

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH : BANGALORE**

**BEFORE SHRI N. V. VASUDEVAN, VICE PRESIDENT AND
SHRI JASON P BOAZ, ACCOUNTANT MEMBER**

Appeal Nos. and Assessment year	APPELLANT	RESPONDENT
ITA No.1854/Bang/2013 2008-09	M/s.VSL Mining Company Pvt. Ltd., House of Lad, Palace Road, Sandur, Karnataka. PAN : AACCV 0903 E	The Deputy Commissioner of Income-Tax, Central Circle – 2(3), Bangalore.
ITA No.204/Bang/2014 2008-09	Assistant Commissioner of Income-tax, Central Circle – 2(3), Bangalore.	M/s.VSL Mining Company Pvt. Ltd., Karnataka. PAN : AACCV 0903 E

Assessee by	:	Shri. V. Srinivasan, Advocate
Revenue by	:	Shri. Pradeep Kumar, CIT

Date of hearing	:	02.04.2019
Date of Pronouncement	:	28.06.2019

ORDER

Per Shri. Jason P. Boaz, A.M.

These are cross appeals, by the assessee and Revenue, directed against the order of the CIT(A), Mysore, dated 17.10.2013 for Assessment Year 2008-09. Since the issues involved are inter-connected and the background facts are common, these appeals were heard together and we, therefore, deem it appropriate to dispose them off by way of this common order for the sake of convenience.

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

2.1 The assessee company is engaged in the business and earns income from export and trading of iron ore, generation of power from windmill turbines and income from interest. A search action under section 132 of the Income Tax Act, 1961 (in short 'the Act') was conducted in the case of Shri. Anil H. Lad and the business premises of the assessee group on 26.10.2007; in the course of which Shri. Anil H. Lad, the Managing Director of the assessee company, admitted additional income of Rs.20 Crores in the hands of himself, his family members, associates and other business concerns.

3. A short while after the search action on 26.10.2017 carried out in the case of the assessee; the Department conducted a survey under section 133A of the Act on 25.03.2008 during which certain documents were impounded. Subsequently, a search under section 132 of the Act was conducted on 01.04.2008 in the case of one Shri. Manoj Kumar Jain at Hospet, in the course of which certain documents and materials were found and seized from his premises. Several statements under section 132(4) / 131 of the Act were recorded by the Department from Shri. Manoj Kumar Jain; with reference to materials found and seized from his premises; in respect of which he stated that some of the transactions related to unaccounted purchase and sale of iron of the assessee in the case on hand. He also submitted that there were certain payments made by him out of cash kept by Shri. Anil H. Lad and his group; which were not recorded in the books of account. Shri. Manoj Kumar Jain, subsequently retracted the admissions made in the aforesaid statements at the time of search and admitted that all the transactions as per the seized material related to him and not to Shri. Anil H. Lad and his group. In this regard, Shri. Manoj Kumar Jain agreed to offer additional income in respect of these transactions in the course of the search action conducted in his case.

2.3 After the search conducted in the case of Shri. Manoj Kumar Jain, Shri. Anil H. Lad, Managing Director of the assessee company was summoned by the Department and was required to explain the notings showing cash payments made and unaccounted sale of iron-ore as found in the search of Shri. Manoj Kumar Jain. Shri Anil H. Lad had denied any such transactions and was also prepared to cross examine Shri. Manoj Kumar Jain at the time of search. However, since Shri. Manoj Kumar Jain had retracted his statement given at the time of search and stated that Shri Anil H. Lad had nothing to do with the transactions as noted in the seized material, the assessee and the Department did not continue with the proceedings for cross-examination of Shri. Manoj Kumar Jain. It is in this factual background, as emerge from records, that the disputes involved in these appeals are to be appreciated.

3.1 For Assessment Year 2008-09, the assessee filed its return of income on 30.09.2008 declaring income of Rs.55,96,22,255/- after claiming deduction of Rs.7,11,55,891/- under section 10B of the Act and set off of unabsorbed brought forward depreciation of Rs.10,65,39,137/-. After search action was conducted, *inter alia*, in the case of the assessee on 26.10.2007, the case was taken up for scrutiny. The Assessing Officer (AO), after calling for details and considering the assessee's submissions concluded the assessment under section 143(3) of the Act vide order dated 31.12.2009, wherein the assessee's income was determined at Rs.115,89,54,044/- in view of the following additions / disallowances:-

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|------|--|---------------------|
| (i) | Disallowance of Deduction claimed
under section 10B of the Act | - Rs. 7,11,55,891/- |
| (ii) | Carry forward depreciation from
Assessment year 2007-08 not allowed | - Rs.10,65,39,137/- |

