition requires to be vacated. It is submitted that during the search no other document, cash or excess stock was found indicating any undisclosed income. The AO has accepted the books of accounts having found it to be correct thereby meaning that trading/manufacturing account was correct and required no interference. When all the aspects of trading account consisting of opening stock, purchase, sales and closing stock remained undisturbed there is no scope to make any addition on the alleged unbilled production. Consequently the addition requires to be deleted.

On the issue of approval granted u/s 153D, it is the contention of the assessee that the approval has been granted without application of mind and in a mechanical manner. In support of its contention, the following caselaws are relied on:

1) Chhugamal Rajpal vs. S.P.Chaliha & Ors - 79 ITR 603 – SC – CLPB page 352
2) CIT vs. Akil Gulamali Somji - 84 CCH 53 - Mum HC– CLPB page 358
3) Smt.Shreelekha Damani vs. DCIT - 173 TTJ 332 - Bombay ITAT– CLPB page 366
4) AAA Paper Marketing Ltd vs ACIT - ITA 167/Lkw/2016 - Lucknow ITAT– CLPB page 375

The grounds on interest u/s 234A/B are consequential in nature.

4.2 Revenue has filed the following written submissions for Assessment Year 2008-09 :-

" Assessment Year 2008–09, (ITA 738/B/2015)

1. Search under section 132 of the Act was conducted in the case of the assessee on 19/7/2010. Notice under section 153A of the Act issued on 21/9/2000 and served on 28/9/2010.

2. Mining lease was granted in favour of M/s.Bharat Mines and Minerals and was extended from time to time. M/s. Bharat Mines and Minerals was a partnership firm during the Assessment Year 1996–97. On the death of his father, the Shri Dinesh Kumar Singhi conducted the business as proprietary till 31/3/2007. Later from 1/4/2007 the business was conducted as firm with M/s.BMM Ispat Ltd joining as partner. Thus from the date of establishment, the business undertaking of M/s. Bharat Mines and Minerals was carried on either as a proprietary concern or as a partnership firm till date in respect of mining lease.

3. DEDUCTION UNDER SECTION 10B OF THE ACT

a. The assessee claimed deduction under section 10B of the Act on profits derived from the export of iron ore. As per the provisions of section 10B deduction is allowable only in the profits derived from the export of goods manufactured/produced and exported from 100% export oriented unit. The deduction is available only for 10 consecutive years beginning from the year in which the undertaking begins to manufacture.

b. The claim of the assessee has been rejected on the following ground: –

i. The unit from which iron ore has been processing/produced has not been conferred with EOU status for the period up to 30/5/2006.

ii. The business was in existence prior to 1/4/1994 and accordingly period of 10 years has expired. The conversion of undertaking setup in Domestic Tariff Area (DTA) is eligible for deduction under section 10B of the Act on getting approval as 100% EOU only for the unexpired period of 10 consecutive years commencing from the year in which the original DTA started manufacturing.

iii. The assessee is indulging in purchase of processed iron ore and exporting the same without any value addition in the undertaking claiming to be an EOU. Such trading activity has been claimed as production and export from the so-called EOU and claim deduction under section 10B of the Act. The material found in the course of search demonstrated that the assessee has been purchasing only processed iron ore and directly exporting the same. The purchase invoices contains

the details of the processed iron ore and the destination is the ports from where the iron ore is exported.

iv. Mrs. Snehalatha Singi wife of the assessee was the ore raising and processing contractor in the mines belonging to M/s.Karthikeyas Manganese and Iron Ore Private Limited, Mrs.Ambika Ghorpade, M.Srinivasulu and H.G.Rangangoud. In all the above mines Mrs.Snehalatha Singi was the contractor excavating, extracting, crushing and processing the raw ore into fines and lumps. From the seized material it is found that Mrs.Snehalatha Singi was crushing and processing the iron ore in the respective mine heads through mobile crushing and screening plants at the respective mines. The mining returns of the above said mine owners show only dispatch of processed iron ore from the mine heads. The assessee has claimed deduction under section 10B on the export of such processed iron ore without carrying out any activity in the EOU and in fact without bringing the material into the EOU.

v. Evidence found during search demonstrated that Shri Dinesh Kumar Singhi was systematically creating invoices to disguise the purchase of initial products as purchasers of raw iron ore.

vi. The old machinery used by the assessee was exceeding the prescribed limit of 20%. Without prejudice to the above contention it is submitted that 20% of the old machinery is contemplated only in the circumstances when the EOU is formed by the transfer to a new business of machinery and plant previously used for any purpose. The said exception is not applicable to the present case as the EOU is not formed by transfer to a new business of machinery or plant previously used for any purpose.

4. WRONG CLAIM OF DEDUCTION BEFORE THE EOU WAS ESTABLISHMENT

The assessing officer has adopted the finding recorded by him for the Assessment Year 2005–06 in the case of the Sri.Dinesh Kumar Singhi. The submissions for Assessment Year 2005–06 in the

case of Sri.Dinesh Kumar Singhi is adopted on this aspect and for sake of convenience is reiterated below.

i. In the application filed before the SEZ dated 3/4/2003 for conversion of existing DTA into 100% EOU for manufacture and export of iron ore, in the Pro-Forma the assessee has stated manufacturer exporter and age of machineries installed in the DTA as 10 to 12 years.

ii. The letter of permission dated 6/5/2003 by SEZ under Exim Policy was subject to conditions stated in Annexure. One of the condition is that the production of EOU under the scheme has to be carried out in the custom bonded area. Only when the licenses are issued, the EOU is said to be set up and it can be demarcated from the DTA by way of bonding. Without necessary license, the assessee cannot claim as an EOU. Without EOU was being set up the assessee has exported iron ore and the export invoices did not depict that the exports were from 100% EOU. From the date of Letter of

Permission(LOP) till 2006, the assessee has been communicating to the SEZ authorities that the project is still under implementation and the EOU has not commenced production. The license for private bonded warehouse was issued by the customs on 29/5/2006. Without setting up valid EOU, exports were made by printing "Shipment by 100% EOU" on the invoices. The various seized material found in the course of search establishes that the assessee has failed to implement the EOU project as per the letter of permission and the exports continued in the DTA status only.

iii. The letter by the assessee (Bharat mines and minerals) dated 30/4/2006 (page 9 of assessment order) seeking for extension of time from a SEZ would clearly indicates the nonexistence of the 100% EOU. The letter of the SEZ dated 5/5/2006 (page 11 of assessment order) would further justify the nonexistence of 100% EOU. The letter dated 17/4/2006 written by assessee to SEZ authorities (page 13 of assessment order) expressing readiness

of commencing the production by end of June 2006 would further justify the above stand of the revenue. The letter dated 2/7/2006 (page 15 of the assessment order) to SEZ by the assessee communicating inspection by Central excise and customs authorities and commencement of commercial production on 30/5/2006 is self explanatory regarding the commencement of commercial production in the 100% EOU.

iv. In the quarterly and annual reports submitted by the assessee to SEZ for the first quarter financial year 2006–07, the date of commencement of production is clearly mentioned as 30/5/2006.

v. The customs authorities by letter dated 19/8/2010 has confirmed designation of private bonded warehouse from 29/5/2006 and the first shipment from 100% EOU on 11/7/2006 (page 18 of assessment order).

vi. The Development Commissioner CSEZ has confirmed by letter dated 7/9/2010 (page 21 of

assessment order) that exports prior to 30/5/2006 is not treated as exports from EOU.

vii. EOU manufacturers required to file application for removal of goods in prescribed Form-ARE-1 before the jurisdictional Central Excise authorities providing full description of the goods being exported from the unit and invoice would bear the description that "**THE SHIPMENT IS UNDER EOU"**. The above requirement has been fulfilled only after 29/5/2006 and prior to this date no ARE-1 forms were submitted. This is evident from seized material marked as A2/BMM/3. The above aspect also has been confirmed by accountant of Bharat Mines and Minerals whose statement were recorded under section 132(4) of the Act. No specific request for cross examination was made by the assessee.

viii. The quarterly and annual performance report submitted to SEZ the assessee declared that the unit has commenced production from the EOU only since 30/5/2006. From the about is clear that EOU

was not established till 30/5/2006 and not entitled for deduction under section 10 B of the Act.

5. INCORRECT CLAIM MADE AFTER THE EXPIRY OF 10 YEARS TAX HOLIDAY PERIOD

The assessing officer has adopted the finding recorded by him for the Assessment Year 2005–06 in the case of Sri.Dinesh Kumar Singhi. The submissions for Assessment Year 2005–06 in the case of Sri.Dinesh Kumar Singhi is adopted on this aspect and for sake of convenience is reiterated below.

a. In the application filed for conversion of existing DTA into EOU, the assessee has declared that it is manufacturer-exporter and the age and remaining life of the machineries already installed as 10 to 12 years. It is clearly stated that the application is for conversion of existing DTA into 100% EOU

b. The assessee and later the firm Bharat Mines and Minerals are not entitled for exemption under section 10B as the DTA was established more than 10 years ago as evidenced as under: –

i. The assessee is in business for more than 20 years.

ii. The assessee is using the same machinery for crushing and screening plants for more than 15 years as evidenced by the accounts.

iii. It is not disputed that the assessee is exporting the products and is carrying on the business at least from 1994.

iv. The unit which is converted to EOU was established at least on 1/4/1994 as per format of registration-cum-membership certificate issued by Export Promotion Council dated 21/6/2005.

v. In the application for membership to Export Promotion Council the assessee has declared that the date of establishment as 1/4/1994 for manufacture of iron ore and the same is evident from extract at (page 27 of assessment order).

vi. The assessee's claiming deduction under section 80HHC from 1996–97 till 2004–05 and may be even prior to this period, would demonstrate the existence of unit 10 years

much prior to the current year and period of 10 years has expired.

1. On the above aspects the Assessing Officer has summarised as under: –

   i. DTA was established at Ranjitpura more than 15 years back and the assessee was processing the iron ore in that plant and exporting the same through MMTC and are directly.

   ii. The existing DTA at Ranjitpura was converted into EOU and the nature of business continue to remain the same and has continued utilising the old plant and machinery.

   iii. The assessee is consistently claiming deduction under section 80HHC as manufacturer – exporter from Assessment Year 1996–97 till 2004–05 as per the records and even maybe prior to that period. After the expiry of tax benefit under that section, the DTA was converted into EOU. Though conversion is not prohibited, the benefit would be applicable for a period of 10 consecutive years from

the date of manufacture and that has expired much prior to the current Assessment Year.

iv. The assessee has formed EOU by purchasing the used machinery and such used machinery is in excess of 20% of the total machinery installed in the unit. 20% of the old machinery is contemplated only in the circumstances when the EOU is formed by the transfer to a new business of machinery and plant previously used for any purpose. The said exception is not applicable to the present case as the EOU is not formed by transfer to a new business of machinery or plant previously used for any purpose.

v. Though conversion of DTA into EOU is permissible under section 10B and the same is applied for section 10A, it would be applicable for the unexpired period of 10 consecutive assessment years from the year in which undertaking begins to manufacture or produce any article or thing and exports such articles or things. In view of the admission made by the assessee regarding the

existence of DTA as on 1/4/1994, period of 10 Conservative years has expired and the same is not extendable to the current Assessment Year.

6. PURCHASE AND EXPORT OF PROCESSED IRON ORE – NO MANUFACTURE INVOLVED IN THE EOU

The assessing officer has adopted the finding recorded by him for the Assessment Year 2006–07 in the case of Sri.Dinesh Kumar Singhi. The submissions for Assessment Year 2006–07 in the case of Sri.Dinesh Kumar Singhi is adopted on this aspect and for sake of convenience is reiterated below.

i. The raw material (ROM) is extracted from the mines and is put to crushing and screening plants where the ROM is crusted into the finish of the products i.e fines and lumps(calibrated ore or C ore). The finished products are fines and lumps.

ii. From the seized material it was found that the assessee purchased processed iron ore from various suppliers and directly exported the same without any value addition in the EOU. The sale bills wherein consignee is mentioned as BMM (Bharat mines and minerals) at genuine,

Krishnapatnam Port or other destination. The ore has been put to crushing and screening plants at the mines where the processing of iron ore is taking place at the respective mines and the finished product is moved from the Mine head's for exports without processing in the EOU unit. This trading activity is claimed deduction under section 10B of the Act further the assessee indulged in preparing invoices to show the procurement of raw material and processing them in EOU.

iii. Seized material referred to in page 7 and 8 of the assessment order containing sale invoices for purchase of iron ore fines would demonstrate the above aspect of purchase of processed iron ore. The purchases made by the assessee are against Form-H which is treated as deemed export of goods. The issue of FORM-H by the assessee to the suppliers of iron ore makes it clear that the goods have been purchased for the sake of exports. Most of the purchases have been delivered by the suppliers at the berths at various ports like Goa, Chennai etc which are loading points for exports. The details of such purchases of processor iron ore as found in the

seized material is tabulated at page 9 to 13 of the assessment order.

iv. Similar transactions with various persons has been in detail tabulated with respect to the purchase of processed ore and supply directly to the port or for rail transport. Attention of this Hon'ble tribunal is invited to Rs 13 to 17 of the assessment order for the sake of brevity.

v. Various seized material has been referred to from page 17 to 20 of the assessment order in support of the contention of the revenue that the iron ore was processed in the mines itself and the same has been purchased and exported by the assessee without even entering the same to the EOU unit. The trading of iron ore is not eligible for section 10B deduction. Further the assessee has not demonstrated the movement of raw ore from mines to EOU and movement of processed iron ore(fines and lumps) to the designated place for export and the respective permits from the respective authorities under various statutes which are mandatory.

vi. The accountant of the assessee has admitted that crushing and screening plants are operational at all the

mines and the processed ore is being directly exported without further value addition by the EOU of the assessee. Even the mine owner has stated that the assessee has installed the crushing and screening plants at the Minehead and is processing the iron ore in the Minehead itself and the finished product was being transported out of the mines. Mr Bharat S Ghorpade agent of KMIORE and Mrs Ambika Ghorpade has admitted crushing and screening of iron ore by mine owners at the mine heads and the same is being purchased by the assessee for the purpose of export. (Reference to statement of Sri Manjunath, Sri Srinivasulu and Mr.Bharat S Ghorpade at page 22 to 24 of the assessment order).

vii. The seized material in the form of transportation bills found in the course of search would clearly demonstrate processing of iron ore by installing screening plants at the Minehead and transporting the same directly to the designated place of export without carrying out any activity in the EOU. (Reference invited to page 25 and 26 of the assessment order)

viii. Insofar as the contention of the revenue that invoices for purchase of processed door were manipulated to reflect as invoice for purchase of ROM. Sample copy is placed at page 28 and 29 to evidence the above manipulation.

ix. On confrontation of the evidence regarding trading exports of iron ore, the assessee has admitted wrongful claim of deduction under section 10B of the Act. Even in the course of statement on oath on 3/11/2010 on confrontation, the wrong claim has been admitted.

7. FORMATION OF EOU BY TRANSFER OF USER COMMISSIONER IN EXCESS OF 20%

The old machinery used by the assessee was exceeding the prescribed limit of 20%. Without prejudice to the above contention it is submitted that 20% of the old machinery is contemplated only in the circumstances when the EOU is formed by the transfer to a new business of machinery and plant previously used for any purpose. The said exception is not applicable to the present case as the EOU is not formed by transfer to a new business of machinery or plant previously used for any purpose."

5.0 **Ground No.7 (A.Y. 2008-09 & 2009-10)**

Ground No.6 (A.Y. 2010-11 & 2011-12)

5.1 We have heard the rival contentions and perused and carefully considered the written submissions filed, the judicial pronouncements cited and the other material on record. On the issue of validity of search in Ground No.7 (supra), it was contended that the issue be decided in accordance with the decision of the Hon'ble Karnataka High Court in the case of C. Ramaiah Reddy (339 ITR 210) and that of the Hon'ble Apex Court in the case of Ess Dee Aluminium Ltd. Vs. DDIT.