- (iii) Denial of claim of depreciation on Windmill
on leased land component - Rs. 75,00,000/-
- (iv) Unaccounted transactions with Shri. Manoj
Kumar Jain:-
- a) Substantive addition - Rs.28,00,00,000/-
- b) Protective addition -Rs.13,41,36,761/-

3.2 Aggrieved by the order of assessment dated 31.12.2009 for Assessment Year 2008-09, the assessee preferred an appeal before CIT(A) challenging the additions / disallowances made. The CIT(A)-Mysore, disposed off the assessee's appeal vide order dated 17.10.2013 allowing the assessee partial relief. In the impugned order, the CIT(A) deleted the substantive addition of Rs.28,00,00,000/- and the protective addition of Rs.13,41,36,761/- in respect of the alleged unaccounted transactions with Shri. Manoj Kumar Jain. The CIT(A) placed reliance on and followed the decision of CIT(A)-VI, Bangalore, in the case of Shri. Manoj Kumar Jain, wherein it was held that the total turnover in unaccounted trading of iron ore carried out by Shri. Manoj Kumar Jain on behalf of Shri Anil H. Lad was Rs.29,25,88,980/-.

4.0 Both Revenue and the assessee, being aggrieved by the order of CIT(A)-Mysore, dated 17.10.2013, have preferred cross appeals before the Tribunal. The grounds raised by Revenue and the assessee are extracted hereunder:-

Revenue's Appeal for Assessment Year 2008-09

4.1 The grounds raised in Revenue's appeal are as under:-

Ground No.1: Whether the Ld CIT(A) is justified in deleting the amount of Rs.28,00,00,000/- added by the Assessing Officer on substantive basis towards unaccounted business transactions?

Ground No.2: Whether the Ld CIT(A) is justified in not upholding the amount of Rs_13.41.36,761/- added on protective basis by the Assessing Officer towards unaccounted transactions?

Assessee's Appeal for Assessment Year 2008-09

4.2 The grounds raised in the assessee's appeal are as under:-

1. *The orders of the authorities below in so far as they are against the appellant are opposed to law, equity, weight of evidence, facts and circumstances of the appellant's case.*
2. *The learned CIT[A] is not justified in upholding the disallowance of depreciation amounting to Rs. 75,00,000/- holding that the same was not forming part of the cost of the windmill and was infact, a payment made for taking the land on lease under the facts and in the circumstances of the appellant's case.*
3. *The learned CIT[A] is not justified in upholding the rejection of the exemption claimed u/s. 108 of the Act amounting to Rs. 7,11,55,891/- under the facts and in the circumstances of the appellant's case.*
4. *The learned CIT[A] is not justified in directing the A.O. to make a substantive addition of Rs. 6,45,000/- as against the protective addition of Rs. 13,41,36,761/- in respect of the alleged unaccounted transaction of the appellant with Sri. Manoj Kumar Jain, under the facts and in the circumstances of the appellant's case.*
5. *Without prejudice to the right to seek waiver with the Hon'ble CCIT/DG, the appellant denies itself liable to be charged to interest U/s 234-A, 234-B and 234-C of the Act, which under the facts and in the circumstances of the appellant's case deserves to be cancelled.*
6. *For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and Justice*

rendered and the appellant may be awarded costs in prosecuting the appeal and also order for the refund of the institution fees as part of the costs.

Additional Grounds

4.3 In the course of hearings, the assessee has also raised the following additional grounds vide letter dated 25.03.2019:-

1. *The addition of Rs. 6,45,000/- sustained by the learned CIT [A] on substantive addition in the place of the substantive addition of Rs. 28,00,00,000/- and the protective addition of Rs. 13,41,36,761/- is bad in law since the said additions have been made on the strength of the documents found and seized during the course of search under section 132 of the Act in the case of Sri. Manoj Kumar Jain especially since the learned assessing officer has not followed the procedure as envisaged under section 153C of the Act and hence, the addition made in the hands of the appellant in regular assessment proceedings deserve to be deleted.*
2. *For the above and other grounds of cross objection that may be urged at the time of the hearing of the appeal which may be allowed and justice rendered.*

4.4 In the course of hearings, the learned AR of the assessee has filed paper book (pages 1 to 415) which, *inter alia*, contains statements recorded from Shri. Manoj Kumar Jain and other material relied upon; a synopsis of dates and arguments dated 14.02.2019 and cited and placed reliance on various judicial pronouncements in support of the assessee's case. The learned DR for Revenue has also filed written submissions. The above material placed before us has been duly considered. We have heard and considered the rival contentions and carefully perused the material on record and now proceed to dispose of these cross appeals hereunder in seriatim.

Assessee's Appeal for Assessment Year 2008-09 in ITA No.1854/Bang/2013

5. **Ground Nos. 1 & 6 (supra).** being general in nature and not urged before us, require no adjudication and are accordingly dismissed as infructuous.

6. **Ground No.5 – Charging of interest under section 234A, 234B and 234C of the Act**

6.1 In this ground (supra), the assessee denies himself liable to be charged interest u/s 234A, 234B and 234C of the Act. The charging of interest is consequential and mandatory and the AO has no discretion in the matter. This proposition has been upheld by the Hon'ble Apex Court in the case of Anjum H. Ghaswala (252 ITR 1) (SC) and I, therefore, uphold the action of the AO in charging the assessee the aforesaid interest u/s 234A, 234B and 234C of the Act. The AO is, however, directed to re-compute the interest chargeable u/s 234A, 234B and 234C of the Act, if any, while giving effect of this order.

7. **Additional Grounds 1 and 2 – raised vide letter dated 25.03.2019**

7.1 The assessee raised the aforesaid additional grounds of appeal before us contending that the protective and substantive additions made by the AO in the orders of assessment was based on documents found and seized in the course of search in the case of Shri. Manoj Kumar Jain; which has been modified by the CIT(A) in the impugned order as the substantive addition is legally flawed and untenable. It is contended that these additional grounds raised before us are pure questions of law that goes to the very root of the matter of jurisdiction to make the additions in the case on hand. In support of prayer for admission of these grounds of appeal, the assessee has placed reliance on the judgment of the Hon'ble Apex

Court in the case of NTPC Ltd., (229 ITR 383) (SC) and Sinhgad Technical Education Society (397 ITR 344) (SC).

7.2 The learned DR for Revenue opposed the admission of the additional grounds raised.

7.3 We have heard and considered the rival submissions put forth on the issue of admission of the additional grounds of appeal (supra) and find that these additional grounds sought to be urged in this appeal before us are pure questions of law and the facts relevant for appreciating these grounds are also available on record. We also observe that these additional grounds go to the very root of the matter of jurisdiction for making the additions in the assessments framed under section 143(3) of the Act. In this view of the matter, and respectfully following the ratio of the decision of Hon'ble Apex Court in the case of NTPC Ltd., (supra), we admit the additional grounds of appeal raised by the assessee (supra); which shall be considered and disposed off first before going into the grounds raised by the assessee and Revenue on merits.

7.4 The assessee, vide the additional grounds raised (supra) contends that the additions made protectively and substantively, on the basis of materials found in the course of search conducted in the case of Shri. Manoj Kumar Jain, without invoking the provisions of section 153C of the Act in the assessment for Assessment Year 2008-09, concluded under section 143(3) of the Act vide order dated 31.12.2009, is illegal. In this regard, the learned AR drew the attention of the Bench to the provisions of Section 153C of the Act, which enable the AO of the person who is not searched under section 132 of the Act to take cognizance of materials seized in the course in the case of the person searched. It was submitted that section 153C of the Act requires recording of satisfaction that materials found

in the course of search belongs to or pertains to some other person other than the person searched. Thereafter, these materials must be transmitted to the AO having jurisdiction over such other person, who has not been searched. The AO of the other person must thereupon record satisfaction that these materials have a bearing on the assessment of income of such other person. It is only thereafter that proceedings can be taken up for framing an assessment under section 153A against such other person. According to the learned AR, the AO while passing the order of assessment for Assessment Year 2008-09 dated 31.12.2009 in the case on hand under section 143(3) of the Act, as a result of search conducted in its own case, had taken into account / considered materials found in the course of subsequent search in the case of Shri. Manoj Kumar Jain without adopting and following the procedure laid down under section 153C of the Act. It is argued that the protection and substantive additions made by the AO in the order of assessment under section 143(3) of the Act, based on documents and materials found in the course of search in the case of Shri. Manoj Kumar Jain is contrary to law and hence these additions even to the extent sustained by the learned CIT(A) are legally untenable and are required to be deleted. The learned AR submits that for the very same reasons, the assessee also supports the impugned order of the CIT(A) deleting / partly deleting the protective and substantive additions though on different grounds. In support of the aforesaid proposition of law, the assessee, *inter alia*, placed reliance on the decision of the Kolkata Bench of ITAT in the case of Krishna Kumar Singhania (168 ITD 217) (Kol – Trib.). Reliance was also placed on the judgment of the Hon'ble Bombay High Court in the case of HDFC Bank Ltd., (174 DTR 92) (Bom).