5.2 We are, however, not inclined to adjudicate this issue raised in Ground No.7 and Ground No.6 in the light of the recent amendment in Finance Act, 2017 to Sec. 132 of the Act by which the Tribunal is precluded from examining this issue and, therefore, decline to go into the issue of validity of the search action. The ITAT is a creation of statute and has to apply the law as laid down in the Act. In this view of the matter, this issue is decided against the assessee and consequently Ground No.7 of assessee's appeals for A.Y. 2008-09 & 2009-10 and Ground No.6 for A.Ys. 2010-11 & 2011-12 are dismissed.

6. **For Assessment Year 2008-09**

6.1 The main contentions in the assessee's arguments put forth on other legal grounds is that in the case on hand there was no seizure of any incriminating material relevant to the impugned Assessment Year's 2008-09 and further there is no mention of any incriminating material in the order of assessment that belongs to the assessee. Consequently, the assessment for Assessment Year 2008-09 does not abate as per the provisions of Sec. 153A of the Act and therefore no reassessment can be made; as has been done in the case on hand.

6.2.1 We have perused the order of assessment for Assessment Year 2008-09 dt.30.3.2013 and find that the material utilized for completing the assessment under Section 153A r.w.s. 143(3) of the Act is not based on material seized in the case of the assessee but is on the basis of material seized in the case of other assessees which are (i) A/BSG/01 & A/BSG/02 seized from Bharat S Ghorpade and (ii) A/RU/1 seized from residence of Rajagopal Upadhyay. There is no mention of any incriminating material seized from the assessee and no addition / disallowance has been made in the order of assessment. In the case on hand the time limit for issue of notice under Section 143(2) of the Act for Assessment Year 2008-09 was 31.10.2009 since the original return was

filed on 6.10.2008. We find that no notice thereunder has been issued within the time specified and consequently the assessment for this year does not abate and therefore reassessment, if any, is to be carried out on the basis of incriminating material found in the course of search.

6.2.2 In this regard, the Hon'ble Karnataka High Court in the case of CIT Vs Lancy Constructions in its order in ITA Nos.528 to 531 has held as under :

> " In our view, if assessment is allowed to be reopened on the basis of search, in which no incriminating material is found, and merely on the basis of further investigating the books of accounts which have been already submitted by the assessee and accepted by the Assessing Officer at the time of regular assessment, the same would amount to the Revenue getting a second opportunity to reopen the concluded assessment, which is not permissible under the law. Merely because a search is conducted in the premises of the assessee, would not entitle the revenue to initiate the process of reassessment, for which there is a separate procedure prescribed in the statute. It is only when the conditions prescribed for reassessment are fulfilled that a concluded assessment can be reopened. The very same accounts which were submitted by the assessee; on the basis of which assessment had been concluded cannot be reappreciated by the Assessing Officer merely because a search had been conducted in the premises of the assessee."

6.2.3 Further, the Hon'ble Karnataka High Court in the decision rendered in M/s. IBC Knowledge Park Pvt. Ltd., ITA No.403/2009 dt.28.4.2016 has explained the entire scope and principles governing the provisions of Sec. 153A and 153C of the Act. In their judgment, the Hon'ble Court has considered several decisions on this issue including

Lancy Constructions (supra) cited by the assessee and Canara Housing Development Co. (2015) 274 CTR 122 (Kar) cited by Revenue. In its decision, in the case of IBC Knowledge Park Pvt. Ltd. (ITA No.403/2009 dt.28.4.2016) the Hon'ble Karnataka High Court has held that notice under Section 153A/153C of the Act can be issued only if it is during a valid search when certain incriminating materials are detected. At paras 45 to 49 of its decision, the Hon'ble High Court has held as under :

> 45. Sections 153A, 153B and 153C were inserted by the Finance Act, 2003, with effect from 1/6/2003. They have replaced the post-search block assessment scheme in respect of any search or requisition made after 31/5/2003. Sub-section (1) of Section 153A *inter alia* deals with assessment in case of search or requisition. It begins with a *non obstante* clause and states that notwithstanding anything contained in Sections 139, 147, 148, 149, 151 and 153, in the case of a person where a search is initiated under Section 132 or books of account, other documents or any valuable assets are requisitioned under Section 132A, the Assessing Officer shall issue notice to such person requiring him to furnish within such period, as may

be specified in the notice, return of income in respect of each assessment year falling within six assessment years referred to in clause (b) of Section 153(1) in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of the Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under Section 139. The Assessing Officer can assess or re-assess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made. However, assessment or re-assessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this sub-section pending on the date of initiation of the search under Section 132 or making of requisition under Section 132A, as the case may be, shall abate. The explanation states, save as otherwise provided in Sections 153A, 153B and 153C, all other provisions of the Act shall apply to the assessment made under Section 153A. Section 153B speaks about time-limit for completion of assessment under Section 153A.

46. 153C is relevant for the purposes of this case. Sub-section (1) of Section 153C begins with a *non obstante* clause and it states that notwithstanding anything contained in Sections 139, 147, 148, 149, 151 and 153, where the Assessing Officer is satisfied that any valuable assets, seized or requisitioned, belongs to, or any books of account or documents, seized or requisitioned, pertains or pertain to, or any information contained therein, relates to a person other than the person referred to in Section 153A, then, the books of account or documents or valuable assets, seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed against each such other person and issue notice and assess or re-assess the income of the other person in accordance with the provisions of Section 153A, if that Assessing Officer is satisfied that the books of account or documents or valuable assets seized or requisitioned have a bearing on the determination of the total income of such other person for the relevant assessment year or years referred to in sub-section (1) of Section 153A.

Sub-section (2) of Section 153C states that where books of account or documents or valuable assets seized or requisitioned as referred to in sub-section (1) has or have been received by the Assessing Officer having jurisdiction over such other person after the due date for furnishing the return of income for the assessment year relevant to the previous year in which search is conducted under Section 132 or requisition is made under Section 132A and in respect of such assessment year - (a) no return of income has been furnished by such other person and no notice under sub-section (1) of Section 142 has been issued to him, or (b) a return of income has been furnished by such other person but no notice under sub-section (2) of Section 143 has been served and limitation of serving the notice under sub-section (2) of Section 143 has expired, or (c) assessment or reassessment, if any, has been made, before the date of receiving the books of account or documents or valuable assets seized or requisitioned by the Assessing Officer having jurisdiction over such other person, such Assessing Officer shall issue notice and assess or reassess total income of such other

person of such assessment year in the manner provided in Section 153A.

47. Chapter XIV-B consists of Section 158B to 158BH, inserted with effect from 01/07/1995, deals with special procedure for assessment in search cases. The Finance Act, 1995 inserted Chapter XIV-B in the Act, incorporating a new scheme of block assessment in cases relating to search conducted under Section 132 of the Act or requisitions made under Section 132A after 30/06/1995. Section 158B(b) defines 'undisclosed income' to include any money, bullion, jewellery or other valuable article or thing or any income based on any entry in the books of account or other documents or transactions, where such money, bullion, jewellery, valuable article, thing, entry in the books of account or other document or transaction represents wholly or partly income or property, which has not been or would not have been disclosed for the purposes of this Act or any expense, deduction or allowance claimed under this Act which is found to be false. Section 158BA deals with assessment of undisclosed income as a result of search, while Section 158BB deals with computation of undisclosed income of the block

period. Block period is defined in Section 158B(a) to mean the period comprising previous years relevant to six assessment years preceding the previous year in which the search was conducted under Section 132 or any requisition was made under Section 132A and also includes the period up to the date of commencement of such search or date of such requisition in the previous year in which the said search was conducted or requisition was made. The proviso is not relevant for the purpose of this case.

48. Section 158BD is relevant for the present case and it states that where the Assessing Officer is satisfied that any undisclosed income belongs to any person, other than the person with respect to whom search was made under Section 132 or whose books of account or other documents or any assets were requisitioned under Section 132A, then the books of account, other documents or valuable assets seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed under Section 158BC against such other person and the provisions of Chapter XIV-B shall apply accordingly. Section 158BE prescribes time limit for completion of block

assessment. Section 158BH states that except as otherwise provided in Chapter XIV-B all other provisions of the Act shall apply to the assessment made under the said chapter. Section 153C provides for the role of the Assessing Officer having jurisdiction over the person searched/requisitioned as regards third party liability. The said section covers assessments which have become necessary, because of books of accounts, documents or valuable assets of third parties indicating their undisclosed income found during the search or requisition under Section 132/132A leading to a *prima facie* tax liability. A special procedure is contemplated in such cases. Such books of accounts, documents or valuable assets are required to be handed over by the Assessing Officer having jurisdiction over the persons searched requisitioned to the assessing officer of a third party on his satisfaction that they belong to a third party before handing over.

49. On a conjoint reading of the aforesaid provisions, it becomes clear that a search can take place only when a concerned officer has information and reason to believe that any person is in possession of any valuable assets, which has not been or would not be disclosed

under the Act. In such a case, a search can take place. Following the search, if any books of account, other documents, any valuable assets is or are found in the possession or control of any person in the course of a search, then the books of account or other documents or valuable assets could be seized. Under Section 153A, the satisfaction regarding an inference of liability must be recorded. The Assessing Officer has to issue notice to the assessee i.e., the person searched for the purpose of assessment or re-assessment of the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted. Section 153C as already noted, deals with assessment of income of any other person, when the Assessing Officer is satisfied that the books of account or documents or valuable assets seized or requisitioned have a bearing on the determination of the total income of such other person for the relevant assessment year or years referred to under sub-section(1) of Section 153A of the Act. In such a case, the Assessing Officer has to issue notice to assess or re-assess income of other person under Section 153A of the Act. Thus, the fact that search has

been conducted would not justify issuance of notice under Section 153A. If it is only during a valid search when certain incriminating materials are detected, notice could be issued.

6.2.4 In the case on hand, the assessment for Assessment Year 2008-09 has been completed as the time limit for issue of notice had expired on 31.10.2009; before the date of search on 19.7.2010. Therefore, since no assessment was pending, there was no question of abatement of assessment. Respectfully, following the decisions of the Hon'ble Karnataka High Court in the case of IBC Knowledge Park Pvt. Ltd. (supra), we hold that for Assessment Year 2008-09 no assessment had abated and therefore the assessment under Section 143(3) r.w.s. 153A of the Act could have been made based only on incriminating documents / material found and seized in the course of search. That clearly not being the factual position in the case on hand, since no incriminating material was found / seized, we are of the view and hold the order of assessment for Assessment Year 2008-09 passed under Section 143(3) r.w.s. 153A of the Act vide order dt.30.3.2013 is bad in law and accordingly cancelled.

Consequently, the original assessment and income returned as per the original return of income filed on 21.10.2009 stands restored. Assessee's appeal for Assessment Year 2008-09 is allowed.

7. Since we have allowed the assessee's appeal for Assessment Year 2008-09 in view of our findings rendered above at paras 6.1 to 6.2.4 of this order (supra), we do not deem it necessary to adjudicate on the other grounds raised on merits, by the assessee.

8. In the result, the assessee's appeal for Assessment Year 2008-09 is partly allowed.

Assessee's Appeal in ITA No.739 to 740/Bang/2015

(for A.Ys. 2009-10 & 2010-11)

9. Before us, apart from oral arguments, both parties filed written submissions which are extracted hereunder :

9.1 For Assessment Year 2009-10

ITA 739/B/15 –AY 2009-10

For the impugned assessment year, the assessee received a notice u/s 153A dt. 21/09/2010 from the DCIT, central circle 1(2) and was served on the assessee on 28/09/2010 directing the assessee to file his return of income for AY 2009-10

(PB page 155). The assessee filed a return of income on 31/01/2012 declaring total loss of Rs.16,16,86,659/- with the following caption at the top of the return."Without prejudice and subject to our letters" which included the aforesaid Rs. Rs.4,16,43,774 /- (PB page 156).

The assessment came to be concluded u/s 153A r.w.s 143(3) on 30/03/2013 disallowing deduction u/s 10B of Rs.125,17,76,128/- and also making an addition of Rs.19,65,05,900/- and thus determining the total income at Rs.144,82,82,030/-.

The details of disallowance are as hereunder:

1. Disallowance u/s 10B Rs. 125,17,76,128/-
2. Unexplained payments/ expenditure in iron ore Rs.19,06,35,900/-
3. Unexplained investments in land Rs. 58,70,000/-

Exfacie the proceedings culminating into order of assessment dt.30/03/2013 is illegal and not as per law. This is the sixth year of undertaking on which deduction u/s10B has been claimed. The CIT-A who heard the appeal has confirmed the addition in respect of 1 and 3 above and deleted the protective addition in Sl no.2 above. Each of the addition is discussed hereunder:

<u>I. Disallowance u/s 10B – Rs. 125,17,76,128/-</u>

The AO has erred in disallowing the claim u/s 10B amounting to Rs. 125,17,76,128/- for the reasons he has mentioned in the assessment order for the AY 2005-06 dt.11/03/2013 and AY 2006-07 dt.13.03.2013 in the case of Dinesh Kumar Singhi. Shri. Dinesh Kumar Singhi has filed his objection by filing appeal and the result of the appeal for AY 2005-06 & AY 2006-07 on this issue will be relevant. In any case the issue cannot be dealt afresh as the claim is for sixth year in respect of an undertaking on which the issue of deduction u/s10B was already resolved in favour of the assessee. The Hon'ble High Court of Karnataka in Sami Labs Ltd vs ACIT (334 ITR 157) – PB page 60 and Hon'ble Delhi HC in CIT vs International Tractors (CLPB page 206) has held that once the claim for initial year is settled the same cannot be revisited on the same set of facts and law. The CIT-A however has confirmed the action of the AO on this issue by holding as under:

''the facts as are applicable in the case of Sri Dinesh Kumar Singhi for AY 2005-06 to 2007-08 are applicable in respect of the appellant firm for AYs 2008-09 to 2011-12''

On this issue it is submitted that the arguments/submissions advanced in the case of Dinesh Kumar Singhi for the AY 2005-06 to AY 2007-08 may kindly be adopted for the impugned AY in appeal.

The AO discussion on the alternative argument found in para A.3 in page 9 and para 7 from page 6 to page 33 of the asst. order of Dinesh Kumar Singhi for AY 2006-07 becomes otiose and not relevant since no disallowance has been made. Further the discussion by the AO does not reckon the fact that the assessee had already taken note of various issues and considered purchases which in his view were not subjected to manufacture at the assessee's manufacturing plant for which 10B has been claimed. However no addition has been made on this ground as the entire 10B claim was disallowed. In this regard it may kindly be noted that the purchase invoices listed for the impugned year paragraph 7 pages 6 to 33 of the assessment order in Dinesh Kumar Singhi for AY 2006-07 lists various instances of the alleged inaccuracy. In this regard it is submitted that the discussion by the AO does not bring out anything clinching to show that the claim by the assessee is incorrect. The purchase invoice are not incriminating in nature as the same has been maintained during the course of regular assessment. Without prejudice, the assessee vide its letter dt.09.09.2010 (PB page 8) has already reworked and reduced its claim to the extent of purchases of Rs.40,34,89,645/- and reworked the claim u/s 10B while filing the return in pursuance of section 153A. Hence the discussion by the AO has not reckoned this aspect and consequently no action is required. Consequently the discussion by the AO in pages 6 to 33 of asst. order of Dinesh Kumar Singhi for AY 2006-07 which is relied on in the impugned assessment becomes academic in nature especially since no addition has been made on this count.