7.5 Per contra, the learned DR for Revenue supported the impugned order of assessment for Assessment Year 2008-09 and submitted that the AO was fully justified in taking cognizance of the material found / seized in the course of search

action in the case of Shri. Manoj Kumar Jain. It is contended that the provisions of section 153C of the Act need not be invoked when assessment proceedings under section 143(3) of the Act are pending in the case of the assessee. It was also contended that there was no bar for making assessment by taking cognizance of material found / seized in the case of Shri. Manoj Kumar Jain.

7.6.1 We have carefully considered the legal arguments / contentions put forth by both parties. The facts not in dispute are that the substantive and protective additions were made in the case on hand on the basis of material found and seized from the premises of Shri. Manoj Kumar Jain. It is also amply clear that the AO did not invoke the provisions of Section 153C of the Act on receipt of the material; but rather chose to take cognizance of these materials (i.e., seized in the case of Shri. Manoj Kumar Jain) in the course of pending assessment proceedings under section 143(3) of the Act for Assessment Year 2008-09 that were before him. It is therefore clearly established that the AO has used seized material / documents found in the course of search conducted in the case of a third party (i.e., search of Shri. Manoj Kumar Jain) for making the additions in the hands of the assessee, although, on protective and substantive basis; which was later on modified as substantive by the CIT(A).

7.6.2 The provisions of Section 153C of the Act enjoins upon the AO of the person searched; that on being satisfied that books of account seized or requisitioned belongs to or pertain to some other persons, to handover the books of account to the AO having jurisdiction over such other person. Thereafter, the second AO, on being satisfied that the books of account and documents received have a bearing on the determination of the total income of the other person, should assume jurisdiction under section 153C of the Act. After assuming jurisdiction under section 153C of the Act, the AO proceeds to carry out an assessment in terms

of section 153A r.w.s. 143(3) of the Act. In this regard, it is relevant to extract section 153 of the Act hereunder:-

“153C(1) Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, where the Assessing Officer is satisfied that,—

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

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

a person other than the person referred to in section 153A, then, the books of account or documents or 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 reassess 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 assets seized or requisitioned have a bearing on the determination of the total income of such other person 17[for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made and] for the relevant assessment year or years referred to in sub-section (1) of section 153A :

***Provided** that in case of such other person, the reference to the date of initiation of the search under section 132 or making of requisition under section 132A in the second proviso to sub-section (1) of section 153A shall be construed as reference to the date of receiving the books of account or documents or assets seized or requisitioned by the Assessing Officer having jurisdiction over such other person.”*

7.6.3 From the above, it is seen that the jurisdictional conditions and circumstances prescribed by the legislature for assumption of jurisdiction and taking action under section 153C of the Act is different when compared to a regular assessment. The jurisdiction to make an assessment under section 153C of the Act

arises when satisfaction is reached that the materials found in the course of search of some other person have a bearing on the determination of the income of the assessee. Further, in the first proviso to section 153C of the Act, it is provided that the reference to the date of search in the second proviso to section 153A of the Act; dealing with abatement of pending proceedings on the date of search; shall for the purpose of the persons proceeded under section 153C of the Act be construed as the date on which the seized materials are received by the AO.

7.6.4 In the case on hand, we find that there was a search under section 132 of the Act in the case of the assessee on 26.10.2007. After the regular assessments proceedings under section 143(3) of the Act were taken up by the assessee and during the pendency thereof; the AO received material / information from the AO of Shri. Manoj Kumar Jain. As per the second proviso to section 153C of the Act, the assessment proceedings pending under section 153A of the Act in the case of the assessee before the AO would abate on the date the AO received the seized material from the AO of Shri. Manoj Kumar Jain and fresh proceedings under section 153C of the Act ought to have been initiated. However, it is seen that, upon receipt of the said information / materials, the AO did not assume jurisdiction under section 153C of the Act, but rather chose to use the said materials / information for making additions in the impugned order of assessment for Assessment Year 2008-09 concluded under section 143(3) of the Act. The AO has discussed these additions in the order of assessment under the caption "Unaccounted Transactions with Shri. Manoj Kumar Jain". The AO noted that the assessment proceedings in the case of Shri. Manoj Kumar Jain were 'being concluded at Central Circle-1, Belgaum'. Thereafter, he has gone on to set-out the issues in the case of Shri. Manoj Kumar Jain, relevant to the assessee in the case on hand. But no satisfaction, it appears, has been recorded that these materials have a bearing on the determination of income. Thus, the AO has not followed the

procedure laid down in section 153C of the Act for taking cognizance of the material found / seized in the case of Shri. Manoj Kumar Jain and making an assessment with reference to those materials in the case on hand.

7.6.5 The Kolkata Bench of ITAT in the case of Krishna Kumar Singhania (168 ITD 217) has considered the provisions of sections 153A and 153C of the Act and after examining the different scope of these two sections, at para 10 of its order, has held as under:-

“We have heard the rival submissions. We find that it is not in dispute that there were no documents that were seized from the premises of the assessee except loose sheets vide seized document reference KKS / 1 comprising of 8 pages , for which satisfactory explanation has been given by the assessee and no addition was made by the Id AO on this seized document. The seized document used by the Id AO for making the addition in section 153A assessment is CG/1 to 11 and CG/HD/1 which were seized only from the office premises of Cygnus group of companies in which assessee is a director. In this regard, it would be pertinent to note that as per section 292C of the Act, there is a presumption that the documents , assets, books of accounts etc found at the time of search in the premises of a person is always presumed to be belonging to him / them unless proved otherwise. This goes to prove that the presumption derived is a rebuttable presumption. Then in such a scenario, the person on whom presumption is drawn , has got every right to state that the said documents does not belong to him / them . The Id AO if he is satisfied with such explanation , has got recourse to proceed on such other person (i.e the person to whom the said documents actually belong to) in terms of section 153C of the Act by recording satisfaction to that effect by way of transfer of those materials to the AO assessing the such other person. This is the mandate provided in section 153C of the Act. In the instant case, if at all, the seized documents referred to in CG/1 to 11 and CG/HD/1 is stated to be belonging to assessee herein, then the only legal recourse available to the department is to proceed on the assessee herein in terms of section 153C of the Act. In this regard, we would like to place reliance on the recent decision of the Hon'ble Delhi High Court in the case of CIT v. Pinaki Misra & Sangeeta Misra [(2017) 148 DTR 219 (Delhi)] = [TS-5161-HC-2017(DELHI)-0] wherein it was held that, no addition could be made on the basis of evidence gathered from extraneous source and on the basis of

statement or document received subsequent to search. Hence we hold that the said materials cannot be used in section 153A of the Act against the assessee. This opinion is given without going into the merits and veracity of the said seized documents implicating the assessee herein.”

7.6.6 The Hon’ble Bombay High Court in the case of HDFC Bank (supra) has also considered a similar question of law in the context of the erstwhile provisions of section 158BD of the Act. The provisions of section 158BD is the pre-cursor to the present provisions of section 153C of the Act; as the said provisions were required to be invoked for framing an assessment in the case of a person who was not searched, but materials indicating undisclosed income was found in the course of search conducted by the Department. In the aforesaid case of HDFC Bank (supra), Revenue sought to take cognizance of the search material and disallow depreciation in regular assessment proceedings and the provisions of section 158BD of the Act was not invoked. The Hon’ble Bombay High Court held that the scope of a regular assessment and the scope of assessment under section 158BD of the Act are different as they stand on different footings and has gone on to uphold the action of the Tribunal in holding that the provisions of section 158BD of the Act ought to have been invoked to make any disallowance of depreciation based on material found in the course of search conducted by the Department in the case of some other person. This judgment also supports the contention of the assessee that no addition could be made in the assessments framed under section 153A of the Act, based on materials found and seized from some other person, unless provisions of section 153C are invoked.

7.6.7 Taking into account the aforesaid factual and legal matrix, we are of the considered view that the AO could not have taken cognizance of the seized documents and other material found and seized in the course of search conducted in the premises / case of Shri. Manoj Kumar Jain, while framing the order of

assessment under section 143(3) of the Act in the case on hand. As a matter of fact, the ongoing assessment proceedings under section 143(3) of the Act would abate on receipt of these seized materials as per the second proviso to section 153C of the Act. We are of the view that in the event the AO wanted to take cognizance of the seized materials, he ought to have invoked the provisions section 153C of the Act after recording his satisfaction based on material sent by the AO of Shri. Manoj Kumar Jain. This jurisdictional pre-condition laid down by the Legislature of recording of satisfaction for taking action under section 153C of the Act cannot be side-stepped / brushed aside and additions be made in proceedings pending under section 143(3) of the Act as the scope of assessments framed under sections 143(3) and 153C of the Act are quite different. In that view of the matter, we hold that the protective additions made by the AO in the impugned order of assessment for Assessment Year 2008-09 dated 31.12.2009, are contrary to the provisions of the Act and are therefore to be deleted. Similarly, the addition sustained by the CIT(A) of Rs.6,45,000/- on substantive basis as profit from trading in iron-ore based on the material found and seized in the search conducted in the case of Shri. Manoj Kumar Jain is also hereby deleted. It is accordingly ordered. Consequently, the additional grounds raised by the assessee are allowed.