<u>II.Unexplained investments in land – Rs. 58,70,000/-</u>

The AO erred in making an addition of Rs.58,70,000/- towards the alleged investment in lands listed out by the AO in para 12.1 extracted as hereunder:

Page no.	*Type of document*	*Date or F.Y*	*Total value of the document*	*Amount of cash paid*	*Description of the property*
4-5	*Agreement of sale with Kumaraswamy & Brothers*	*01/03/2009*	*90,00,000*	*10,00,000*	*6 acres 52cents at Ranjithpura*
7-9	*Agreement of sale and receipt*	*20/03/2009*	*1,10,000*	*1,10,000*	*5 acres at somalapura*
10-12	*Agreement of sale and cash voucher with Mr.Eshwarappa & S Kumaraswamy*	*20/01/2009*	*85,00,000*	*10,00,000*	*4 acres 58 cents at Ranjithpura*
13-14	*Agreement of sale with Mr.Shivappa & others*	*23/01/2009*	*29,87,250*	*10,50,000*	*2 acres 89 cents at Ranjithpura*
15-16	*Agreement of sale with Mr.Shivappa & others*	*23/01/2009*	*26,82,750*	*10,50,000*	*2 acres 60 cents at Ranjithpura*
17-21	*Agreement of extraction of iron ore with Mr.Ramesh and cash voucher*	*15/03/2009*	*44,00,000*	*12,00,000*	*12 acres at Dindehalli*
22-24	*Cash vouchers*	*20/01/2009*	*5,60,000*	*5,60,000*	*Advance for plots*
	Total			*58,70,000*	

As per the AO the said details were extracted from seized material No A/RU/1 seized from the residence of Sri Rajagopal Upadhyaya on 19/07/2010 (PB page 402) . The AO has alleged that the assessee has not filed a reply and at the same breath he has extracted the reply filed by the assessee in para 12.3 extracted hereunder:

" It is clear that, the so called seized material said to have been seized from the premises of Sri Rajagopal Upadhyaya marked as A/RU/1 indicating certain payments to the persons mentioned in your query is factually incorrect. First of all, it is the

material seized from Rajagopal Upadhyaya. It is not clear as to how income from the material seized from him can be assessed or proposed to be assessed in the hands of the assessee firm. There is no legal provision to make such assessment. The so called seized material relied on by you does not say anything about any payment alleged to have been made by us. Your assumptions are fanciful and incorrect. We here by confirm that no such payments have been made. It is also not clear as to who are those Eshwarappa, Kumaraswamy and which are the lands in respect of which such payments have been made. No procedure has been followed by you for raising such queries in the notice. The seized material has to be dealt in the respective hands and cannot be dealt in the hands of the stranger assessee firm. Hence, it is required that the proposal to add the said payments be dropped."

Exfacie the addition is unjustified as even the bare minimum procedure as required u/s 153C has not been followed. Further copies of the statement relied on by the AO was not given to enable the assessee to file its defense. The addition has been made based on material seized from Rajagopal Upadhyaya in seized material A/RU/1 without any proceeding u/s 153C, the same cannot be considered in the hands of the assessee. Further perusal of the agreement listed supra does not bring out any transaction or any payment by the assessee among these parties. When no investment is found in the name of the assessee, invoking section 69 is an error. Reliance on the statement made by Rajagopal and others without affording opportunity of cross examination is a serious lapse and no addition can be made based on such uncorroborated statements as held in the following caselaws:

1) Obulapuram Mining Company Pvt Ltd vs DCIT - ITA 653/Bang/2015 - ITAT Bangalore – CLPB page 49
2) CIT vs SMC Share Brokers Ltd - 288 ITR 345 - Delhi HC – CLPB page 92
3) PCIT vs Saumya Construction P Ltd - 387 ITR 529 - GUJ HC – CLPB page 319

The AO erred in refusing to allow adjustment of loss on forward exchange contract amounting to Rs.23,82,85,725/-. The rejection by the AO is contrary to the provisions of law & is arbitrary. In the alternative the assessee prays that the loss may be allowed to be carried forward u/s 73 of the Act.

On the issue of 153D approval, rely on the submission given for AY 2008-09 supra.

The grounds on interest u/s 234A/B are consequential in nature."

9.2 Written submissions by the ld. Standing Counsel are as under :-

" Assessment Year 2009–10, (ITA 739/B/2015)

8. Search under section 132 of the Act was conducted in the case of the assessee on 19/7/2010. Notice under section 153A of the Act issued on 21/9/2000 and served on 28/9/2010.
9. Mining lease was granted in favour of M/s.Bharat Mines and Minerals and was extended from time to time. M/s. Bharat Mines and Minerals was a partnership firm during the Assessment Year 1996–97. On the death of his father, the Shri Dinesh Kumar Singhi conducted the business as proprietary till 31/3/2007. Later from 1/4/2007 the business was conducted as firm with M/s.BMM Ispat Ltd joining as partner. Thus from the date of establishment, the business undertaking of M/s. Bharat Mines and Minerals was carried on either as a proprietary concern or as a partnership firm till date in respect of mining lease.

10. DEDUCTION UNDER SECTION 10B OF THE ACT

c. The assessee claimed deduction under section 10B of the Act on profits derived from the export of iron ore. As per the provisions of section 10B deduction is allowable only in the profits derived from the export of goods manufactured/produced and exported from 100% export oriented unit. The deduction is available only for 10 consecutive years beginning from the year in which the undertaking begins to manufacture.

d. The claim of the assessee has been rejected on the following ground: –

vii. The unit from which iron ore has been processing/produced has not been conferred with EOU status for the period up to 30/5/2006.

viii. The business was in existence prior to 1/4/1994 and accordingly period of 10 years has expired. The conversion of undertaking setup in Domestic Tariff Area (DTA) is eligible for deduction under section

10B of the Act on getting approval as 100% EOU only for the unexpired period of 10 consecutive years commencing from the year in which the original DTA started manufacturing.

ix. The assessee is indulging in purchase of processed iron ore and exporting the same without any value addition in the undertaking claiming to be an EOU. Such trading activity has been claimed as production and export from the so-called EOU and claim deduction under section 10B of the Act. The material found in the course of search demonstrated that the assessee has been purchasing only processed iron ore and directly exporting the same. The purchase invoices contains the details of the processed iron ore and the destination is the ports from where the iron ore is exported.

x. Mrs. Snehalatha Singi wife of the assessee was the ore raising and processing contractor in the mines belonging to M/s.Karthikeyas Manganese and Iron Ore Private Limited,Mrs.Ambika Ghorpade, M.Srinivasulu and H.G.Rangangoud. In all the above mines Mrs.Snehalatha Singi was the contractor excavating, extracting, crushing and processing the raw ore into fines and lumps. From the seized material it is found that Mrs.Snehalatha Singi was crushing and processing the iron ore in the respective mine heads through mobile crushing and screening plants at the respective mines. The mining returns of the above said mine owners show only dispatch of processed iron ore from the mine heads. The assessee has claimed deduction under section 10B on the export of such processed iron ore without carrying out any activity in the EOU and in fact without bringing the material into the EOU.

xi. Evidence found during search demonstrated that Shri Dinesh Kumar Singhi was systematically creating invoices to disguise the purchase of initial products as purchasers of raw iron ore.

xii. The old machinery used by the assessee was exceeding the prescribed limit of 20%. Without prejudice to the above contention it is submitted that 20% of the old machinery is contemplated only in the circumstances when the EOU is formed by the transfer to a new business of machinery and plant previously used for any purpose. The said exception is not applicable to the present case as the EOU is not formed by transfer to a new business of machinery or plant previously used for any purpose.

11. WRONG CLAIM OF DEDUCTION BEFORE THE EOU WAS ESTABLISHMENT

The assessing officer has adopted the finding recorded by him for the Assessment Year 2005–06 in the case of the Sri.Dinesh Kumar Singhi. The submissions for Assessment Year 2005–06 in the case of Sri.Dinesh Kumar Singhi is adopted on this aspect and for sake of convenience is reiterated below.

ix. In the application filed before the SEZ dated 3/4/2003 for conversion of existing DTA into 100% EOU for manufacture and export of iron ore, in the Pro-Forma the assessee has stated manufacturer exporter and age of machineries installed in the DTA as 10 to 12 years.

x. The letter of permission dated 6/5/2003 by SEZ under Exim Policy was subject to conditions stated in Annexure. One of the condition is that the production of EOU under the scheme has to be carried out in the custom bonded area. Only when the licenses are issued, the EOU is said to be set up and it can be demarcated from the DTA by way of bonding. Without necessary license, the assessee cannot claim as an EOU. Without EOU was being set up the assessee has exported iron ore and the export invoices did not depict that the exports were from 100% EOU. From the date of Letter of Permission(LOP) till 2006, the assessee has been communicating to the SEZ authorities that the project is still under implementation and the EOU

has not commenced production. The license for private bonded warehouse was issued by the customs on 29/5/2006. Without setting up valid EOU, exports were made by printing "Shipment by 100% EOU" on the invoices. The various seized material found in the course of search establishes that the assessee has failed to implement the EOU project as per the letter of permission and the exports continued in the DTA status only.

xi. The letter by the assessee (Bharat mines and minerals) dated 30/4/2006 (page 9 of assessment order) seeking for extension of time from a SEZ would clearly indicates the nonexistence of the 100% EOU. The letter of the SEZ dated 5/5/2006 (page 11 of assessment order) would further justify the nonexistence of 100% EOU. The letter dated 17/4/2006 written by assessee to SEZ authorities (page 13 of assessment order) expressing readiness of commencing the production by end of June 2006 would further justify the above stand of the revenue. The letter dated 2/7/2006 (page 15 of the assessment order) to SEZ by the assessee communicating inspection by Central excise and customs authorities and commencement of commercial production on 30/5/2006 is self explanatory regarding the commencement of commercial production in the 100% EOU.

xii. In the quarterly and annual reports submitted by the assessee to SEZ for the first quarter financial year 2006–07, the date of commencement of production is clearly mentioned as 30/5/2006.

xiii. The customs authorities by letter dated 19/8/2010 has confirmed designation of private bonded warehouse from 29/5/2006 and the first shipment from 100% EOU on 11/7/2006 (page 18 of assessment order).

xiv. The Development Commissioner CSEZ has confirmed by letter dated 7/9/2010 (page 21 of assessment order) that exports prior to 30/5/2006 is not treated as exports from EOU.

xv. EOU manufacturers required to file application for removal of goods in prescribed Form-ARE-1 before the jurisdictional Central Excise authorities providing full description of the goods being exported from the unit and invoice would bear the description that "**THE SHIPMENT IS UNDER EOU"**. The above requirement has been fulfilled only after 29/5/2006 and prior to this date no ARE-1 forms were submitted. This is evident from seized material marked as A2/BMM/3. The above aspect also has been confirmed by accountant of Bharat Mines and Minerals whose statement were recorded under section 132(4) of the Act. No specific request for cross examination was made by the assessee.

xvi. The quarterly and annual performance report submitted to SEZ the assessee declared that the unit has commenced production from the EOU only since 30/5/2006. From the about is clear that EOU was not established till 30/5/2006 and not entitled for deduction under section 10 B of the Act.

12. INCORRECT CLAIM MADE AFTER THE EXPIRY OF 10 YEARS TAX HOLIDAY PERIOD

The assessing officer has adopted the finding recorded by him for the Assessment Year 2005–06 in the case of Sri.Dinesh Kumar Singhi. The submissions for Assessment Year 2005–06 in the case of Sri.Dinesh Kumar Singhi is adopted on this aspect and for sake of convenience is reiterated below.

c. In the application filed for conversion of existing DTA into EOU, the assessee has declared that it is manufacturer-exporter and the age and remaining life of the machineries already installed as 10 to 12 years. It is clearly stated that the application is for conversion of existing DTA into 100% EOU

d. The assessee and later the firm Bharat Mines and Minerals are not entitled for exemption under section 10B

as the DTA was established more than 10 years ago as evidenced as under: –

vii. The assessee is in business for more than 20 years.

viii. The assessee is using the same machinery for crushing and screening plants for more than 15 years as evidenced by the accounts.

ix. It is not disputed that the assessee is exporting the products and is carrying on the business at least from 1994.

x. The unit which is converted to EOU was established at least on 1/4/1994 as per format of registration-cum-membership certificate issued by Export Promotion Council dated 21/6/2005.

xi. In the application for membership to Export Promotion Council the assessee has declared that the date of establishment as 1/4/1994 for manufacture of iron ore and the same is evident from extract at (page 27 of assessment order).

xii. The assessee's claiming deduction under section 80HHC from 1996–97 till 2004–05 and may be even prior to this period, would demonstrate the existence of unit 10 years much prior to the current year and period of 10 years has expired.

2. On the above aspects the Assessing Officer has summarised as under: –

vi. DTA was established at Ranjitpura more than 15 years back and the assessee was processing the iron ore in that plant and exporting the same through MMTC and are directly.

vii. The existing DTA at Ranjitpura was converted into EOU and the nature of business continue to remain the same and has continued utilising the old plant and machinery.

viii. The assessee is consistently claiming deduction under section 80HHC as manufacturer – exporter from Assessment Year 1996–97 till 2004–05 as per the records and even maybe prior to that period. After the expiry of tax benefit under that section, the DTA was converted into EOU. Though conversion is not prohibited, the benefit would be applicable for a period of 10 consecutive years from the date of manufacture and that has expired much prior to the current Assessment Year.

ix. The assessee has formed EOU by purchasing the used machinery and such used machinery is in excess of 20% of the total machinery installed in the unit. 20% of the old machinery is contemplated only in the circumstances when the EOU is formed by the transfer to a new business of machinery and plant previously used for any purpose. The said exception is not applicable to the present case as the EOU is not formed by transfer to a new business of machinery or plant previously used for any purpose.

x. Though conversion of DTA into EOU is permissible under section 10B and the same is applied for section 10A, it would be applicable for the unexpired period of 10 consecutive assessment years from the year in which undertaking begins to manufacture or produce any article or thing and exports such articles or things. In view of the admission made by the assessee regarding the existence of DTA as on 1/4/1994, period of 10 Conservative years has expired and the same is not extendable to the current Assessment Year.

13. PURCHASE AND EXPORT OF PROCESSED IRON ORE – NO MANUFACTURE INVOLVED IN THE EOU

The assessing officer has adopted the finding recorded by him for the Assessment Year 2006–07 in the case of Sri.Dinesh Kumar Singhi. The submissions for Assessment Year 2006–07 in the case of Sri.Dinesh Kumar Singhi is adopted on this aspect and for sake of convenience is reiterated below.

x. The raw material (ROM) is extracted from the mines and is put to crushing and screening plants where the ROM is crusted into the finish of the products i.e fines and lumps(calibrated ore or C ore). The finished products are fines and lumps.

xi. From the seized material it was found that the assessee purchased processed iron ore from various suppliers and directly exported the same without any value addition in the EOU. The sale bills wherein consignee is mentioned as BMM (Bharat mines and minerals) at genuine, Krishnapatnam Port or other destination. The ore has been put to crushing and screening plants at the mines where the processing of iron ore is taking place at the respective mines and the finished product is moved from the Mine head's for exports without processing in the EOU unit. This trading activity is claimed deduction under section 10B of the Act further the assessee indulged in preparing invoices to show the procurement of raw material and processing them in EOU.

xii. Seized material referred to in page 7 and 8 of the assessment order containing sale invoices for purchase of iron ore fines would demonstrate the above aspect of purchase of processed iron ore. The purchases made by the assessee are against Form-H which is treated as deemed export of goods. The issue of FORM-H by the assessee to the suppliers of iron ore makes it clear that the goods have been purchased for the sake of exports. Most of the purchases have been delivered by the suppliers at the berths at various ports like Goa, Chennai etc which are loading points for exports. The details of such purchases of processor iron ore as found in the seized material is tabulated at page 9 to 13 of the assessment order.

xiii. Similar transactions with various persons has been in detail tabulated with respect to the purchase of processed ore and supply directly to the port or for rail transport. Attention of this Hon'ble tribunal is invited to Rs 13 to 17 of the assessment order for the sake of brevity.

xiv. Various seized material has been referred to from page 17 to 20 of the assessment order in support of the contention of the revenue that the iron ore was processed in the

mines itself and the same has been purchased and exported by the assessee without even entering the same to the EOU unit. The trading of iron ore is not eligible for section 10B deduction. Further the assessee has not demonstrated the movement of raw ore from mines to EOU and movement of processed iron ore(fines and lumps) to the designated place for export and the respective permits from the respective authorities under various statutes which are mandatory.

xv. The accountant of the assessee has admitted that crushing and screening plants are operational at all the mines and the processed ore is being directly exported without further value addition by the EOU of the assessee. Even the mine owner has stated that the assessee has installed the crushing and screening plants at the Minehead and is processing the iron ore in the Minehead itself and the finished product was being transported out of the mines. Mr Bharat S Ghorpade agent of KMIORE and Mrs Ambika Ghorpade has admitted crushing and screening of iron ore by mine owners at the mine heads and the same is being purchased by the assessee for the purpose of export. (Reference to statement of Sri Manjunath, Sri Srinivasulu and Mr.Bharat S Ghorpade at page 22 to 24 of the assessment order).

xvi. The seized material in the form of transportation bills found in the course of search would clearly demonstrate processing of iron ore by installing screening plants at the Minehead and transporting the same directly to the designated place of export without carrying out any activity in the EOU. (Reference invited to page 25 and 26 of the assessment order)

xvii. Insofar as the contention of the revenue that invoices for purchase of processed door were manipulated to reflect as invoice for purchase of ROM. Sample copy is placed at page 28 and 29 to evidence the above manipulation.

xviii. On confrontation of the evidence regarding trading exports of iron ore, the assessee has admitted wrongful claim of deduction under section 10B of the Act. Even in the course of statement on oath on 3/11/2010 on confrontation, the wrong claim has been admitted.