8. Ground No.2 – Disallowance of Depreciation

8.1 In this ground (supra), the assessee assailed the action of the CIT(A) in upholding the disallowance of depreciation of Rs.75,00,000/- claimed on Windmills; by holding that the same was not forming part of the cost of the Windmill; but was actually payment made for taking the land on lease. In this regard, the learned AR submitted that the assessee had claimed depreciation of Rs.75 lakhs on the lease land on which the Windmill purchased from M/s. Suzlon Energy Ltd., was erected and commissioned; pursuant to a lease agreement for

land entered into with them. M/s. Suzlon Energy Ltd., sub-lease the said land to prospective investors in the Windmill and charge lease rent for the entire period of sub-lease to the assessee so that the Windmills can be installed and thus, M/s. Suzlon Energy Ltd., raises a bill which includes the said sub-lease rent. The assessee included the lease rent charged by M/s. Suzlon Energy Ltd., as part of the cost of machinery and claimed depreciation thereon. According to the assessee's contention, the entire cost of the Windmill is the consideration paid for the transfer of the lease in the land, partakes the same character as that of the equipment that was purchased and the same constitutes plant and therefore the assessee claimed depreciation. The AO disallowed the assessee's claim of depreciation, by holding that the payment by the assessee towards the lease land is in the nature of capital expenditure and since the assessee has obtained benefit of enduring nature therefrom, the lease rent paid on the land cannot be treated as plant and consequently depreciation cannot be allowed. On appeal, the assessee reiterated the submissions put forth by it before the AO but the CIT(A) upheld the disallowance of depreciation made by the AO.

8.1.2 Alternatively, the assessee contended that if its aforesaid claim; that lease charges paid on land be treated as plant and depreciation be allowed thereon; cannot be acceded to, the said payment of lease rent on land has to be treated as advance rent and the same is to be allowed deduction under section 37(1) of the Act. In support of this proposition, the learned AR placed reliance on the decision of the Co-ordinate Bench of this Tribunal in the case of V. S. Lad & Sons Vs. ACIT in ITA Nos. 18 to 20/Bang/2013, 144 to 146/Bang/2013 dated 13.06.2014.

8.2 Per contra, the learned DR for Revenue supported the orders of the authorities below.

8.3.1 We have considered the rival submissions and carefully perused the material on record; including the judicial pronouncement cited. Similar issues were considered and decided by a Co-ordinate Bench of this Tribunal in the case of M/s. V. S. Lad & Sons Vs. ACIT in ITA Nos.18 to 20/Bang/2013 and 144 to 146/Bang/2013 dated 13.06.2014, wherein it was held that the amount paid as lease rent for acquiring leasehold rights over the land cannot be considered as plant and the lease rent paid for acquiring leasehold rights over the land cannot be treated as cost of the plant (Windmill). However, the alternate claim has been allowed by treating the said payment of lease rent as an allowable revenue expenditure under section 37(1) of the Act. The relevant observations / findings in the order of the Co-ordinate Bench in the case of M/s. V. S. Lad & Sons Vs. ACIT (supra) at para 37 thereof is extracted hereunder:-

“37. With regard to the alternative claim made by the assessee, the claim cannot fall within the parameters of section 30 of the Act, because that section covers only rent paid on building. The claim has therefore to be considered u/s. 37(1) of the act. On this aspect, we find that the Hon'ble High Court of Karnataka in the case of HMT Ltd. (supra), has considered the premium for acquiring leasehold rights as nothing but rent paid in advance. The rent paid in advance was for acquiring leasehold rights over the land. Such payment had been considered by the Hon'ble Court as revenue expenditure. In view of the aforesaid decision of the Hon'ble High Court which is in pari materia with the facts of the present case, we are of the view that the lump sum rent paid for the entire period of 30 years has to be considered as revenue expenditure. The CIT(A) wrongly distinguished this decision as a case of lease of factory building. We therefore accept the alternative prayer of the assessee. Thus, the relevant grounds of appeal in all the three assessment years are treated as allowed on the alternative ground.”

8.3.2 Respectfully following the decision of the Co-ordinate Bench of this Tribunal in the case of M/s. V. S. Lad & Sons in ITA Nos. 18 to 20/Bang/2013 and ITA Nos.144 to 146/Bang/2013 dated 13.06.2014, we allow the lease rent paid for acquiring the leasehold rights over the land as rent paid in advance and direct

that the same is to be allowed as revenue expenditure as per the provisions of section 37(1) of the Act. Consequently, ground No.2 of assessee's appeal is partly allowed.

9. Ground No.3 – Disallowance of claims of deduction under section 10B of the Act – Rs.7,11,55,891/-

9.1 In this ground (supra), the assessee contends that the CIT(A) is not justified in upholding the rejection of deduction of Rs.7,11,55,891/- claimed under section 10B of the Act. In this regard, the learned AR submitted that it is not in dispute that the assessee had exported the goods through M/s. V. S. Lad & Sons since the assessee did not have a warehouse in Chennai Port. That the assessee operates a 100% EOU, for which approval has been granted by the Assistant Development Commissioner, ESEZ, Bangalore, is also not in dispute. The AO has held that the sales made to M/s. V. S. Lad & Sons by the assessee are local sales and cannot be treated as deemed exports as the transaction took place in India. Further, the AO was of the view that sale by one EOU to another EOU is treated as deemed export only for the purpose of duty draw back and this does not have any impact for determining benefit under the Income Tax Act, 1961 for the purposes of section 10B of the Act. In coming to this view, the authorities below have placed reliance on the decision of the Co-ordinate Bench of this Tribunal in the case of Tata Elxsi Ltd., Vs. ACIT (2008) 115 TTJ (Bang) 423 and disallowed the assessee's claim of deduction under section 10B of the Act. The learned AR submitted that the aforesaid decision relied upon by the AO in the order of assessment and by the CIT(A) in his impugned order has since been reversed by the Hon'ble Karnataka High Court vide its order reported in (2015) 127 DRT 327 (Kar). It was submitted that the Hon'ble Karnataka High Court followed its own decision in Tata Elxsi Ltd., Vs. ACIT (supra), while deciding the case of Pr. CIT Vs.

International Stones India Pvt. Ltd., (2018) 168 DTR 21 (Kar). The learned AR submitted that in view of the above submissions, the assessee's claim for deduction under section 10B of the Act amounting to Rs.7,11,55,891/- requires to be allowed since the said sales made by the assessee through M/s. V. S. Lad & Sons have to be considered deemed exports.

9.2 Per contra, the learned DR for Revenue relied on the decisions of the authorities below and submitted that the disallowance of the assessee's claim for deduction under section 10B of the Act is to be upheld.

9.3.1 We have heard and considered the rival submissions / contentions and carefully perused the material on record. Admittedly, there is no dispute with regard to the fact that the goods in question were exported through M/s. V. S. Lad & Sons. The only point of dispute is whether the assessee is entitled to deduction under section 10B of the Act on the deemed exports. This issue is covered by the decision of the Hon'ble Karnataka High Court in the case of Tata Elxsi Ltd., reported in (2015) 127 DRT 327 (Kar) wherein the Tribunal held against the assessee and the Hon'ble High Court had ruled in favour of the assessee holding as under at paras 20 and 21 thereof:-

“20. From the aforesaid provisions, it is clear that if an assessee wants to claim the benefit of s. 10A, firstly he must export articles or things or computer software. Secondly, the said export may be done directly by him or through other exporter after fulfilling the conditions mentioned therein. Thirdly, such an export should yield foreign exchange which should be brought into the country. If all these three conditions are fulfilled, then the object of enacting s. 10A is fulfilled and the assessee would be entitled to the benefit of exemption from payment of income-tax on the profits and gains derived by the undertaking from the export.

21. Clause 6.11 of Exim Policy dealing with entitlement for supplies from the DTA states that supplies from the DTA to

EOU/EHTP/STP/BTP units will be regarded as 'deemed export', besides being eligible for relevant entitlements under para 6.12 - of the policy. They will also be eligible for the additional entitlements mentioned therein. What is of importance is when a supply is made from DTA to STP, it does not satisfy the requirements of export as defined under the Customs Act. However, for the purpose of Exim Policy, it is treated as 'deemed export'. Therefore, when s. 10A of the Act was introduced to give effect to the Exim Policy. the supplies made from one STP to another STP has to be treated as 'deemed export' because cl. 6.19 specifically provides for export through status holder. It provides that an EOU/EHTP/STP/BTP unit may export goods manufactured /software developed by it through other exporter or status holder recognized under this policy or any other EOU/EHTP/STP/SEZ/BTP unit. What follows from this provision is that to be eligible for exemption from payment of income-tax, export should earn foreign exchange. it does not mean that the undertaking should personally export goods manufactured/software developed by it outside the country. It may export out of India by itself or exported out of India through any other STP unit. Once the goods manufactured by the assessee is shown to have been exported out of India either by the assessee or by another STP unit and foreign exchange is directly attributable to such export, then s. 10A of the Act is attracted and such exporter is entitled to benefit of deduction of such profits and gains derived from such export from payment of income-tax. Therefore, the finding of the authorities that the assessee has not directly exported the computer software outside country and because it supplied the software to another STP unit, which though exported and foreign exchange received was not treated as an export and was held to be not entitled to the benefit is unsustainable in law. The substantial question of law is answered in favour of the assessee and against the Revenue. The appeal is allowed. The impugned orders are set aside. The assessee is held to be entitled to deduction of such profits and gains derived from the export of the computer software. No costs."