14. FORMATION OF EOU BY TRANSFER OF USER COMMISSIONER IN EXCESS OF 20%

The old machinery used by the assessee was exceeding the prescribed limit of 20%. Without prejudice to the above contention it is submitted that 20% of the old machinery is contemplated only in the circumstances when the EOU is formed by the transfer to a new business of machinery and plant previously used for any purpose. The said exception is not applicable to the present case as the EOU is not formed by transfer to a new business of machinery or plant previously used for any purpose.

15. CASH PAYMENTS MADE TO MRS AMBIKA GHORPADE AND M/S.KMIORE

The Assessing Officer has relied on the reasons assigned in the order of assessment in the case of M/S.BMM Ispat Ltd for Assessment Year 2008–09. The submissions made in the case of the assessee for Assessment Year 2008–09 are relied on and extracted below for convenience.

i. During the course of search it was found that Mrs Snehalatha Singhi entered into raising and processing contracts with mine owners M/s.Karthikeyas Manganese and Iron Ores Pvt Ltd (KMIORE) and Mrs.Ambika Ghorpade (AKG). The processed ore was handed over by Mrs Snehalatha Singhi to the mine owners and the mine owners in turn sell the ore to the entities owned by Mr.DineshKumar Singhi i.e Bharat Mines and Minerals and BMM Ispat. The mines KMIORE belongs to Mr.Karthik M Ghorpade and and his wife Mrs Ambika Ghorpade. The mines have been termed as new mines (NM) and old mines (OM) as per the timing of start of the mining lease of two mines. The profit has been shared between the mine owners and the assessee in the ratio of 70: 30.

ii. The seized document reflected sale of iron ore from the above two mines “with” and “without” permits to BMM group. The seized material reflected payment of sale consideration to the mine owners both in cheque and cash from BMM group. The cheque component has been accounted by the mine owners and cash component has not been offered for taxation. The seized document has been scanned and placed at page 5 and 6 of the order of

assessment in the case of M/s.BMM Ispat Ltd for Assessment Year 2008–09. Statements of the Shri Dinesh Kumar Singhi, Mrs Ambika Ghorpade, Sri Kartikeya Ghorpade, Sri Bharat Ghorpade were recorded and the material found, the statements of each other were confronted and all the persons have admitted transaction outside the books and payment of consideration for iron ore in cash and receipt of the cash. The relevant statements have been extracted in the order of assessment in the case of M/s.BMM Ispat Ltd for Assessment Year 2008–09 from page 11 to 23.

iii. On analysis of the entire documents and the statements, it is clear that: –

a. BMM group is carrying on the activity of extraction, excavation and processing of iron ore in the mines of KMIORE and AKG in the name of Mrs Snehalatha Singhi.

b. The entire quantity of iron ore with and without permits is purchased by BMM group and the same has been admitted by sellers and the purchasers.

c. Sellers have admitted cash payments reflected in the seized materials received from Shri Dinesh Kumar Singhi.

d. Shri Dinesh Kumar Singhi has admitted cash payment of Rs.1.40 crores for billing for April 2010 and Rs.1.43 crores for billing in the month of March 2010.

e. From the above documents it is clear that the entire sum of Rs 64 crores has been paid by Sri Dinesh Kumar Singhi of BMM, as he has purchased the entire ore from the sellers KMIORE and AKG.

f. In connection with the material found and seized in the case of Shri Bharat Ghorpade, Shri Dinesh Kumar Singhi has admitted recordings of transactions pertaining to the assessee.

16. LEGALITY OF THE EXPENDITURE ON PURCHASE OF IRON ORE “WITH” AND “WITHOUT”PERMITS

The Assessing Officer has relied on the reasons assigned in the order of assessment in the case of M/S.BMM Ispat Ltd for Assessment Year 2008–09. The submissions made in the case of the assessee for Assessment Year 2008–09 are relied on and extracted below for convenience.

i. The Assessing Officer rightly arrived at a conclusion that the payments made for purchase of iron ore without permit is not an allowable expenditure as the same was in violation of the law governing the mining activity and transport of iron ore. It is further found that the consideration received towards sale of iron ore without permit has been inflated against the ore sold with permit and the same is reflected from the seized material placed at page 28, 33 and 34 of the order of assessment in the case of M/s.BMM Ispat Ltd for Ay. 2008 – 09. The Explanation to Section 37(1) of the Act is applicable and the same has been rightly disallowed by the Assessing Officer.

ii. This Hon'ble Court in the case of M/s.ILC Industries Ltd has clearly held that mining activity carried out without having permissions required under the Mines and Minerals (Development and Regulation)Act (MMDR Act) would amount to illegal activity and the expenditure is not allowable in view of Explanation to section 37(1) of the Act. Attention of this Hon'ble Tribunal is invited to para 35 of the order in ITA 767 – 771/B/2014 dated 20/9/2016.

17. UNACCOUNTED INVESTMENT IN LANDS

In the course of search in the residence of Sri.Rajagopal Upadhayaya, Accounts Manager of the assessee, certain agreements of sale and cash vouchers were seized indicating payment of cash by the assessee for purchase of land. Sri.Rajagopal Upadhayaya, has admitted payment of cash and the same is not being reflected in the books of accounts of the assessee. In fact the assessee has accepted part of such cash payments made towards purchase of land demonstrating the authenticity of the material found in the course of search. In reply to the show cause notice the assessee has not denied the said transactions nor requested for cross examination. Hence the Assessing Officer is justified in treating the cash payments as an expenditure investments as provided under section 69 of the Act. No material has been

placed before the Appellate Commissioner also to deny the transaction."

9.3 **Assessee's Submissions (ITA No.740/Bang/2015 – A.Y. 2010-11)**

" For the impugned assessment year, the assessee received a notice u/s 153A dt. 21/09/2010 from the DCIT, central circle 1(2) and was served on the assessee on 28/09/2010 directing the assessee to file his return of income for AY 2010-11 (PB page 223). The assessee filed a return of income on 31/01/2012 declaring NIL total income with the following caption at the top of the return."Without prejudice and subject to our letters" which included the aforesaid Rs. Rs.16,70,04,649 /- (PB page 224).

The assessment came to be concluded u/s 153A r.w.s 143(3) on 30/03/2013 disallowing the deduction u/s 10B of Rs.271,69,21,004/- and also making an addition of Rs.53,66,66,005/-and thus determining the total income at Rs.325,35,87,009/-.

The details of disallowance are as hereunder:

1. Disallowance u/s 10B Rs. 271,69,21,004/-
2. Unexplained payments/ expenditure in iron ore Rs.15,27,27,045/-
3. Disallowance u/s 37(1) (Bellikere port exports) Rs. 38,39,38,960/-

Exfacie the proceedings culminating into order of assessment dt.30/03/2013 is illegal and not as per law. This is the seventh year of undertaking on which deduction u/s10B has been claimed. The CIT-A who heard the appeal has confirmed the addition in respect of 1 and 3 above and deleted the protective addition in Sl no.2 above. Each of the addition is discussed hereunder:

I. Disallowance u/s 10B – Rs. 271,69,21,004/-

The AO has erred in disallowing the claim u/s 10B amounting to Rs. 271,69,21,004/- for the reasons he has mentioned in the assessment order for the AY 2005-06 dt.11/03/2013 and AY 2006-07 dt.13.03.2013 in the case of

Dinesh Kumar Singhi. Shri. Dinesh Kumar Singhi has filed his objection by filing appeal and the result of the appeal for AY 2005-06 & AY 2006-07 on this issue will be relevant. In any case the issue cannot be dealt afresh as the claim is for seventh year in respect of an undertaking on which the issue of deduction u/s10B was already resolved in favour of the assessee. The Hon'ble High Court of Karnataka in Sami Labs Ltd vs ACIT (334 ITR 157) – PB page 60 and Hon'ble Delhi HC in CIT vs International Tractors (CLPB page 206) has held that once the claim for initial year is settled the same cannot be revisited on the same set of facts and law. The CIT-A however has confirmed the action of the AO on this issue by holding as under:

''the facts as are applicable in the case of Sri Dinesh Kumar Singhi for AY 2005-06 to 2007-08 are applicable in respect of the appellant firm for AYs 2008-09 to 2011-12''

On this issue it is submitted that the arguments/submissions advanced in the case of Dinesh Kumar Singhi for the AY 2005-06 to AY 2007-08 may kindly be adopted for the impugned AY in appeal.

The AO discussion on the alternative argument found in para A.3 in page 9 and para 7 from page 6 to page 33 of the asst. order of Dinesh Kumar Singhi for AY 2006-07 becomes otiose and not relevant since no disallowance has been made. Further the discussion by the AO does not reckon the fact that the assessee had already taken note of various issues and considered purchases which in his view were not subjected to manufacture at the assessee's manufacturing plant for which 10B has been claimed. However no addition has been made on this ground as the entire 10B claim was disallowed. In this regard it may kindly be noted that the purchase invoices listed for the impugned year paragraph 7 pages 6 to 33 of the assessment order in Dinesh Kumar Singhi for AY 2006-07 lists various instances of the alleged inaccuracy. In this regard it is submitted that the discussion by the AO does not bring out anything clinching to show that the claim by the assessee is incorrect. The purchase invoice are not incriminating in nature as the same has been maintained during the course of regular assessment. Without prejudice, the assessee vide its letter dt.09.09.2010 (PB page 8) has already reworked and

reduced its claim to the extent of purchases of Rs.26,83,72,017/- and reworked the claim u/s 10B while filing the return in pursuance of section 153A. Hence the discussion by the AO has not reckoned this aspect and consequently no action is required. Consequently the discussion by the AO in pages 6 to 33 of asst. order of Dinesh Kumar Singhi for AY 2006-07 which is relied on in the impugned assessment becomes academic in nature especially since no addition has been made on this count.

II.Disallowance u/s 37(1) (Bellikere port exports) - Rs. 38,39,38,960/-

The AO made an addition of Rs.38,39,38,960/- being the estimated expenditure incurred on the export of 139695.373DMT of iron ore, the export value of Rs.51,61,07,620/-. Brief facts are that the assessee had exported said quantity of value added iron ore and realized the export proceeds of Rs.51,61,07,620/-. The said export was made through a seaport titled as Bellikere port at Karwar District, Karnataka. It is the allegation of the AO that the impugned time period of FY 2009-10 and 2010-11 there were several irregularities in the exports through Bellikere port as reported in the media. Accordingly the AO sought details of the export through show cause notice dt.20.03.2013 (PB page 265). Relevant potion of assessee's reply is found in PB page 266. The notice and reply is extracted in page 9 of the assessment order. The AO proceeded to disallow as stated in the notice and as per the discussion in para 12 & 13 page 37 of the assessment order. The AO has disallowed solely on the contention that the assessee could not have effected such exports without resorting to illegal means as in his view there was a ban from removing the stored material in Bellikere stock yard. The AO however did not bring out any evidence of any ban imposed by any authority nor has he explained what is the nature of illegality or the irregularity committed by the assessee. He resorted to invoking explanation to Sec 37(1) based on media report and apprehension than on any facts. The CIT-A reiterated and elaborated the apprehension of the AO and failed to appreciate the argument of the assessee.

The allegation of the AO is that the assessee had not submitted evidence to indicate that the transportation of iron ore to bellikere stock yard and its subsequent removal when there was ban in force were legal invoked the proviso to section 37(1) of the Act and disallowed the entire expenditure estimated as incurred for production of iron ore. In this regard, the CIT-A upheld the addition. The case of the assessee is that the export through bellikere was a regular transaction having complied with all the necessary legal formalities and realize the foreign exchange is a perfectly legally valid transaction. The allegation that transportation of the iron ore was without permission is devoid of any substance as the AO has not cited any proceeding against the assessee under law for such alleged transgression. The assessee is a leaseholder of mine for extraction of iron ore and has set up a new manufacturing plant for value addition on the same, both having been done as per the provisions of law, no irregularity can be imputed against the assessee. The allegation of transportation without permit is fanciful to say the least as the total quantity is 139695.373DMT carried at the rate of 10tons per truck would require 13969 sorties and such mammoth transportation could not have taken place without permit as alleged by the AO. Enroute such transportation several state government authorities such as forest, mining, sales tax, customs, check post, central excise, police and RTO authorities are all supervising the economic activity and movement of goods in the region besides vigilant and active media. None of them have noticed, detected or reported any activity by the assessee which can be termed illegal or irregular in the region. Further the distance is about 350kms stretching over four districts could not be presumed to be illegal unless there is any concrete evidence of such illegal activity. The AO has alleged that the assessee had carried out transportation transaction with leading players of illegal mining including M/s.Obulapuram Mining Company and host of transporters who transported such iron ore illegally again lacks substance as the addition made in the hands of M/s.Obulapuram Mining Company has been set aside by the Hon'ble Bangalore ITAT in ITA 653/B/2015 (caselaw PB page 49). Hence it is submitted that the allegation of illegality by the AO is not supported by any factual evidence. There are no notorious facts so as to apply section 114 of the Evidence Act. Without

prejudice, the proviso to section 37(1) cannot be invoked in the case of stock in trade and sec 37(1) applies only for expenditure specifically provided in sec 37. The Supreme court in Dr.T.A.Quereshi vs. CIT (287 ITR 547) (caselaw PB page 390) in para 14, 15 & 16 of the decision has held as under:

'' 14. In our opinion, the High Court has adopted an emotional and moral approach rather than a legal approach. We fully agree with the High Court that the assessee was committing a highly immoral act in illegally manufacturing and selling heroin. However, cases are to be decided by Court on legal principles and not on one's own moral views. Law is different from morality, as the positivist jurists Bentham and Austin pointed out.

15. As already observed above, the facts of the case are squarely covered by the decision of this Court in CIT vs. Piara Singh (supra).

16. The Explanation to s. 37 has really nothing to do with the present case as it is not a case of a business expenditure, but of business loss. Business losses are allowable on ordinary commercial principles in computing profits. Once it is found that the heroin seized formed part of the stock-in-trade of the assessee, it follows that the seizure and confiscation of such stock-in-trade has to be allowed as a business loss. Loss of stock-in-trade has to be considered as a trading loss vide CIT vs. S.N.A.S.A. Annamalai Chettiar 1973 CTR (SC) 233 : AIR 1973 SC 1032.''

Further the Hon'ble Delhi Tribunal in Jai Surgicals Ltd vs ACIT – 163 TTJ 724 (caselaw PB page 395) has discussed explanation to section 37(1) and held in para 10 & 12 as hereunder:

''Explanation to sec. 37(1), which is a deeming provision, talks of disallowing any expenditure incurred by an assessee for 'any purpose' which is either an offence or prohibited by law. So what is contemplated for disallowance is an 'expenditure' incurred 'for any purpose which is either an offence or which is prohibited by law'. When we consider the mandate of the Explanation in the light of the fact that it is a deeming provision, there remains no doubt whatsoever that the inquiry to determine the applicability or otherwise of the Explanation is restricted to ascertaining the purpose of the expenditure. In simple words, the investigation should be carried out to see the object and consideration for the expenditure incurred. If the purpose of the expenditure is either an offence or is prohibited by law, then it would suffer disallowance. If, however, the purpose of the expenditure is neither to commit an offence nor is prohibited by any law, then there can be no question of disallowance. It means that the offence or prohibition under law should be judged with the 'purpose' of the expenditure on a standalone basis divorced from the fulfillment or otherwise of the procedural formalities attached with and necessary for the incurring of such expenditure. To put it in simple words, if the expenditure is otherwise lawful and neither amounts to offence nor is prohibited by law, but the procedural provisions attached for incurring it are not complied with, no doubt irregularity will creep in, but such irregularity would not

make the expenditure itself as unlawful so as to be brought within the scope of the Explanation. What, therefore, turns out is that it is the expenditure alone which should be tested on the touchstone of the mandate of Explanation to section 37(1) and nothing more than that. If the expenditure itself is for a valid and lawful purpose, then, there can be no question of any disallowance. The words 'for any purpose' set in place by the legislature with the 'expenditure' on the one hand and 'which is an offence or which is prohibited by law' on the other, make it abundantly clear that if the purpose of expenditure, which is sought to be disallowed is not an offence or not prohibited by law, the same cannot be brought within the scope of Explanation to section 37(1) of the Act. If, on the other hand, the purpose of expenditure is an offence or is prohibited by law, the same cannot escape the clutches of the Explanation. The natural corollary which thus follows is that if the 'purpose' of expenditure is not to commit an offence or is otherwise not prohibited by law, then any breach of some procedural statutory provision necessary to be complied with before incurring such expenditure, would not per se convert the otherwise lawful purpose into an offence or prohibition under law so as to attract the wrath of the Explanation. A line of distinction needs to be drawn between the cases where the purpose of the expenditure incurred itself is unlawful on one hand and the cases where the purpose of expenditure is lawful but there is some lapse in complying with the procedural provisions for incurring such expenditure on the other. Whereas the disallowance will be called for in terms of the Explanation to section 37(1) in the first set of cases where the very 'purpose' of the expenditure incurred is unlawful, the second set of cases will escape the mischief of the Explanation because the 'purpose' of the expenditure is not unlawful. The crux of the matter is that the 'purpose' of the expenditure incurred should be viewed in isolation unbothered by anything else for determining whether or not the Explanation is attracted.

(Para 10)

As against that and adverting to the facts of the instant case, the expenditure which has been instantly disallowed is a sum of Rs.41.24 lac on account of job work charges paid by the assessee to M/s Razormed Inc. It is not the case of the Revenue and naturally cannot be that the payment of job work charges is an offence or is prohibited by law. What the authorities below have taken into consideration while making the disallowance is that since there was no prior approval from the Central Government, the expenditure of job work charges became disallowable. We fail to understand as to how the payment of job work charges can by any stretch of imagination be construed as offence or prohibited by law simply because the necessary permission from the Central Government was obtained belatedly. It has been noticed above that the inquiry should stop on determining the immediate purpose of expenditure, which in the present case is job work done for the assessee. The first question to be asked is whether such payment of job charges is an offence? The answer is obviously in negative. The second question is whether such payment of job charges is prohibited by law? Again the answer is in negative because no law prohibits the payment of job work charges in a manufacturing unit. When the language of the Explanation is crystal clear and does not encompass the incurring of expenses for a lawful purpose, such as the job charges, within its ambit, it is wholly impermissible to import a further requirement in the language of the Explanation to make the otherwise lawful

purpose as unlawful for lack of the prior approval of the Central Government. As the 'purpose' of incurring the expenditure of job charges is neither an offence nor is prohibited by law, we fail to comprehend as to how the otherwise lawful purpose would become contingent upon obtaining or not obtaining the prior approval of the Central Government. Since such expenditure in itself is neither an offence nor prohibited by any law and there is a valid and lawful quid pro quo for the same, the view canvassed in the impugned order is accordingly upheld.

(Para 12)''

In conclusion explanation to Sec 37(1) can be invoked only in twin cases:

1)In the case of an offence.

2)When it is prohibited by law.

In this case there is no offence committed by the assessee nor the activity of the assessee is prohibited by law. There is no evidence of any act or omission by the assessee for which the assessee has been convicted for an offence nor there is any order by any government, statutory authority or judiciary holding the activity of the assessee as prohibited in law. There is no shred of evidence in support of the allegations made by the AO. The AO's allegation that the export was without permit is a allegation without substance as the issue of permits etc is governed under a different Act and administered by different authorities and outside the purview of the AO and there is no finding by any such authority that there is irregularity or illegality by the assessee. Consequently the disallowance of Rs. 38,39,38,960/- by the AO is based on conjecture and requires to be deleted.

The AO erred in refusing to allow adjustment of loss on forward exchange contract amounting to Rs. 18,92,70,495/-. The rejection by the AO is contrary to the provisions of law & is arbitrary. In the alternative the assessee prays that the loss may be allowed to be carried forward u/s 73 of the Act.

On the issue of 153D approval, rely on the submission given for AY 2008-09 supra.

The grounds on interest u/s 234B/D are consequential in nature."

9.4 Revenue's Written submissions for A.Y. 2010-11 are extracted hereunder :-

Assessment Year 2010–11, (ITA 740/B/2015)

18. Search under section 132 of the Act was conducted in the case of the assessee on 19/7/2010. Notice under section 153A of the Act issued on 21/9/2000 and served on 28/9/2010.

19. Mining lease was granted in favour of M/s.Bharat Mines and Minerals and was extended from time to time. M/s. Bharat Mines and Minerals was a partnership firm during the Assessment Year 1996–97. On the death of his father, the Shri Dinesh Kumar Singhi conducted the business as proprietary till 31/3/2007. Later from 1/4/2007 the business was conducted as firm with M/s.BMM Ispat Ltd joining as partner. Thus from the date of establishment, the business undertaking of M/s. Bharat Mines and Minerals was carried on either as a proprietary concern or as a partnership firm till date in respect of mining lease.

20. DEDUCTION UNDER SECTION 10B OF THE ACT

e. The assessee claimed deduction under section 10B of the Act on profits derived from the export of iron ore. As per the provisions of section 10B deduction is allowable only in the profits derived from the export of goods manufactured/produced and exported from 100% export oriented unit. The deduction is available only for 10 consecutive years beginning from the year in which the undertaking begins to manufacture.

f. The claim of the assessee has been rejected on the following ground: –

xiii. The unit from which iron ore has been processing/produced has not been conferred with EOU status for the period up to 30/5/2006.

xiv. The business was in existence prior to 1/4/1994 and accordingly period of 10 years has expired. The conversion of undertaking setup in Domestic Tariff Area (DTA) is eligible for deduction under section 10B of the Act on getting approval as 100% EOU only for the unexpired period of 10 consecutive years commencing from the year in which the original DTA started manufacturing.

xv. The assessee is indulging in purchase of processed iron ore and exporting the same without any value addition in the undertaking claiming to be an EOU. Such trading activity has been claimed as production and export from the so-called EOU and

claim deduction under section 10B of the Act. The material found in the course of search demonstrated that the assessee has been purchasing only processed iron ore and directly exporting the same. The purchase invoices contains the details of the processed iron ore and the destination is the ports from where the iron ore is exported.

xvi. Mrs. Snehalatha Singi wife of the assessee was the ore raising and processing contractor in the mines belonging to M/s.Karthikeyas Manganese and Iron Ore Private Limited,Mrs.Ambika Ghorpade, M.Srinivasulu and H.G.Rangangoud. In all the above mines Mrs.Snehalatha Singi was the contractor excavating, extracting, crushing and processing the raw ore into fines and lumps. From the seized material it is found that Mrs.Snehalatha Singi was crushing and processing the iron ore in the respective mine heads through mobile crushing and screening plants at the respective mines. The mining returns of the above said mine owners show only dispatch of processed iron ore from the mine heads. The assessee has claimed deduction under section 10B on the export of such processed iron ore without carrying out any activity in the EOU and in fact without bringing the material into the EOU.

xvii. Evidence found during search demonstrated that Shri Dinesh Kumar Singhi was systematically creating invoices to disguise the purchase of initial products as purchasers of raw iron ore.

xviii. The old machinery used by the assessee was exceeding the prescribed limit of 20%. Without prejudice to the above contention it is submitted that 20% of the old machinery is contemplated only in the circumstances when the EOU is formed by the transfer to a new business of machinery and plant previously used for any purpose. The said exception is not applicable to the present case as the EOU is not formed by transfer to a new

business of machinery or plant previously used for any purpose.

21. WRONG CLAIM OF DEDUCTION BEFORE THE EOU WAS ESTABLISHMENT

The assessing officer has adopted the finding recorded by him for the Assessment Year 2005–06 in the case of the Sri.Dinesh Kumar Singhi. The submissions for Assessment Year 2005–06 in the case of Sri.Dinesh Kumar Singhi is adopted on this aspect and for sake of convenience is reiterated below.

xvii. In the application filed before the SEZ dated 3/4/2003 for conversion of existing DTA into 100% EOU for manufacture and export of iron ore, in the Pro-Forma the assessee has stated manufacturer exporter and age of machineries installed in the DTA as 10 to 12 years.

xviii. The letter of permission dated 6/5/2003 by SEZ under Exim Policy was subject to conditions stated in Annexure. One of the condition is that the production of EOU under the scheme has to be carried out in the custom bonded area. Only when the licenses are issued, the EOU is said to be set up and it can be demarcated from the DTA by way of bonding. Without necessary license, the assessee cannot claim as an EOU. Without EOU was being set up the assessee has exported iron ore and the export invoices did not depict that the exports were from 100% EOU. From the date of Letter of Permission(LOP) till 2006, the assessee has been communicating to the SEZ authorities that the project is still under implementation and the EOU has not commenced production. The license for private bonded warehouse was issued by the customs on 29/5/2006. Without setting up valid EOU, exports were made by printing “Shipment by 100% EOU” on the invoices. The various seized material found in the course of search establishes that the assessee has failed to implement the EOU project as per the letter of permission and the exports continued in the DTA status only.

xix. The letter by the assessee (Bharat mines and minerals) dated 30/4/2006 (page 9 of assessment order) seeking for extension of time from a SEZ would clearly indicates the nonexistence of the 100% EOU. The letter of the SEZ dated 5/5/2006 (page 11 of assessment order) would further justify the nonexistence of 100% EOU. The letter dated 17/4/2006 written by assessee to SEZ authorities (page 13 of assessment order) expressing readiness of commencing the production by end of June 2006 would further justify the above stand of the revenue. The letter dated 2/7/2006 (page 15 of the assessment order) to SEZ by the assessee communicating inspection by Central excise and customs authorities and commencement of commercial production on 30/5/2006 is self explanatory regarding the commencement of commercial production in the 100% EOU.

xx. In the quarterly and annual reports submitted by the assessee to SEZ for the first quarter financial year 2006–07, the date of commencement of production is clearly mentioned as 30/5/2006.

xxi. The customs authorities by letter dated 19/8/2010 has confirmed designation of private bonded warehouse from 29/5/2006 and the first shipment from 100% EOU on 11/7/2006 (page 18 of assessment order).

xxii. The Development Commissioner CSEZ has confirmed by letter dated 7/9/2010 (page 21 of assessment order) that exports prior to 30/5/2006 is not treated as exports from EOU.

xxiii. EOU manufacturers required to file application for removal of goods in prescribed Form-ARE-1 before the jurisdictional Central Excise authorities providing full description of the goods being exported from the unit and invoice would bear the description that "**THE SHIPMENT IS UNDER EOU"**. The above requirement has been fulfilled only after 29/5/2006 and prior to this date no

ARE-1 forms were submitted. This is evident from seized material marked as A2/BMM/3. The above aspect also has been confirmed by accountant of Bharat Mines and Minerals whose statement were recorded under section 132(4) of the Act. No specific request for cross examination was made by the assessee.

xxiv. The quarterly and annual performance report submitted to SEZ the assessee declared that the unit has commenced production from the EOU only since 30/5/2006. From the about is clear that EOU was not established till 30/5/2006 and not entitled for deduction under section 10 B of the Act.

22. INCORRECT CLAIM MADE AFTER THE EXPIRY OF 10 YEARS TAX HOLIDAY PERIOD

The assessing officer has adopted the finding recorded by him for the Assessment Year 2005–06 in the case of Sri.Dinesh Kumar Singhi. The submissions for Assessment Year 2005–06 in the case of Sri.Dinesh Kumar Singhi is adopted on this aspect and for sake of convenience is reiterated below.

e. In the application filed for conversion of existing DTA into EOU, the assessee has declared that it is manufacturer-exporter and the age and remaining life of the machineries already installed as 10 to 12 years. It is clearly stated that the application is for conversion of existing DTA into 100% EOU

f. The assessee and later the firm Bharat Mines and Minerals are not entitled for exemption under section 10B as the DTA was established more than 10 years ago as evidenced as under: –

xiii. The assessee is in business for more than 20 years.

xiv. The assessee is using the same machinery for crushing and screening plants for more than 15 years as evidenced by the accounts.

xv. It is not disputed that the assessee is exporting the products and is carrying on the business at least from 1994.

xvi. The unit which is converted to EOU was established at least on 1/4/1994 as per format of registration-cum-membership certificate issued by Export Promotion Council dated 21/6/2005.

xvii. In the application for membership to Export Promotion Council the assessee has declared that the date of establishment as 1/4/1994 for manufacture of iron ore and the same is evident from extract at (page 27 of assessment order).

xviii. The assessee's claiming deduction under section 80HHC from 1996–97 till 2004–05 and may be even prior to this period, would demonstrate the existence of unit 10 years much prior to the current year and period of 10 years has expired.

3. On the above aspects the Assessing Officer has summarised as under: –

xi. DTA was established at Ranjitpura more than 15 years back and the assessee was processing the iron ore in that plant and exporting the same through MMTC and are directly.

xii. The existing DTA at Ranjitpura was converted into EOU and the nature of business continue to remain the same and has continued utilising the old plant and machinery.

xiii. The assessee is consistently claiming deduction under section 80HHC as manufacturer – exporter from Assessment Year 1996–97 till 2004–05 as per the records and even maybe prior to that period. After the expiry of tax benefit under that section, the DTA was converted into EOU. Though conversion is not prohibited, the benefit would be applicable for a period of 10 consecutive years from

the date of manufacture and that has expired much prior to the current Assessment Year.

xiv. The assessee has formed EOU by purchasing the used machinery and such used machinery is in excess of 20% of the total machinery installed in the unit. 20% of the old machinery is contemplated only in the circumstances when the EOU is formed by the transfer to a new business of machinery and plant previously used for any purpose. The said exception is not applicable to the present case as the EOU is not formed by transfer to a new business of machinery or plant previously used for any purpose.

xv. Though conversion of DTA into EOU is permissible under section 10B and the same is applied for section 10A, it would be applicable for the unexpired period of 10 consecutive assessment years from the year in which undertaking begins to manufacture or produce any article or thing and exports such articles or things. In view of the admission made by the assessee regarding the existence of DTA as on 1/4/1994, period of 10 Conservative years has expired and the same is not extendable to the current Assessment Year.

23. PURCHASE AND EXPORT OF PROCESSED IRON ORE – NO MANUFACTURE INVOLVED IN THE EOU

The assessing officer has adopted the finding recorded by him for the Assessment Year 2006–07 in the case of Sri.Dinesh Kumar Singhi. The submissions for Assessment Year 2006–07 in the case of Sri.Dinesh Kumar Singhi is adopted on this aspect and for sake of convenience is reiterated below.

xix. The raw material (ROM) is extracted from the mines and is put to crushing and screening plants where the ROM is crusted into the finish of the products i.e fines and lumps(calibrated ore or C ore). The finished products are fines and lumps.

xx. From the seized material it was found that the assessee purchased processed iron ore from various suppliers and

directly exported the same without any value addition in the EOU. The sale bills wherein consignee is mentioned as BMM (Bharat mines and minerals) at genuine, Krishnapatnam Port or other destination. The ore has been put to crushing and screening plants at the mines where the processing of iron ore is taking place at the respective mines and the finished product is moved from the Mine head's for exports without processing in the EOU unit. This trading activity is claimed deduction under section 10B of the Act further the assessee indulged in preparing invoices to show the procurement of raw material and processing them in EOU.

xxi. Seized material referred to in page 7 and 8 of the assessment order containing sale invoices for purchase of iron ore fines would demonstrate the above aspect of purchase of processed iron ore. The purchases made by the assessee are against Form-H which is treated as deemed export of goods. The issue of FORM-H by the assessee to the suppliers of iron ore makes it clear that the goods have been purchased for the sake of exports. Most of the purchases have been delivered by the suppliers at the berths at various ports like Goa, Chennai etc which are loading points for exports. The details of such purchases of processor iron ore as found in the seized material is tabulated at page 9 to 13 of the assessment order.

xxii. Similar transactions with various persons has been in detail tabulated with respect to the purchase of processed ore and supply directly to the port or for rail transport. Attention of this Hon'ble tribunal is invited to Rs 13 to 17 of the assessment order for the sake of brevity.

xxiii. Various seized material has been referred to from page 17 to 20 of the assessment order in support of the contention of the revenue that the iron ore was processed in the mines itself and the same has been purchased and exported by the assessee without even entering the same to the EOU unit. The trading of iron ore is not eligible for section 10B deduction. Further the assessee has not demonstrated the movement of raw ore from mines to EOU and movement of processed iron ore(fines and lumps) to the designated place for export and the respective

permits from the respective authorities under various statutes which are mandatory.

xxiv. The accountant of the assessee has admitted that crushing and screening plants are operational at all the mines and the processed ore is being directly exported without further value addition by the EOU of the assessee. Even the mine owner has stated that the assessee has installed the crushing and screening plants at the Minehead and is processing the iron ore in the Minehead itself and the finished product was being transported out of the mines. Mr Bharat S Ghorpade agent of KMIORE and Mrs Ambika Ghorpade has admitted crushing and screening of iron ore by mine owners at the mine heads and the same is being purchased by the assessee for the purpose of export. (Reference to statement of Sri Manjunath, Sri Srinivasulu and Mr.Bharat S Ghorpade at page 22 to 24 of the assessment order).

xxv. The seized material in the form of transportation bills found in the course of search would clearly demonstrate processing of iron ore by installing screening plants at the Minehead and transporting the same directly to the designated place of export without carrying out any activity in the EOU. (Reference invited to page 25 and 26 of the assessment order)

xxvi. Insofar as the contention of the revenue that invoices for purchase of processed door were manipulated to reflect as invoice for purchase of ROM. Sample copy is placed at page 28 and 29 to evidence the above manipulation.

xxvii. On confrontation of the evidence regarding trading exports of iron ore, the assessee has admitted wrongful claim of deduction under section 10B of the Act. Even in the course of statement on oath on 3/11/2010 on confrontation, the wrong claim has been admitted.

24. FORMATION OF EOU BY TRANSFER OF USER COMMISSIONER IN EXCESS OF 20%

The old machinery used by the assessee was exceeding the prescribed limit of 20%. Without prejudice to the above contention it is submitted that 20% of the old machinery is contemplated only in the circumstances when the EOU is

formed by the transfer to a new business of machinery and plant previously used for any purpose. The said exception is not applicable to the present case as the EOU is not formed by transfer to a new business of machinery or plant previously used for any purpose.

25. CASH PAYMENTS MADE TO MRS AMBIKA GHORPADE AND M/S.KMIORE

The Assessing Officer has relied on the reasons assigned in the order of assessment in the case of M/S.BMM Ispat Ltd for Assessment Year 2008–09. The submissions made in the case of the assessee for Assessment Year 2008–09 are relied on and extracted below for convenience.

iv. During the course of search it was found that Mrs Snehalatha Singhi entered into raising and processing contracts with mine owners M/s.Karthikeyas Manganese and Iron Ores Pvt Ltd (KMIORE) and Mrs.Ambika Ghorpade (AKG). The processed ore was handed over by Mrs Snehalatha Singhi to the mine owners and the mine owners in turn sell the ore to the entities owned by Mr.DineshKumar Singhi i.e Bharat Mines and Minerals and BMM Ispat. The mines KMIORE belongs to Mr.Karthik M Ghorpade and and his wife Mrs Ambika Ghorpade. The mines have been termed as new mines (NM) and old mines (OM) as per the timing of start of the mining lease of two mines. The profit has been shared between the mine owners and the assessee in the ratio of 70: 30.

v. The seized document reflected sale of iron ore from the above two mines “with” and “without” permits to BMM group. The seized material reflected payment of sale consideration to the mine owners both in cheque and cash from BMM group. The cheque component has been accounted by the mine owners and cash component has not been offered for taxation. The seized document has been scanned and placed at page 5 and 6 of the order of assessment in the case of M/s.BMM Ispat Ltd for Assessment Year 2008–09. Statements of the Shri Dinesh Kumar Singhi, Mrs Ambika Ghorpade, Sri Kartikeya Ghorpade, Sri Bharat Ghorpade were recorded and the material found, the statements of each other were confronted and all the persons have admitted transaction outside the books and payment of consideration for iron

ore in cash and receipt of the cash. The relevant statements have been extracted in the order of assessment in the case of M/s.BMM Ispat Ltd for Assessment Year 2008–09 from page 11 to 23.

vi. On analysis of the entire documents and the statements, it is clear that: –

g. BMM group is carrying on the activity of extraction, excavation and processing of iron ore in the mines of KMIORE and AKG in the name of Mrs Snehalatha Singhi.

h. The entire quantity of iron ore with and without permits is purchased by BMM group and the same has been admitted by sellers and the purchasers.

i. Sellers have admitted cash payments reflected in the seized materials received from Shri Dinesh Kumar Singhi.

j. Shri Dinesh Kumar Singhi has admitted cash payment of Rs.1.40 crores for billing for April 2010 and Rs.1.43 crores for billing in the month of March 2010.

k. From the above documents it is clear that the entire sum of Rs 64 crores has been paid by Sri Dinesh Kumar Singhi of BMM, as he has purchased the entire ore from the sellers KMIORE and AKG.

l. In connection with the material found and seized in the case of Shri Bharat Ghorpade, Shri Dinesh Kumar Singhi has admitted recordings of transactions pertaining to the assessee.

26. LEGALITY OF THE EXPENDITURE ON PURCHASE OF IRON ORE "WITH" AND "WITHOUT" PERMITS

The Assessing Officer has relied on the reasons assigned in the order of assessment in the case of M/S.BMM Ispat Ltd for Assessment Year 2008–09. The submissions made in the case of the assessee for Assessment Year 2008–09 are relied on and extracted below for convenience.

iii. The Assessing Officer rightly arrived at a conclusion that the payments made for purchase of iron ore without permit is not an allowable expenditure as the same was in violation of the law governing the mining activity and transport of iron ore. It is further found that the consideration received towards sale of iron ore without permit has been inflated against the ore sold with permit and the same is reflected from the seized material placed at page 28, 33 and 34 of the order of assessment in the case of M/s.BMM Ispat Ltd for Ay. 2008 – 09. The Explanation to Section 37(1) of the Act is applicable and the same has been rightly disallowed by the Assessing Officer.

iv. This Hon'ble Court in the case of M/s.ILC Industries Ltd has clearly held that mining activity carried out without having permissions required under the Mines and Minerals (Development and Regulation)Act (MMDR Act) would amount to illegal activity and the expenditure is not allowable in view of Explanation to section 37(1) of the Act. Attention of this Hon'ble Tribunal is invited to para 35 of the order in ITA 767 – 771/B/2014 dated 20/9/2016.

27. EXPORT OF IRON ORE STOCKED IN THE BELLIKERE

i. The assessee has exported 139695.373 DMT iron ore from Bellikere Port. The movement of iron ore is Governed by provisions of MMDR Act. In view of the consistent purchase of ore by the assessee without permits, the assessee was requested to justify the legality of the export of ore from Bellikere Port. The assessee failed to establish the legality of the transport of ore and export of the same by producing the documents/permits for transportation or removal of stock. The above exercise was undertaken by the Assessing Officer in view of the ban imposed by the Supreme Court on lifting of ore stored at Bellikere Port. In view of the failure on the part of the assessee to demonstrate the legality of the same, the Assessing Officer is justified in disallowing the expenditure by invoking section 37(1) of the Act.

ii. It is further submitted that by considering the report submitted by the Central Empowered Committee constituted by Apex Court for examining the legality of the mining in Karnataka, considering the report submitted by the Central Empowered Committee, the

Apex Court on 18/4/2013 ordered cancellation of leases and the assessee was one among 51 leases cancelled by the Government. The above aspect was published in various newspapers and extract of the same is extracted for ready reference of this Hon'ble tribunal.

Notification issued cancelling 51 mining leases under category C

SPECIAL CORRESPONDENT

BANGALORE:, SEPTEMBER 15, 2013 01:46 IST

In a significant development, the State government has issued a notification cancelling 51 iron ore mining leases under category C to abide by a Supreme Court directive.

According to Principal Secretary, Department of Commerce and Industries, Tushar Girinath, the notification was issued on Friday and the lease areas of all the 51 category C mines are now under the control of the government.

CEC report

The Supreme Court-appointed Central Empowered Committee (CEC), in its final report on February 3, 2012, had categorised 166 mining leases in Karnataka in three categories ð A, B and C ð based on the extent of illegalities committed by the lessees.

It had classified 45 mining leases under category A, 72 under category B and 49 under category C. Subsequently, the court had ordered shifting two more mines from category B to category C.

Following the CECôs report, the Supreme Court on April 18, 2013, ordered cancellation of all the 51 leases with maximum illegalities in the districts of Bellary, Tumkur and Chitradurga.

Leases where illegal mining by way of mining pits outside the sanctioned lease areas have been found to be 10 to 15 per cent of the lease area are classified under category C.

Prominent names

Prominent among the companies whose leases have been cancelled under the category are: VSL Mining Company of Minister for Information Santosh Lad and MLA Anil Lad, S.B. Minerals of the former Tourism Minister Anand Singh, Associated Mining Company of the former Minister G. Janardhan Reddy, Hotur Traders of Ambika Ghorpade and Yogendranath Singh, Matha Mining Company in which kin of the former Minister V. Somanna have shares, **Bharat Mines and Minerals,** Latha Mining Company, Deccan Mining Syndicate and Trident Minerals.

According to sources in the Department of Mines, prior to the ban on mining in the State, these leases accounted for about 15 million tonnes of iron ore production.

The apex court had also ordered re-allotment of category C mines to steel mills for captive consumption through a transparent process. The State government has constituted a committee to finalise the modalities of re-allotting these 51 mining leases.

In view of the failure on the part of the assessee to discharge the burden of carrying out the activity of mining in accordance with

law, the Assessing Officer is justified in disallowing the expenditure.

On the above aspect reliance is placed on the order of this Hon'ble Tribunal in the case of M/s.ILC Industries Ltd in ITA 767 – 771/B/2014 dated 20/9/2016."

10.1 The main contentions put forth in the assessee's arguments on other legal grounds (i.e. apart from challenging the validity of search, which we have considered and dismissed at paras 5 to 5.2 of this order (supra), is that in the case on hand, there was no seizure of any incriminating material from the assessee's premises relevant to the Assessment Years 2009-10 & 2010-11 which is the basis of any addition or disallowance in the impugned orders of assessment dt.30.3.2013. On perusal thereof, it is seen that the additions made **for A.Y. 2009-10**, inter alia, in A/RU/I pertain to (i) seized material seized at the premises of Rajgopal Upadhyay on account of unaccounted investment in land, and (ii) addition of unaccounted payments / expenditure is made on the basis of material found in the case of BMM Ispat Limited. Similarly **for A.Y. 2010-11**, the additions / disallowances pertain to (i) addition of unaccounted payments / expenditure made on the basis of material found in the case of BMM Ispat Limited and (ii) the disallowance under Section 37(1) of the Act too does not indicate or specify that it is made on the basis of material seized in the case of the assessee. According to assessee the impugned orders of assessment for Assessment Years 2009-10 and 2010-11 passed under Section 153A r.w.s. 143(3), make a mention of material found / seized, not at the assessee's premises but, at

the premises of other persons which have been utilized for making additions / disallowances in the impugned orders.

9.2 In this regard, the Hon'ble Karnataka High Court in the case of IBC Knowledge Park Pvt. Ltd. (ITA No.403/2009) dt.28.4.2016 at paras 45 to 49 of its order (extracted supra) has explained the entire scope and principles governing the provisions of Sec. 153A and 153C of the Act. In their judgment, the Hon'ble Court, after considering various judicial pronouncements in this regard has held that notice under Section 153A of the Act can be issued in a case only if it is during a valid search in which incriminating material is found / seized. In the case on hand, on a perusal of the impugned orders of assessment, as recorded by us in pre-para 9.1 of this order (supra), no addition / disallowance has been made based on incriminating material found and seized in the case on hand but rather the additions / disallowances made in these two assessment years have been made based on seized material found / seized in the premises of other persons and / or based on findings rendered in other cases. ; since the said seized material did not pertain to the assessee in the case on hand, then in keeping with the decision of the Hon'ble Karnataka High Court in the case of IBC Knowledge Park Pvt. Ltd. (supra), as discussed above and for Assessment Year 2008-09 in the case on hand (supra), the orders of assessment for Assessment Years 2009-10 and 2010-11 are liable to be set aside / cancelled.

10. The assessee has raised other grounds of appeal on the merits of the additions / disallowances made by the Assessing Officer in the

impugned orders of assessment for Assessment Years 2009-10 and 2010-11. Since we have already held that the orders of assessment for Assessment Years 2009-10 and 2010-11 are not valid and cancelled, therefore the other grounds raised on merits are only academic in nature and do not require adjudication.

11. In the result, the assessee's appeals for Assessment Years 2009-10 and 2010-11 are allowed as indicated above.

Assessee's Appeal in ITA No.741/Bang/2015 for Asst Year 2011-12.

12. **Grounds 7 to 12 - Deduction u/s. 10B of the Act.**

12.1 The Assessing Officer has made disallowance of deduction under Section 10B of the Act amounting to Rs.271,69,21,004 for the reasons mentioned in the order of assessment. Of Sri Dinesh Kumar Singhi for Assessment Years 2005-06 and 2006-07. In the impugned order of assessment for Assessment Year 2011-12 dt.30.3.2013, at para 9.2 thereof, the Assessing Officer has further observed as under :-

"9.2 Even if it were to be held subsequently by the appellate authorities that the assessee is eligible for deduction under Section 10B on the above counts, the deduction to the extent of the amount determined in the table in para 7.7 in the order in the case of Shri Dinesh Kumar Singhi for Assessment Year 2006-07 is disallowable for the reason that the profit to that extent is not derived from the EOU as no activity of production/ procuring is done therein."

12.2 On appeal, the learned CIT (Appeals) has also upheld the disallowance of deduction u/s. 10B of the Act for the reasons discussed in her appellate order in the case of Shri Dinesh Kumar Singhi.

12.3 Before us, apart from oral arguments, the counsels of both parties have filed written submissions which are extracted hereunder :-

12.3.1 **Assessee's submissions**.

" **ITA 741/B/15 –AY 2011-12**

The assessee filed a return of income on 31/01/2012 declaring an income of Rs.16,19,36,000/- with the following caption at the top of the return."Without prejudice and subject to our letters"(PB page 284). Subsequently the assessee received a notice u/s 143(2) dt 21/05/2012 and also notices u/s 142(1) wherein the Ld. AO sought for several details which were duly submitted by the assessee.

The assessment was concluded u/s 143(3) r.w.s 153D on 30/03/2013 determining the income at Rs.265,46,73,841/- resulting from disallowance u/s 10B of Rs.212,38,08,115/- and an addition of Rs.12,95,46,334/-.

The details of disallowance are as hereunder:

1. Disallowance u/s 10B Rs. 212,38,08,115/-
2. Unaccounted payments/unexplained expenditure Rs. 12,95,46,334/-

Exfacie the proceedings culminating into order of assessment dt.30/03/2013 is illegal and not as per law. This is the eigth year of undertaking on which deduction u/s10B has been claimed. The CIT-A who heard the appeal has confirmed the addition in respect of 1 above and deleted the protective addition in Sl no.2 above. Each of the addition is discussed hereunder:

I. Disallowance u/s 10B – Rs. 212,38,08,115/-

The AO has erred in disallowing the claim u/s 10B amounting to Rs. 212,38,08,115/- for the reasons he has mentioned in the assessment order for the AY 2005-06 dt.11/03/2013 and AY 2006-07 dt.13.03.2013 in the case of Dinesh Kumar Singhi. Shri. Dinesh Kumar Singhi has filed his objection by filing appeal and the result of the appeal for AY 2005-06 & AY 2006-07 on this issue will be relevant. In any case the issue cannot be dealt afresh as the claim is for eigth year in respect of an undertaking on which the issue of deduction u/s10B was already resolved in favour of the assessee. The Hon'ble High Court of Karnataka in Sami Labs Ltd vs ACIT (334 ITR 157) – PB page 60 and Hon'ble Delhi HC in CIT vs International Tractors (CLPB page 206) has held that once the claim for initial year is settled the same cannot be revisited on the same set of facts and law. The CIT-A however has confirmed the action of the AO on this issue by holding as under:

''the facts as are applicable in the case of Sri Dinesh Kumar Singhi for AY 2005-06 to 2007-08 are applicable in respect of the appellant firm for AYs 2008-09 to 2011-12''

On this issue it is submitted that the arguments/submissions advanced in the case of Dinesh Kumar Singhi for the AY 2005-06 to AY 2007-08 may kindly be adopted for the impugned AY in appeal.

The AO erred in refusing to allow adjustment of loss on forward exchange contract amounting to Rs. 15,58,03,235/-. The rejection by the AO is contrary to the provisions of law & is arbitrary. In the alternative the assessee prays that the loss may be allowed to be carried forward u/s 73 of the Act.

On the issue of 153D approval, rely on the submission given for AY 2008-09 supra.

The grounds on interest u/s 234A/B/C are consequential in nature."

12.3.2 Revenue has put forth the following written submissions :-

28. " Search under section 132 of the Act was conducted in the case of the assessee on 19/7/2010.

29. Mining lease was granted in favour of M/s.Bharat Mines and Minerals and was extended from time to time. M/s. Bharat Mines and Minerals was a partnership firm during the Assessment Year 1996–97. On the death of his father, the Shri Dinesh Kumar Singhi conducted the business as proprietary till 31/3/2007. Later from 1/4/2007 the business was conducted as firm with M/s.BMM Ispat Ltd joining as partner. Thus from the date of establishment, the business undertaking of M/s. Bharat Mines and Minerals was carried on either as a proprietary concern or as a partnership firm till date in respect of mining lease.

30. DEDUCTION UNDER SECTION 10B OF THE ACT

g. The assessee claimed deduction under section 10B of the Act on profits derived from the export of iron ore. As per the provisions of section 10B deduction is allowable only in the profits derived from the export of goods manufactured/produced and exported from 100% export oriented unit. The deduction is available only for 10 consecutive years beginning from the year in which the undertaking begins to manufacture.

h. The claim of the assessee has been rejected on the following ground: –

xix. The unit from which iron ore has been processing/produced has not been conferred with EOU status for the period up to 30/5/2006.

xx. The business was in existence prior to 1/4/1994 and accordingly period of 10 years has expired. The conversion of undertaking setup in Domestic Tariff Area (DTA) is eligible for deduction under section 10B of the Act on getting approval as 100% EOU only for the unexpired period of 10 consecutive years commencing from the year in which the original DTA started manufacturing.

xxi. The assessee is indulging in purchase of processed iron ore and exporting the same without any value addition in the undertaking claiming to be an EOU. Such trading activity has been claimed as production and export from the so-called EOU and claim deduction under section 10B of the Act. The material found in the course of search demonstrated that the assessee has been purchasing only processed iron ore and directly

exporting the same. The purchase invoices contains the details of the processed iron ore and the destination is the ports from where the iron ore is exported.

xxii. Mrs. Snehalatha Singi wife of the assessee was the ore raising and processing contractor in the mines belonging to M/s.Karthikeyas Manganese and Iron Ore Private Limited,Mrs.Ambika Ghorpade, M.Srinivasulu and H.G.Rangangoud. In all the above mines Mrs.Snehalatha Singi was the contractor excavating, extracting, crushing and processing the raw ore into fines and lumps. From the seized material it is found that Mrs.Snehalatha Singi was crushing and processing the iron ore in the respective mine heads through mobile crushing and screening plants at the respective mines. The mining returns of the above said mine owners show only dispatch of processed iron ore from the mine heads. The assessee has claimed deduction under section 10B on the export of such processed iron ore without carrying out any activity in the EOU and in fact without bringing the material into the EOU.

xxiii. Evidence found during search demonstrated that Shri Dinesh Kumar Singhi was systematically creating invoices to disguise the purchase of initial products as purchasers of raw iron ore.

xxiv. The old machinery used by the assessee was exceeding the prescribed limit of 20%. Without prejudice to the above contention it is submitted that 20% of the old machinery is contemplated only in the circumstances when the EOU is formed by the transfer to a new business of machinery and plant previously used for any purpose. The said exception is not applicable to the present case as the EOU is not formed by transfer to a new business of machinery or plant previously used for any purpose.

31. WRONG CLAIM OF DEDUCTION BEFORE THE EOU WAS ESTABLISHMENT

The assessing officer has adopted the finding recorded by him for the Assessment Year 2005–06 in the case of the Sri.Dinesh Kumar Singhi. The submissions for Assessment Year 2005–06 in the case of Sri.Dinesh Kumar Singhi is adopted on this aspect and for sake of convenience is reiterated below.

xxv. In the application filed before the SEZ dated 3/4/2003 for conversion of existing DTA into 100% EOU for manufacture and export of iron ore, in the Pro-Forma the assessee has stated manufacturer exporter and age of machineries installed in the DTA as 10 to 12 years.

xxvi. The letter of permission dated 6/5/2003 by SEZ under Exim Policy was subject to conditions stated in Annexure. One of the condition is that the production of EOU under the scheme has to be carried out in the custom bonded area. Only when the licenses are issued, the EOU is said to be set up and it can be demarcated from the DTA by way of bonding. Without necessary license, the assessee cannot claim as an EOU. Without EOU was being set up the assessee has exported iron ore and the export invoices did not depict that the exports were from 100% EOU. From the date of Letter of Permission(LOP) till 2006, the assessee has been communicating to the SEZ authorities that the project is still under implementation and the EOU has not commenced production. The license for private bonded warehouse was issued by the customs on 29/5/2006. Without setting up valid EOU, exports were made by printing “Shipment by 100% EOU” on the invoices. The various seized material found in the course of search establishes that the assessee has failed to implement the EOU project as per the letter of permission and the exports continued in the DTA status only.

xxvii. The letter by the assessee (Bharat mines and minerals) dated 30/4/2006 (page 9 of assessment order) seeking for extension of time from a SEZ would clearly indicates the nonexistence of the 100% EOU. The letter of the SEZ dated 5/5/2006 (page 11 of assessment order) would further justify the nonexistence of 100% EOU. The letter dated 17/4/2006 written by assessee to SEZ authorities (page 13 of assessment order) expressing readiness of commencing the production by end of June 2006 would further justify the above stand of the revenue. The letter dated 2/7/2006 (page 15 of the assessment order) to SEZ by the assessee communicating inspection by Central excise and customs authorities and commencement of commercial production on 30/5/2006 is self explanatory regarding the commencement of commercial production in the 100% EOU.

xxviii. In the quarterly and annual reports submitted by the assessee to SEZ for the first quarter financial year 2006–07, the date of commencement of production is clearly mentioned as 30/5/2006.

xxix. The customs authorities by letter dated 19/8/2010 has confirmed designation of private bonded warehouse from 29/5/2006 and the first shipment from 100% EOU on 11/7/2006 (page 18 of assessment order).

xxx. The Development Commissioner CSEZ has confirmed by letter dated 7/9/2010 (page 21 of assessment order) that exports prior to 30/5/2006 is not treated as exports from EOU.

xxxi. EOU manufacturers required to file application for removal of goods in prescribed Form-ARE-1 before the jurisdictional Central Excise authorities providing full description of the goods being exported from the unit and invoice would bear the description that "**THE SHIPMENT IS UNDER EOU"**. The above requirement has been fulfilled only after 29/5/2006 and prior to this date no ARE-1 forms were submitted. This is evident from

seized material marked as A2/BMM/3. The above aspect also has been confirmed by accountant of Bharat Mines and Minerals whose statement were recorded under section 132(4) of the Act. No specific request for cross examination was made by the assessee.

xxxii. The quarterly and annual performance report submitted to SEZ the assessee declared that the unit has commenced production from the EOU only since 30/5/2006. From the about is clear that EOU was not established till 30/5/2006 and not entitled for deduction under section 10 B of the Act.

32. INCORRECT CLAIM MADE AFTER THE EXPIRY OF 10 YEARS TAX HOLIDAY PERIOD

The assessing officer has adopted the finding recorded by him for the Assessment Year 2005–06 in the case of Sri.Dinesh Kumar Singhi. The submissions for Assessment Year 2005–06 in the case of Sri.Dinesh Kumar Singhi is adopted on this aspect and for sake of convenience is reiterated below.

g. In the application filed for conversion of existing DTA into EOU, the assessee has declared that it is manufacturer-exporter and the age and remaining life of the machineries already installed as 10 to 12 years. It is clearly stated that the application is for conversion of existing DTA into 100% EOU

h. The assessee and later the firm Bharat Mines and Minerals are not entitled for exemption under section 10B as the DTA was established more than 10 years ago as evidenced as under: –

xix. The assessee is in business for more than 20 years.

xx. The assessee is using the same machinery for crushing and screening plants for more than 15 years as evidenced by the accounts.

xxi. It is not disputed that the assessee is exporting the products and is carrying on the business at least from 1994.

xxii. The unit which is converted to EOU was established at least on 1/4/1994 as per format of registration-cum-membership certificate issued by Export Promotion Council dated 21/6/2005.

xxiii. In the application for membership to Export Promotion Council the assessee has declared that the date of establishment as 1/4/1994 for manufacture of iron ore and the same is evident from extract at (page 27 of assessment order).

xxiv. The assessee's claiming deduction under section 80HHC from 1996–97 till 2004–05 and may be even prior to this period, would demonstrate the existence of unit 10 years much prior to the current year and period of 10 years has expired.

4. On the above aspects the Assessing Officer has summarised as under: –

xvi. DTA was established at Ranjitpura more than 15 years back and the assessee was processing the iron ore in that plant and exporting the same through MMTC and are directly.

xvii. The existing DTA at Ranjitpura was converted into EOU and the nature of business continue to remain the same and has continued utilising the old plant and machinery.

xviii. The assessee is consistently claiming deduction under section 80HHC as manufacturer – exporter from Assessment Year 1996–97 till 2004–05 as per the records and even maybe prior to that period. After the expiry of tax benefit under that section, the DTA was converted into EOU. Though conversion is not prohibited, the benefit would be applicable for a period of 10 consecutive years from

the date of manufacture and that has expired much prior to the current Assessment Year.

xix. The assessee has formed EOU by purchasing the used machinery and such used machinery is in excess of 20% of the total machinery installed in the unit. 20% of the old machinery is contemplated only in the circumstances when the EOU is formed by the transfer to a new business of machinery and plant previously used for any purpose. The said exception is not applicable to the present case as the EOU is not formed by transfer to a new business of machinery or plant previously used for any purpose.

xx. Though conversion of DTA into EOU is permissible under section 10B and the same is applied for section 10A, it would be applicable for the unexpired period of 10 consecutive assessment years from the year in which undertaking begins to manufacture or produce any article or thing and exports such articles or things. In view of the admission made by the assessee regarding the existence of DTA as on 1/4/1994, period of 10 Conservative years has expired and the same is not extendable to the current Assessment Year.

33. PURCHASE AND EXPORT OF PROCESSED IRON ORE – NO MANUFACTURE INVOLVED IN THE EOU

The assessing officer has adopted the finding recorded by him for the Assessment Year 2006–07 in the case of Sri.Dinesh Kumar Singhi. The submissions for Assessment Year 2006–07 in the case of Sri.Dinesh Kumar Singhi is adopted on this aspect and for sake of convenience is reiterated below.

xxviii. The raw material (ROM) is extracted from the mines and is put to crushing and screening plants where the ROM is crusted into the finish of the products i.e fines and lumps(calibrated ore or C ore). The finished products are fines and lumps.

xxix. From the seized material it was found that the assessee purchased processed iron ore from various suppliers and

directly exported the same without any value addition in the EOU. The sale bills wherein consignee is mentioned as BMM (Bharat mines and minerals) at genuine, Krishnapatnam Port or other destination. The ore has been put to crushing and screening plants at the mines where the processing of iron ore is taking place at the respective mines and the finished product is moved from the Mine head's for exports without processing in the EOU unit. This trading activity is claimed deduction under section 10B of the Act further the assessee indulged in preparing invoices to show the procurement of raw material and processing them in EOU.

xxx. Seized material referred to in page 7 and 8 of the assessment order containing sale invoices for purchase of iron ore fines would demonstrate the above aspect of purchase of processed iron ore. The purchases made by the assessee are against Form-H which is treated as deemed export of goods. The issue of FORM-H by the assessee to the suppliers of iron ore makes it clear that the goods have been purchased for the sake of exports. Most of the purchases have been delivered by the suppliers at the berths at various ports like Goa, Chennai etc which are loading points for exports. The details of such purchases of processor iron ore as found in the seized material is tabulated at page 9 to 13 of the assessment order.

xxxi. Similar transactions with various persons has been in detail tabulated with respect to the purchase of processed ore and supply directly to the port or for rail transport. Attention of this Hon'ble tribunal is invited to Rs 13 to 17 of the assessment order for the sake of brevity.

xxxii. Various seized material has been referred to from page 17 to 20 of the assessment order in support of the contention of the revenue that the iron ore was processed in the mines itself and the same has been purchased and exported by the assessee without even entering the same to the EOU unit. The trading of iron ore is not eligible for section 10B deduction. Further the assessee has not demonstrated the movement of raw ore from mines to EOU and movement of processed iron ore(fines and lumps) to the designated place for export and the respective

permits from the respective authorities under various statutes which are mandatory.

xxxiii. The accountant of the assessee has admitted that crushing and screening plants are operational at all the mines and the processed ore is being directly exported without further value addition by the EOU of the assessee. Even the mine owner has stated that the assessee has installed the crushing and screening plants at the Minehead and is processing the iron ore in the Minehead itself and the finished product was being transported out of the mines. Mr Bharat S Ghorpade agent of KMIORE and Mrs Ambika Ghorpade has admitted crushing and screening of iron ore by mine owners at the mine heads and the same is being purchased by the assessee for the purpose of export. (Reference to statement of Sri Manjunath, Sri Srinivasulu and Mr.Bharat S Ghorpade at page 22 to 24 of the assessment order).

xxxiv. The seized material in the form of transportation bills found in the course of search would clearly demonstrate processing of iron ore by installing screening plants at the Minehead and transporting the same directly to the designated place of export without carrying out any activity in the EOU. (Reference invited to page 25 and 26 of the assessment order)

xxxv. Insofar as the contention of the revenue that invoices for purchase of processed door were manipulated to reflect as invoice for purchase of ROM. Sample copy is placed at page 28 and 29 to evidence the above manipulation.

xxxvi. On confrontation of the evidence regarding trading exports of iron ore, the assessee has admitted wrongful claim of deduction under section 10B of the Act. Even in the course of statement on oath on 3/11/2010 on confrontation, the wrong claim has been admitted.

34. FORMATION OF EOU BY TRANSFER OF USER COMMISSIONER IN EXCESS OF 20%

The old machinery used by the assessee was exceeding the prescribed limit of 20%. Without prejudice to the above contention it is submitted that 20% of the old machinery is contemplated only in the circumstances when the EOU is

formed by the transfer to a new business of machinery and plant previously used for any purpose. The said exception is not applicable to the present case as the EOU is not formed by transfer to a new business of machinery or plant previously used for any purpose."

12.4.1 We have heard the rival contentions, perused the written submissions and carefully considered the material on record; including the judicial pronouncements cited. In so far as the issue of deduction under Section 10B of the Act is concerned, the Assessing Officer has relied on the findings rendered in the case of Sri Dinesh Kumar Singhi for Assessment Years 2005-06 to 2007-08. The assessee in their written submissions have relied on the submissions in the case of Sri Dinesh Kumar Singhi for Assessment Years 2005-06 to 2007-08 and the ld. Standing Counsel too has relied on the submission put forth by him in the case of Dinesh Kumar Singhi for Assessment Years 2005-06 and 2006-07. We have discussed this issue in the appeal filed by Shri Dinesh Kumar Singhi these years and for the reasons discussed therein, we have held the action of the Assessing Officer as incorrect. The same decision will apply to the facts of the assessee's case also. Therefore, the grounds raised by the assessee on this issue is allowed.

12.4.2 On the issue of deduction under Section l0B of the Act both the sides have relied on the submissions made in the case of Sri Dinesh Kumar Singhi for A.Y 2005-06 and the subsequent years. The ld CIT(A) has also relied on the decision rendered by her in the case of Sri Dinesh Kumar Singhi for A.Y 2005-06. The appeal in the case of Sri Dinesh Kumar

Singhi for A.Y 2005-06 has been decided by us on the ground that the action initiated u/s 153A has been incorrect and hence the merits of the issue of deduction u/s 10B of the Act has not been adjudicated by us.

12.4.3 As has been observed by the ld CIT (A), the business of the assessee was carried out as a partnership firm initially and then as a proprietary concern of Sri Dinesh Kumar Singhi. And subsequently as a partnership firm M/s Bharat Mines & Minerals. From the impugned order, it is seen that the ld CIT(A) has merely relied upon the order of the A.O, without examining and adjudicating on the detailed submissions made by the assessee. Further, from the assessment order of the A.O in case of Dinesh Kumar Singhi for A.Y 2005-06, on which reliance has been placed by the A.O and the ld CIT(A), the disallowance of deduction has been made based on certain seized materials. From that order, it is not clear/decipherable whether these seized records pertain to the assessee, whether any finding has been recorded in this regard and whether the seized records were made available and confronted to the assessee and its response obtained or not. From the order of assessment, it appears that these procedural aspects, which are germane to the finalisation of assessment proceedings pursuant to search action, have not been done. Further, from the order of assessment, it is seen that the Assessing Officer has relied upon the statement of one Sri Rajagopal Upadhayaya, while concluding that the deduction u/s l0B of the Act is not allowable. It is also not clear whether this statement was made available to the assessee and their response obtained before concluding the assessment.

We have already held, in the case of Karthikeya Manganese and Iron Ore Pvt. Ltd., that statements of third persons cannot be used against the assessee unless the copies were made available to the assessee and his response in the matter is also obtained.

12.4.4 In view of the above, we are of the considered opinion that this issue of deduction u/s.10B of the Act needs to be examined afresh by the A.O, after duly considering the procedural and legal issues highlighted above and the contentions of the assessee raised both before the ld CIT(A) and before us and decide the issue, as per law. Needless to add, the assessee shall be accorded adequate opportunities to make its submissions which shall be duly considered. We therefore remand the matter back to the file of the A.O with the above directions. We hold and direct accordingly.

13. **Ground No.13 – Disallowance of Loss on Forward Exchange Contract**.

13.1 The Assessing Officer, in the impugned assessment order, has disallowed an amount of Rs.15,58,03,235 on account of loss on forward exchange contract, holding the transaction to be speculative in nature. On appeal, the learned CIT (Appeals) has upheld the Assessing Officer's decision. Before us, while the assessee has assailed the decision of the authorities below, revenue has supported their order in this regard.

13.2 We have considered the rival contentions and perused and carefully considered the material on record. We find that both the authorities below have decided the issue summararily, without analyzing the transaction and deciding the nature of the same. In this view of the matter, we deem it appropriate to set aside the findings of the authorities below on this issue and remand the matter to the file of the Assessing Officer for proper consideration of the facts of the transaction and for adjudication thereon, after affording the assessee adequate opportunity of being heard in the matter and to file details and submissions in this regard which shall be duly considered. We hold and direct accordingly.

14. In the result, the assessee's appeal for Assessment Year 2011-12 is partly allowed.

Revenue's appeal in ITA Nos.983 to 986/Bang/2015

(for A.Ys. 2008-09 to 2011-12).

15.1 In the orders of assessment for Assessment Years 2008-09 to 2011-12, the Assessing Officer made the following additions on account of unaccounted payments/unexplained expenditure for the reasons stated in the order of assessment passed under Section 153A r.w.s 143(3) of the Act for Assessment Year 2008-09 in the case of M/s. BMM Ispat Limited. The details of the additions made are tabulated as under :

Asst. Year	Unaccounted cash payments to M/s. KMIORE (Rs.)	Unaccounted cash payments to AKG (Rs.)	Total unaccounted cash payments. (Rs.)
2008-09	8,35,91,047	8,35,91,047	16,71,82,094
2009-10	17,79,43,250	1,26,92,650	19,06,35,900
2010-11	8,70,54,416	6,56,72,629	15,27,27,045
2011-12	9,58,64,287	3,36,82,047	12,95,46,339
Total	44,44,53,000	19,56,38,373	64,00,91,373

The above payments were substantively assessed in the hands of M/s. BMM Ispat Limited, M/s. Kartikeya Mnaganese & Iron Ores Pvt. Ltd. and Smt. Ambika Ghorpade in their respective assessments for the concerned assessment years and the same were assessed protectively in the hands of the assessee. On appeal, the learned CIT (Appeals) deleted the above protective additions and upheld the same in the appeal in the case of M/s. BMM Ispat Limited.

15.2 Aggrieved by the order of learned CIT (Appeals) – 11, Bangalore for Assessment Years 2008-09 to 2011-12 dt.27.2.2015, Revenue has filed these appeals wherein it has raised the following similar grounds for all assessment years.

" i. The learned CIT (Appeals) has erred in deleting the addition made protectively towards unaccounted payments / unexplained expenditure.

ii. For these and any other ground that may be agitated during the course of appeal, the order of the learned CIT (Appeals) may be set aside and that of the Assessing Officer restored."

15.3 Apart from oral arguments, the ld. Counsels for both sides have filed written submissions which are extracted hereunder :

15.3.1. **Revenue's Submissions are as under** :

" On the basis of the seized material regarding cash payments made to Mrs. Ambika Ghorpade and M/s.KMIORE by 'M/s.BMM'. As it was contended that "M/s.BMM" does not relates to the assessee and it is relating to BMM Ispat Ltd, the Assessing Officer made substantive addition in the case of M/s.BMM Ispat Ltd and protective addition in the case of the assessee.

M/s.BMM Ispat Ltd has contested the above issue in appeals. Hence the protective addition should have been confirmed by the Appellate Commissioner.

It is submitted that the above controversy is involved before this Hon'ble Tribunal in the batch of appeals which have been heard along with this appeal. Subject to result of appeal in the case of M/s.BMM Ispat Ltd pending before this Hon'ble Tribunal, it is prayed to confirm the addition."

1. **CASH PAYMENTS MADE TO MRS AMBIKA GHORPADE AND M/S.KMIORE**

The Assessing Officer has relied on the reasons assigned in the order of assessment in the case of M/S.BMM Ispat Ltd for Assessment Year 2008–09. The submissions made in the case of the assessee for Assessment Year 2008–09 are relied on and extracted below for convenience.

vii. During the course of search it was found that Mrs Snehalatha Singhi entered into raising and processing contracts with mine owners M/s.Karthikeyas Manganese and Iron Ores Pvt Ltd (KMIORE) and Mrs.Ambika Ghorpade (AKG). The processed ore was handed over by Mrs Snehalatha Singhi to the mine owners and the mine

owners in turn sell the ore to the entities owned by Mr.DineshKumar Singhi i.e Bharat Mines and Minerals and BMM Ispat. The mines KMIORE belongs to Mr.Karthik M Ghorpade and and his wife Mrs Ambika Ghorpade. The mines have been termed as new mines (NM) and old mines (OM) as per the timing of start of the mining lease of two mines. The profit has been shared between the mine owners and the assessee in the ratio of 70: 30.

viii. The seized document reflected sale of iron ore from the above two mines "with" and "without" permits to BMM group. The seized material reflected payment of sale consideration to the mine owners both in cheque and cash from BMM group. The cheque component has been accounted by the mine owners and cash component has not been offered for taxation. The seized document has been scanned and placed at page 5 and 6 of the order of assessment in the case of M/s.BMM Ispat Ltd for Assessment Year 2008–09. Statements of the Shri Dinesh Kumar Singhi, Mrs Ambika Ghorpade, Sri Kartikeya Ghorpade, Sri Bharat Ghorpade were recorded and the material found, the statements of each other were confronted and all the persons have admitted transaction outside the books and payment of consideration for iron ore in cash and receipt of the cash. The relevant statements have been extracted in the order of assessment in the case of M/s.BMM Ispat Ltd for Assessment Year 2008–09 from page 11 to 23.

ix. On analysis of the entire documents and the statements, it is clear that: –

m. BMM group is carrying on the activity of extraction, excavation and processing of iron ore in the mines of KMIORE and AKG in the name of Mrs Snehalatha Singhi.

n. The entire quantity of iron ore with and without permits is purchased by BMM group and the same has been admitted by sellers and the purchasers.

o. Sellers have admitted cash payments reflected in the seized materials received from Shri Dinesh Kumar Singhi.

p. Shri Dinesh Kumar Singhi has admitted cash payment of Rs.1.40 crores for billing for April 2010 and Rs.1.43 crores for billing in the month of March 2010.

q. From the above documents it is clear that the entire sum of Rs 64 crores has been paid by Sri Dinesh Kumar Singhi of BMM, as he has purchased the entire ore from the sellers KMIORE and AKG.

r. In connection with the material found and seized in the case of Shri Bharat Ghorpade, Shri Dinesh Kumar Singhi has admitted recordings of transactions pertaining to the assessee.

2. LEGALITY OF THE EXPENDITURE ON PURCHASE OF IRON ORE "WITH" AND "WITHOUT" PERMITS

The Assessing Officer has relied on the reasons assigned in the order of assessment in the case of M/S.BMM Ispat Ltd for Assessment Year 2008–09. The submissions made in the case of the assessee for Assessment Year 2008–09 are relied on and extracted below for convenience.

v. The Assessing Officer rightly arrived at a conclusion that the payments made for purchase of iron ore without permit is not an allowable expenditure as the same was in violation of the law governing the mining activity and transport of iron ore. It is further found that the consideration received towards sale of iron ore without permit has been inflated against the ore sold with permit and the same is reflected from the seized material placed at page 28, 33 and 34 of the order of assessment in the case of M/s.BMM Ispat Ltd for Ay. 2008 – 09. The Explanation to Section 37(1) of the Act is applicable and the same has been rightly disallowed by the Assessing Officer.

vi. This Hon'ble Court in the case of M/s.ILC Industries Ltd has clearly held that mining activity carried out without having permissions required under the Mines and Minerals (Development and Regulation)Act (MMDR Act) would amount to illegal activity and the expenditure is not allowable in view of Explanation to section 37(1) of the Act.

Attention of this Hon'ble Tribunal is invited to para 35 of the order in ITA 767 – 771/B/2014 dated 20/9/2016.

The further contention of the assessee that approval granted under section 153D of the Act is without application of mind and in mechanical manner is incorrect. The approval has been granted strictly in conformity with the provisions of the Act.

Wherefore it is respectfully prayed that the appeal filed by the assessee may be rejected in the interest of justice and equity. "

15.3.2 **The assessee's submissions are as under** :

" As stated in the assessee's appeals supra the CIT-A has deleted the protective addition made in respect of Unaccounted cash payments/unexplained expenditure. In this regard the assessee submits as under:

The addition is based on A/BSG/01, A/BSG/02 and A/DKS-1 and the statements on oath from Bharat S Ghorpade, Karthikeya M Ghorpade, Ambika Ghorpade and others. The legality and veracity of placing reliance on the above has been discussed at length and submissions made particularly in the case of BMM Ispat Ltd in ITA 779 to 781/B/15 for the AY's 2008-09 to 2011-12 may be adopted herein. It is further submitted that having regard to the specific requirements of sec 153A, 153C, 68, 69 of the Act addition if any can be considered only if there is a evidence of cash payment by the assessee. The AO himself has a doubt as to whether at all the assessee has made such purchases and payments. The fact that no evidence has been brought in support of the addition supports the arguments of the assessee and the finding of the CIT-A that no assessment of whatsoever nature can be made in the hands of the assessee. In view of the above the department appeals may be dismissed in the interest of justice."

15.4.1 We have heard the rival contentions, perused and carefully considered the material on record before us. We find that the addition

made in respect of unaccounted cash payments / expenditure for Assessment Year 2008-09 to 2011-12, is totally amounting to Rs.64,00,91,373 (as tabulated in para 15.1 of this order). It of consequent to note that the entire addition of Rs.64,00,91,373 is made substantively in the case of BMM Ispat Ltd. and also proportionately in the case of M/s. Kartikeya Manganese and Iron Ores Pvt. Ltd. and Smt. Ambika Ghorpade for Assessment Years 2008-09 to 2011-12.

15.4.2 The appeals in the cases of M/s. BMM Ispat Limited in ITA Nos. 779 to 881 and 1106/Bang/2015 for Assessment Years 2008-09 to 2011-12; M/s. Kartikeya Manganese Iron Ores Pvt. Ltd. in ITA Nos.832 to 835/Bang/2015 for Assessment Years 2008-09 to 2011-12 and in the case of Smt. Ambika Ghorpade in ITA No.828 to 831/Bang/2015 for Assessment Years 2008-09 to 2011-12 were extensively heard by us also considering the facts and circumstances of the matter surrounding the assessee in the case on hand i.e. Bharat Mines & Minerals. On the issue of relevance and reliability of statements and other aspects, detailed discussion has been made in the cases of M/s. Kartikeya Manganese Iron Ores Pvt. Ltd. and Smt. Ambika Ghorpade and the conclusions arrived at and findings therein are applicable to the assessee in case on hand as well. Since we have deleted the additions made by the Assessing Officer and decided the issue in favour of the assessees in the cases of M/s. BMM Ispat Ltd., M/s. Kartikeya Manganese Iron Ores Pvt. Ltd. and Smt. Ambika Ghorpade, the same findings will apply to the assessee's appeal in the case on hand also. Consequently, in the factual matrix of the case

as discussed above, we uphold the action of the learned CIT (Appeals) in deleting the additions made protectively towards unaccounted payments / unexplained expenditure in the case on hand for Assessment Years 2008-09 to 2011-12. Accordingly, we dismiss the grounds raised by the revenue.

16. In the result, the appeals of Revenue for Assessment Years 2008-09 to 2011-12 are dismissed.

Order pronounced in the open court on the 10th day of April,2018.

Sd/-	Sd/-
(SUNIL KUMAR YADAV)	**(JASON P BOAZ)**
Accountant Member	Judicial Member

Bangalore,
Dt.10.4.2018

*Reddy gp

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2	Respondent	5	DR. ITAT, Bangalore
3	CIT	6	Guard File

Senior Private Secretary
Income Tax Appellate Tribunal
Bangalore.