9.3.2 From the above, it transpires that the decision of the Bangalore Bench of the Tribunal in the case of Tata Elxsi Ltd., Vs. ACIT (supra) relied upon

by the AO/CIT(A) has been reversed by the Hon'ble Karnataka High Court. Respectfully following the decision of the Hon'ble Karnataka High Court in the case of Tata Elxsi Ltd., Vs. ACIT (2015) 127 DRT 327 (Kar), we hold that the assessee is entitled for deduction under section 10B of the Act on deemed exports amounting to Rs.7,11,55,891/- and direct the AO to allow the assessee's claim. It is accordingly ordered. Consequently, ground No.3 of assessee's appeal is allowed.

10. Ground No.4 – Addition of Rs.6,45,000/-

10.1 In respect of this ground (supra), the learned AR submitted that the substantive addition of Rs.6,45,000/- was ordered by the CIT(A) as being the profit on unaccounted trading in iron-ore with Shri. Manoj Kumar Jain in place of the protective addition made amounting to Rs.13,41,36,761/-. According to the assessee's contention, the addition made is misconceived since it is based on the statements given by Shri. Manoj Kumar Jain and opportunity of cross-examination of Shri. Manoj Kumar Jain was not afforded to the assessee. Several arguments / averments were put forth by the learned AR contending that the statement of Shri. Manoj Kumar Jain is not reliable and cannot be used against the assessee.

10.2 The learned DR for Revenue vehemently supported the order of CIT(A) on this issue.

10.3 We have considered the rival contentions put forth and carefully perused the material on record. We have already allowed the additional grounds raised by the assessee and held that the material found / seized in the course of search conducted in the case of Shri. Manoj Kumar Jain could not be used in the impugned order of assessment for Assessment Year 2008-09 which is framed under section

143(3) of the Act without following the procedure laid down under section 153C of the Act. On this ground itself, we have deleted the addition of Rs.6,45,000/-. Therefore, there is no need for rendering any separate findings on this ground No.4 raised by the assessee. This ground is accordingly disposed off as infructuous.

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

Revenue's Appeal in ITA No.204/Bang/2013 for Assessment Year 2008-09

12. Ground No.1 – Deletion of Substantive addition of Rs.28 Crores.

Ground No.2 – Deletion of Protective addition of Rs.13,41,36,761/-.

12.1 In respect of these grounds (supra), the learned DR for Revenue contends that the CIT(A) was not justified in deleting these additions by placing reliance on the order of CIT(A) – VI, Bangalore, in the case of Shri. Manoj Kumar Jain and from the statements recorded from him it was very clear that the assessee had entered into transactions of unaccounted sale of iron-ore for which it was paid cash by Shri. Manoj Kumar Jain. The learned DR submitted that the evidence was clear and these unaccounted transactions had to be brought to tax. The learned DR prayed that in view of the above, these additions; both substantive and protective; should be restored.

12.2 Per contra, the learned AR for the assessee relied on the orders of the CIT(A). According to the learned AR, there is no material to either substantiate or corroborate the statements of Shri. Manoj Kumar Jain and therefore the CIT(A) was justified in deleting both the additions on protective and substantive grounds. It was also submitted that there was no opportunity afforded to the assessee for

cross-examination of Shri. Manoj Kumar Jain and hence no addition can be made on the basis of the self-serving statement of Shri. Manoj Kumar Jain. It was also contended that there are several discrepancies in his statements and therefore it is to be ignored.

12.3 We have considered the rival submissions and perused the material on record. We have already taken a view in this order (supra); while dealing with the additional ground raised by the assessee that the materials found / seized in the case of Shri. Manoj Kumar Jain cannot be used for framing an assessment under section 143(3) of the Act in the case of this assessee. In this view of the matter, we find no reason to interfere with the impugned order of the CIT(A) deleting the aforesaid additions made on protective grounds; though his order is upheld for different reasons. Finding no merits in the grounds raised by Revenue, the same are dismissed.

13. In the result, Revenue's appeal for Assessment Year 2008-09 is dismissed.

14. To sum up, the assessee's appeal for Assessment Year 2008-09 is partly allowed and Revenue's cross appeal is dismissed.

Order pronounced in the open court on this 28th day of June, 2019.

Sd/-
(N. V. VASUDEVAN)
Vice President

Sd/-
(JASON P BOAZ)
Accountant Member

Bangalore.
Dated: 28th June, 2019.
/NS/*

Copy to:

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|---------------|---------------|
| 1. Appellants | 2. Respondent |
| 3. CIT | 4. CIT(A) |
| 5. DR | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore.