IN THE INCOME TAX APPELLATE TRIBUNAL

"B" BENCH : BANGALORE

BEFORE SHRI A. K. GARODIA, ACCOUNTANT MEMBER

AND SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA No. 1270 & 1271/Bang/2019
Assessment years : 2013 – 14 & 2014 – 15

M/s Ramgad Minerals & Mining Limited, No. 1, Baldota Enclave, Abheraj Baldota Road, Hospet – 583203 **PAN : AAACR8532R**	Vs.	ACIT Circle – 1, Bellary
APPELLANT		RESPONDENT

Assessee by	:	Shree Vijay Mehta, C. A.
Revenue by	:	Shree Muzaffar Hussain, CIT DR
Date of hearing	:	29.09.2020
Date of Pronouncement	:	04.11.2020

O R D E R

PER ARUN KUMAR GARODIA, A. M.:

Present appeals are filed by the assessee and the same are directed against two separate orders of Ld.CIT(A), Gulbarga both dated 29.03.2019. Ld.AR submitted that, on identical reasoning, Ld.AO disallowed the SPV charges for years

under consideration. It has also been submitted that facts are similar in respect of disallowance made by Ld.AO. Ld. CIT DR has not raised any objection regarding the issue to be disposed of by way of common order.

Grounds for AY 2013-14

1. *On the facts and in the circumstances of the case and in law, the Hon'bleCIT(A) erred in confirming the disallowance made by the Assistant Commissioner of Income Tax-ACIT (assessing officer) of SPV (Special Purpose Vehicle) Charges of Rs.8,71,00,614/-, failing to appreciate the fact that SPV Charges is in the nature of Business expenditure and fit into the definition of section 37(1) of Income Tax Act, 1961.*

2. *On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in confirming the addition made by the assessing officer amounting to Rs.20,22,24,624/-being the net amount received on the sale of carbon credit included under Book Profit for calculation of MAT u/s 115JB, failing to appreciate the fact that Income credited to P&L account for Sale of carbon credits is not in accordance with Part II of Schedule VI as the same does not arise out of the working of the company during the period covered by the account and hence in order to compute the correct Book Profit u/s 115JB, the same needs to be excluded.*

3. *The appellant further prays to allow adding, altering or amending any of the aforesaid grounds of appeal at or before the time of hearing.*

Grounds for AY 2014-15

1. *On the facts and in the circumstances of the case and in law, the Hon'bleCIT(A) erred in confirming the addition made by the Ld. AO of SPV(Special Purpose Vehicle) Charges of Rs.8,44,79,372/-, failing to appreciate the fact that SPV Charges is in the nature of business expenditure and fit into the definition of section 37(1) of Income Tax Act, 1961.*

2. *On the facts and in the circumstances of the case and in law, the theHon'bleCIT(A) erred in confirming the disallowance of*

Reclamation & Rehabilitation(R&R) Expenses Rs.59,45,711/- made by the Ld. AO, failing to appreciate the fact that Reclamation & Rehabilitation(R&R) expenses were incurred for business expediency and it is in the nature of business expenditure and fit into the definition of section 37(1) of Income Tax Act, 1961.

3. *On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the decision of the Ld. AO in assessing the amount of Rs.6,70,32,794/- being the net amount received on the sale of carbon credit included under Book Profit for calculation of MAT u/s 115JB, failing to appreciate the fact that Income credited to P&L account for Sale of carbon credits is not in accordance with Part II of Schedule VI as the same does not arise out of the working of the company during the period covered by the account and hence in order to compute the correct Book Profit u/s 115JB, the same needs to be excluded.*

4. *For the above and any other reason which may be adduced at the time of hearing, the appellant prays to allow the expenses of SPV Charges and R&R expenses in full as per Ground no.1 and 2.*

The appellant further prays to allow adding, altering or amending any of the aforesaid grounds of appeal at or before the time of hearing.

Brief facts of the case for A. Y. 2013 – 14 are as under:

2. Assessee is a private limited company wherein public are not substantially interested. It is into the business of extraction of iron ore, processing the iron ore and trading in the same. Further assessee owns windmills and generates and supplies power using wind energy. For year under consideration, the assessee filed its return of income declaring total income of Rs.9,91,20,010/- after setting off unabsorbed depreciation against the current year income of Rs.8,13,90,802/- and claimed deduction under section 80IA of Rs.27,97,65,181/- under normal provisions of the Act.

The book profit declared by assessee was Rs.55,41,55,961/- under section 115 JB of the Act. Subsequently, the assessee filed revised return of income declaring total income as in the original return of income filed on 24/09/2003 with only difference that assessee reduced the book profit to Rs.35,19,31,337/- under section 115 JB of the Act.

2.1. Ld.AO observed that the total income declared by assessee includes income from mining activity, Trading in iron ore, transportation and hire charges, loading charges, income and sale of wind power. The return was selected for scrutiny and statutory notices were issued to assessee in response to which representative of assessee appeared before Ld. AO and furnished details as called for.

2.2. During the scrutiny assessment proceedings, Ld.AO observed that, assessee reduced a sum of Rs.8,71,00,614/- towards special purpose vehicle (SPV) from the gross e-auction sale of iron ore. Upon calling for details in respect of the same, Ld. AO noted that;

- Sum of Rs.1,84,075/- pertained to previous year (assessment year 2012-13) being 5% of the sale value;
- Sum of Rs.8,69,16,539/- pertain to year under consideration being 15% of sale value.

2.3. Assessee has thus reflected net sale of iron ore at Rs.49,23,42,978/- in the profit and loss account. Ld.AO noted that sum of Rs.8,71,00,614/- was debited to P&L account as SPV expenses. Ld.AO also noted that the said

sum was deducted by monitoring committee and retained by the Central empowered committee as per the directions of *Hon'ble Supreme Court* out of sale proceeds for purpose of taking various ameliorative and mitigative measures as compensatory payment. Ld.AO after calling for various explanations/submissions from assessee held that the said amount as not allowable as per *Explanation 1 to section 37 (1)* of the Act.

3. Second common grievance of the assessee in both years is about addition of net amount received on the sale of Carbon Credit included by the AO under Book Profit for calculation of MAT u/s 115JB of Rs. 20,22,24,624/- in A.Y: 2013-14 and Rs. 670,32,794/- in AY:2014-15.

4. For AY:2014-15, assessee is also aggrieved about disallowance of Reclamation & Rehabilitation (R & R) Expenses of Rs. 59,45,711/-.

5. Aggrieved by additions made by Ld.AO, the assessee preferred appeal before Ld.CIT(A), who upheld the disallowances/additions so made by the AO.

Ld.CIT(A) gave similar observations as given by Ld.AO. He held that the amount contributed towards SPV is hit by *Explanation 1 to section 37 (1)* of the Act. Ld. CIT (A) followed decisions of *Hon'ble Supreme Court* rendered in the case of *Haji Aziz & Abdul Shakoor Bros. vs. CIT, 41 ITR 350 (SC),* Indian *Aluminium Co. Ltd. Vs. CIT, 79 ITR 514 (SC)* and *Maddi Venkatraman & Co. (P) Ltd. Vs. CIT, 229 ITR 534 (SC).*

6. Aggrieved by the order of Ld. CIT(A), the assessee is in appeal before us now for both years under consideration.

7. At the outset, Ld.AR submitted that only two kinds of disallowance have been made by Ld.AO pertaining to mining activity carried on by assessee for years under consideration. One is SPV contribution by Monitoring Committee out of sale proceeds (this issue is common to both years under consideration) and Contribution towards R&R plan as per direction of Supreme court (this issue is there in AY 2014-15).

He also mentioned that both these payments are recurring in nature to assessee, and that assessee has to contribute to SPV against every sale as per the scheme approved by *Hon'ble Supreme Court*. Ld.AR regarding R&R contribution submitted that such payments has to be made by assessee as quantified by the CEC, and in the event of any shortfall, same would be recouped from the guarantee paid by assessee.

SPV Contribution:

In course of hearing of these appeals, arguments were raised by both sides on issues raised by assessee. It is submitted that disallowance of SPV (Special Purpose Vehicle) Charges are common for both years. Ld.AR submitted that, disallowance of SPV (Special Purpose Vehicle) Charges in AY.2013-14 is Rs.871,00,614/- and for AY:2014-15 is Rs.8,44,79,372/-.

7.1. Assessee placed before us annual returns filed with the Indian Bureau of Mines filed for financial year 01/04/2012 to 31/03/2013 in Form H-1. We note that the assessee is lease holder of mine, "Iyli Gurunath Iron Ore Mines", having sanctioned lease area of 20.23 ha. It also reveals that assessee declared stock of 2,34,081.710 MT of Iron Ore for the relevant period that includes fines and lumps with the closing stock of 1,08,380.250 MT

7.2. For the period 01/04/2013 to 31/03/2014 in Form H-1, assessee declared total stock of 3,20,000 MT of iron ore including fines and lumps and the assessee also had an opening stock of 1,08,380.250 MT from previous year.

7.3. Assessee debited sum of Rs.8,71,00,614/- for assessment year 2013-14 and sum of Rs.8,44,79,372/- for assessment year 2014-15 towards SPV expenses in the following manner:

Assessment year 2013-14:

Particulars	**Total sales**	**SPV contribution**
15% of current year sale	579,443,591	86,916,539
5% of previous year sale	3,681,493	184,075
		87,100,614

Assessment year 2014-15:

Particulars	Total sales	SPV contribution
15% of old stock sold	41,94,98,341	6,29,43,633
10% of fresh stock sold	21,53,57,392	2,15,35,739
		8,44,79,372

7.4. Ld.AR submitted that assessee debited the above amount to P & L Account as SPV Expenses as, this amount was deducted by Monitoring Committee as per the directions of *Hon'ble Supreme Court* out of sale proceeds for the purpose of taking various ameliorative and mitigative measures. Ld.AR submitted that, assessee filed reply before authorities below and submitted that *Hon'ble Supreme court* in 'A' Category Mines, directed contribution of 10% out of e auction sales towards SPV and in Category 'B' mines, the contribution was to the extent of 15% of e auction sales. Ld.AR submitted that SPV expenses is for socio economic development of the mining area. He further submitted that Ld.AO invoked *Explanation 1 to section 37 (1)* of Act.

7.5. Ld.AR relied on decision of *Hon'ble Hyderabad Tribunal* in case of *NMDC Ltd. Vs. ACIT* as reported in *175 ITD 332.* Our attention was drawn to paras 9 to 11 of this *Tribunal's*

order. He pointed out that in Para 10 of order, *Hon'ble Hyderabad Tribunal* noted that assessee therein was classified as 'A' Category Mine and in para 11, it is held by the *Tribunal* that 10% of sale proceeds being SPV in 'A' category mine was to be contributed without which, assessee therein could not have resumed its activities and therefore, is a 'business expenditure' and is allowable u/s 37(1) of Income tax Act. He submitted that the only difference is in percentage of SPV contribution, which is 15% of sale proceeds in 'B' Category as against 10% of sale proceeds in 'A' Category. Ld.AR submitted that it does not change the nature/character of expenditure and therefore, in the present case, decision of Hon'ble *Hyderabad Tribunal* is squarely applicable.

7.6. At the outset, Ld.AR submitted that some penalty was levied in respect of various violation committed by assessee and other mine owners of this category at the rate of Rs.5 Crore per Hectare for pits beyond Lease Area and Rs.1 Crore per Hectare for overburden/waste dump beyond lease area. He submitted that in the present case, the assessee paid Rs.229 Lakhs as penalty on the basis of area of pits and overburden/waste dumps outside the lease area and this amount was paid by the assessee in F. Y. 2011 – 12 relevant to A. Y. 2012 – 13 and the same is disallowed by assessee itself in the computation of income for that year. Ld.AR filed copy of computation of income for that year showing the

disallowance made. The Ld. AR filed written submission detailing all the above arguments advanced before us referring to various observations by *Hon'ble Supreme Court* in case of Samaj *Parivartan Samudaya & Ors Vs. State of Karnataka & Ors. In (Civil) No.562 of 2009 dated 18/04/2013*

7.7. Ld. CIT DR supported the orders of the lower authorities. About the decision of *Hon'ble Hyderabad Tribunal*, cited by Ld.AR in the case of *NMDC Ltd. Vs. ACIT (Supra)*, it was submitted that in that case, the assessee was in 'A' category and therefore, this tribunal decision is not applicable in the present case. He placed reliance on various observations of Hon'ble Supreme Court emphasising that the SPV contributions are basically in the nature of penalty which are to be disallowed under explanation 1 to section 37 (1) of the Act.

7.8. We have considered rival submissions in light of records placed before us.

7.8.1. Before dwelling into various issues alleged by assessee before us, it is necessary to understand observation/directions of *Hon'ble Supreme Court* in following decisions on mining activity;

- *Hon'ble Supreme Court* by *order dated 29/07/2011* passed in *GOI vs. Obulapuram Mining Co. Pvt. Ltd., reported in (2011) 12 SCC 491*, suspended all mining

and transportation activities in area admeasuring approximately 10,868 ha, pertaining to district of Bellary.

- Subsequently, by order dated 26/08/2011 passed in *Samaj Parivartana Samudaya vs state of Karnataka*, reported in *(2013) 8 SCC 209*, *Hon'ble Apex Court* extended ban to Tumkur and Chitradurga mines, based upon a report filed by Central Empowered Committee (hereinafter referred to as CEC). *Hon'ble Apex Court* directed *Ld. Amicus Curiae* to submit quantity which could be released from existing stock of 25,000,000 Ton of iron ore, subject to reclamation and rehabilitation plans being submitted. This was in pursuance to plea raised by Association of Steel Industry and other affected parties.
- On 23/09/2011, *Hon'ble Apex Court* was appraised with Central Empowered Committee (hereinafter referred to as CEC) report dated 01/09/2011, containing modalities of sale of existing stock of iron ore through E-Auction, sale proceeds to be deposited in nationalised bank. It was submitted in the report that, where there is no illegal mining, 80% of sale proceeds to be released and 20% to be retained. MC was to be constituted to supervise and control E-Auction, size of lot, transportation etc. It was submitted therein that, MC would utilise sale proceeds for payment of royalty, taxes etc.

- Subsequently, a plea by Karnataka Iron and Steel Manufacturers Association was raised regarding shortage of supply of minerals due to suspension of mining activity, before *Hon'ble Apex Court*. The association also sought for a direction to reopen Category 'A' mines.
- Thereafter, by order dated 03/09/2012 *Hon'ble Apex Court* in case of *Samaj Parivartana Samudaya vs state of Karnataka*, reported in *(2013) 8 SCC 219* approved report dated 29/08/2012 filed by CEC. *Hon'ble Apex Court* ordered for reopening of category 'A' mines, and vacated order dated 29/07/2011 passed in case of *GOI vs. Obulapuram Mining Co. Pvt. Ltd., (supra)* and order dated 26/08/2011 in case of *Samaj Parivartana Samudaya vs State of Karnataka (supra).*
- Thereafter, by order dated 28/09/2012, CEC filed detailed report dated 03/02/2012, categorising mines into 'A', 'B' and 'C', depending on various types of violations by mining lessee.

7.8.2. Report considered 63, Category 'B' mining lessee that includes Assessee's mining lease and suggested compensatory payments by leaseholders for repairing environmental depredation brought by leaseholders to the extent of unplanned illegal mining done in their respective areas. The report suggested reclamation and rehabilitation plan by each leaseholders by constituting a special purpose vehicle by State of Karnataka, to carry out highly essential

comprehensive environment plans for mining impact zone, in order to restore environmental damage, caused in such area due to illegal and reckless mining on a very large scale, and to ensure that environment in such areas may not suffer from any such type of abuse and destruction in future. *Hon'ble Apex Court* observed in para 5.1 to 5.4 as under:

> *"5.1. Compensatory payment: (a) each of the leaseholders must pay compensation for the areas under illegal mining pits outside the sanctioned area, as found by the joint team (and as finally held by CEC) at the rate of Rs.5 crores per hectare, and (b) for the areas under illegal overburden dumps, roads, offices, etc. Outside the sanctioned the lease area, as found by the joint team (as might have been finally held by CEC) at the rate of Rs.1 crore per hectare.*
>
> *5.1.1. it is made clear that the payment at the rates aforesaid is the minimum payment and each leaseholders may be liable to pay additional amounts on the basis of the final determination of the national loss caused by the illegal mining and the illegal use of the land for overburden dumps, roads, offices etc. Each leaseholder, besides making payment as directed above, must give an undertaking to CEC for payment of the additional*

amounts, if held liable on the basis of the final determination.

……

5.2. Guarantee money for implementation of the R and are planned in the respective sanctioned lease areas: CEC shall take an estimate of the expenses required for the full implementation of the art and are planned in each of the 63 category B mines and each of the leaseholders must pay the estimated amount as guarantee for implementation of the R & R plans in their respective sanctioned a lease area and in the areas where they carried on illegal mining activities which were used for illegal overburden dumps, roads, offices etc beyond the sanctioned lease area. In case, any leaseholder defaults in implementation of the R&R plan, it will be open to CEC is to carry out the R&R plan for that leasehold to some other proper agency from the guarantee money deposited by the leaseholder. However, on the full implementation of the R&R plan to the complete satisfaction of CEC and subject to the approval of the court, the guarantee money would be refundable to the leaseholder.

5.3 in addition to the above, each leaseholder must pay a sum equivalent to 15% of sale proceeds of its iron oversold through the monitoring committee as per the earlier orders of this court. In this regard, it

may be stated that though the Amicus suggests the payment at 10% of the sale proceeds, having regard to the overall facts and circumstances of the case, we have enhanced this payment is to 15% of sale proceeds.

5.3.1. Here it needs to be clarified that CEC/monitoring committee is holding the sale proceeds of the iron ores of the leaseholders, including the 63 leasehold being the subject of this order. In case, the money held by CEC/monitoring committee on the account of any leaseholder is sufficient to cover the payments under the aforesaid 3 heads, the lease holder may, in writing, authorize CEC to deduct from the sale proceeds on its account the amounts under the aforesaid 3 heads and an undertaking to make payment of any additional amount as compensatory payment. On submission of such authorisation and undertaking, CEC shall retain the amounts covering the aforesaid 3 heads and pay to the leaseholder concerned the balance amount, if any. It is expected that the balance amount, after making the adjustment as indicated here, would be paid to the leaseholder concerned within one month from the date of submission of authorisation and the undertaking.

5.3.2. In case of any leaseholder, if the money held on his account is not sufficient to cover the aforesaid

3 heads, he must pay the deficit within 2 months from today.

5.4. The R&R plans for the aforesaid 63 category B mines may be prepared as early as possible, as directed by orders of this court dated 13/04/2012, 20/04/2012 and 04/05/2012, and in case where the R & R plan is already prepared and ready, the leaseholder may take steps for is comprehensive implementation, both within and outside the sanctioned lease area, without any delay."

7.8.3. In aforesaid paras, *Hon'ble Apex Court* refers to *orders dated 13/04/2012, 20/04/2012 and 04/05/2012* passed in case of *State of AP vs Obulapuram Mining Co. Pvt. Ltd.*, reported in *(2013) 8 SCC 213, (2013) 8 SCC 216 and (2013) 8 SCC 217* respectively.

7.8.4. Finally, *Hon'ble Apex Court,* in order dated 18/04/2013 passed in case of *Samaj Parivartana Samudaya vs State of Karnataka,* reported in *(2013) 8 SCC 154,* disposed of the Writ Petition. Various issues were raised before *Hon'ble Apex Court* challenging credibility of CEC. *Hon'ble Apex Court,* observed as under:

"26. In the circumstances enumerated above, questions concerning the credibility of CEC are absolutely unfounded, particularly in the absence of any materials to substantiate the apprehensions, if not allegations that have been levelled. The said body has been performing such tasks and has been assigned by this court by the

orders passed from time to time. The directions on the basis of which CEC has proceeded and had submitted its reports are within the framework of the terms of reference of CEC as determined by this court by order dated 14/12/2007. Needless to say, acceptance of the recommendations made by CEC on the basis of which orders of the court are formulated is upon the satisfaction of the court. We, therefore, close the issue by holding the contentions made to be wholly untenable."

7.8.5. In aforestated para, *Hon'ble Apex Court* refers to *order dated 14/12/2016* passed in case of *TN Godavarman Thirmulpad vs Union of India* reported in *(2013) 8 SCC 204*. *Hon'ble Apex Court* dealt with acceptability of recommendations of CEC with regard to;-

1. Categorization;
2. Reclamation and Rehabilitation (R&R) Plans;
3. Reopening of Categories 'A' and 'B' mines, subject to conditions
4. Closure/reopening of Category 'C' mines ; and
5. Future course of action in respect of Category 'C' mines, if closure thereof is to be ordered by the court.

7.8.6. *Hon'ble Apex Court* in para 51 of its order, observed that, IA Nos. 74 and 4 of 2012 filed by Federation of Indian Mineral Industries, a body, that claimed membership of vast number of lessees involved in proceedings, unequivocally accepted findings of survey conducted by joint team and

recommendations of CEC, insofar as categorisation of lease, and actions suggested for reopening of Categories 'A' and 'B' mines, along with other pre-conditions stipulated, including, preparation of R&R Plans. *Hon'ble Apex Court* noted that, only caveat was in regard to Category 'C' mines.

7.8.7. *Hon'ble Apex Court* categorically expressed its opinion in respect of Category 'C' in para 55 as under:

> *"55. Once the result of the survey undertaken and the boundaries of the leases determined by the joint team has been accepted by the court and the basis of categorisation of the mind has been found to be rational and constitutionally permissible it will be difficult for this court to visualise as to how the Category 'C' mines can be allowed to reopen. There is no room for compassion fervent pleas, for clemency cannot have even a persuasive value. As against the individual interest of the 49 categories see leaseholders, public interest at large would require the court to lean in favour of demonstrative in the efficacy and effectiveness of a long arm of the law. We, therefore, order for the complete closure of the Category 'C' mines and for necessary follow up action in terms of the recommendations of CEC in this regard, details of which have already been extracted in an earlier part of this order."*

7.8.8. In the present case, the assessee holds lease under Category 'B'. *Hon'ble Apex Court* in paragraph 5.1 to

5.4(reproduced hereinabove), considers modalities of disbursement of sale proceeds under Category 'B", as under: Out of 20% of sale proceeds retained by MC for Category 'B' lease holders, *Hon'ble Apex Court* approved;

- 15% to be contributed to SPV, wherein;
  (a) mining leases due to illegal mining by way of-
    (i) mining pits outside the sanctioned lease areas have been found to be up to 10% of the lease areas (category 'A'), and/or
    (ii) overburden/waste dumps outside sanctioned lease areas have been found to be up to 15% of the lease areas (category 'B'), and;
  (b) leases falling on interstate boundary between Karnataka and Andhra Pradesh, and for which, survey sketches have not been finalized, would be assigned in Category 'B'.
- Estimated payment towards R&R plan in the respective sanctioned lease areas and in the areas where illegal mining activities were carried out or which were used for illegal overburden dumps, roads, offices etc beyond the sanctioned lease deed along with guarantee money for implementation of R&R plan.
- Compensation to be borne by lessee for carrying out illegal mining outside sanctioned lease area, at the rate of Rs.5 crore per hectare of land found by joint team to be under illegal mining pit; and,

- Compensation for illegal mining by way of overburden dumps road, office etc., outside sanctioned lease area at the rate of Rs,1crore per hectare of land found to be under illegal overburden dumps etc.,

Hon'ble Apex Court directed balance amount, if any, to be reimbursed to respective lessee.

7.8.9. In present appeals, only issue raised for our consideration is in respect of 15% contribution made to SPV for assessment year 2013-14 and 2014-15; and issue in respect of R&R expenses incurred during assessment year 2013 – 14. First of all, we summarise objections of Ld.AO as in respect of SPV expenses as under:-

(a) This is one of the objections of the AO that the SPV Expenses is not allowable because it is not compensation but it is penal in nature for contravention of law as observed by him in para 4.3 of the assessment order for AY:2013-14.

(b) Second objection of the Ld.AO is contained in para 4.9 of the assessment order for AY:2013-14 and as per the same, this is the objection of Ld.AO that the said SPV is nothing but CSR Expenses only and therefore not allowable.

(c) Third objection of Ld.AO is also contained in para 4.9 of the assessment order for AY:2013-14 and as per the same, this is the objection of the Ld.AO that the said SPV is not allowable u/s 37 (1) as it was not incurred by the assessee wholly and exclusively for the purpose of business.

(d) In para 4.8 of the assessment order for AY:2013-14, Ld.AO is stating this that SPV rate is 10% in category 'A'

Mines but 15% in Category 'B' Mines and this extra 5% in Category 'B' Mines is for various violations and illegal mining and even after this observation, he finally held in the same para that whole SPV Expenses of 15% is not allowable.

7.8.10. Ld.AO observed that, these SPV were deducted pursuant to directions of *Hon'ble Supreme Court (supra)* by order dated 18/04/2013, wherein, it was directed that, sum so paid towards SPV charges should be exhaustively and exclusively used to undertake socio economic and infrastructure development, afforestation, soil and biodiversity conservation and for ensuring inclusive growth of the area surrounding mining leases.

7.8.11. Ld.AO further observed that these payments are nothing but appropriation of profits earned by assessee that cannot be said to have incurred for purpose of business or earning profits. Accordingly, entire amount adjusted towards SPV was disallowed by Ld.AO. Ld.AO was of opinion that entire sale proceeds as per E auction bid Sheets/invoices were to be assessed as trading receipts. The amount retained by CEC/monitoring committee as per directions of *Hon'ble Supreme Court*, on behalf of assessee for SPV purposes, was on account of damages and loss caused to environment due to contravention of law, and therefore, cannot be allowed as deduction out of sale proceeds, even after accrual of such liability. Ld.AO was of opinion that, even in Category 'A' mines, there was marginal

illegality found by CEC, because of which 10% of contribution was attributed out of sale proceeds to the SPV.

7.8.12. On careful reading of decision of *Hon'ble Supreme Court* dated 18/04/2013, it is clear that 15% contribution to SPV account was guarantee payment for implementing of R & R plan, which would be deducted from sale proceeds. This was one of the conditions for resuming mining operations under Category 'B'.

We refer to and rely on observations by *Hon'ble Supreme Court* in case of *CIT vs Sitaldas Tirathdas reported in (1961) 41 ITR 367. Hon'ble Supreme Court* laying down following principal referred to various rulings that illustrated aspects of diversion of income by overriding title.

> *"These are the cases which have considered the problem from various angles. Some of them appear to have applied the principle correctly and some, not. But we do not propose to examine the correctness of the decisions in the light of the facts in them. In our opinion, the true test is whether the amount sought to be deducted, in truth, never reached the assessee as its income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to pay out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee. Whereby the obligation income is diverted before it reaches the assessee, it is deductible but where the income is required to be applied to discharge an obligation after such income reaches the assessee the same consequence in law does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another portion of one's own income*

which has been received and essence applied. The first is a case in which the income never reaches the assessee, who, even if he were to collect it, does so, not as part of his income but for and on behalf of the person to whom it was payable."

Emphasis Supplied

7.8.13. In the present case, we note that 15% of sale proceeds was payable to SPV account after it accrued to assessee and the fact that, assessee was obliged to part with such portion of income, by virtue of directions of *Hon'ble Supreme Court,* as a precondition to resume mining operations under Category 'B'. At this juncture, we also emphasise that, but for the intervention by *Hon'ble Supreme Court*, assessee would not have contributed 15% to SPV account for implementation of reclamation and rehabilitation scheme on its own, as there was no statutory requirement to do so under relevant statutes that regulate mining activities.

7.8.14. Hon'ble Supreme Court has been very clear regarding the types of payments that needs to be recovered from lessee's under Category 'B', from the sale proceeds as well as otherwise. All the payments form part of R&R plan for recouping and rehabilitating the environment. Certain payments are onetime payment and some others are recurring depending upon the sale of iron ore sold in the name of each licensee or depending on the need for rehabilitation.

7.8.15. In our view, contributing 15% to SPV account on account of Category 'B', would be application of income, and

therefore, should be considered as expenditure incurred for carrying out its business activity. This we hold so, for the reason that, contributions determined by *Hon'ble Supreme Court* are in the nature of guarantee payment necessary for resuming mining activity. We also note that, alleged sum in these grounds are for implementation of R&R Plans in respective sanctioned lease areas held by assessee, where illegal mining activities or which were used for illegal overburden dumps, roads, offices etc., beyond sanctioned lease area were carried out. Here, we also note that, *Hon'ble Supreme Court* directed CEC to refund any leftover guarantee money, after completion of implementation of R& R plan, subject to satisfaction of CEC and approval *by Hon'ble Supreme Court*. For this peculiar reason, amount so contributed towards SPV being 15% of sale proceeds, under Category B, cannot be treated as penal in nature. We, therefore, reject observations of authorities below that, such sum having contributed by assessee fall within ambit of explanation 1 to section 37 (1) of the Act.

7.8.16. The decisions relied upon by Ld. CIT (A) has also been perused by us. We note that those decisions deal with expenses which are in the nature of penalty. In the present situation, contribution towards SPV is a requirement to be incurred to continue its business activities. In our view, these payments in present case do not fall within the category of penalty. *Hon'ble Supreme Court* has quantified rate for the mass tort, that has occasioned due to illegalities

committed in the operation of mines separately. We also note that assessee has *suo moto* disallowed the payments that fall within the category of penalty which has been computed in accordance with directions of *Hon'ble Supreme Court* (being Rs.5 crore per hectare for area as under illegal mining pits outside sanctioned areas and Rs.1 crore per hectare for area under illegal overburden dumps, roads, offices exception outside the sanctioned lease area).

Based on above discussions and analysis, we are of opinion that contribution to SPV being 15% of sale proceeds, under category B, is an allowable expenditure for year under consideration.

7.8.17. At this juncture, we note that, assessee for assessment year 2013-14 has considered 5% expenditure pertaining to previous year. No details pertaining to previous year expenses is made available before us. Assessee has also not placed before us any documents in relation to the same.

However, we are of the opinion that matching principal must be followed and Income tax is a levy on income. It takes into account the point of time at which liability to tax is attracted, i.e.; accrual of income or its receipt. *Hon'ble Supreme Court* in case of *CIT vs Shoorji Vallabhdas & Co* reported in *(1962) 46 ITR 144* held that:

> *"…… If income does not result at all, there cannot be a tax, even though in bookkeeping, and entries made about a 'hypothetical income', which does not materialise. Where income has, in fact, been received*

and subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable. Where, however the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of the income, even though an entry to that effect might, in certain circumstances, have been made in the books of account."

7.8.18. We also refer to decision by *Hon'ble Bombay High Court* on concept of real income, emphasised in case of *Kashiparekh and Co Ltd (HM) vs. CIT,* reported in *(1960) 39 ITR 706*. *Hon'ble Court* held that, surrender of income even after closure of accounting year may make no difference to the concept of real income. *Hon'ble Bombay High Court*, relied on view expressed by *Hon'ble Supreme Court* in case of *CIT vs Birla Gwalior (P) Ltd* reported in *(1973) 89 ITR 266* as under:

"The principle of real income is not to be subordinated as to amount virtually to a negation of it when a surrender or concession or rebate in respect of managing agency commission is made, agreed to or given on grounds of commercial expediency, simply because it takes place sometime after the close of an accounting year. In examining any transaction and situation of this nature the court would have more regard to the reality and speciality of the situation rather than the purely theoretical or doctrinaire aspect of it. It will lay greater emphasis on the business aspect of the matter viewed as a whole when that can be done without disk regarding statutory language."

Therefore, in our opinion, the 5% expenditure pertaining to previous year claimed by assessee in A. Y. 2013 – 14 cannot be considered in assessment year 2013-14. We, therefore, confirm the disallowance of the same being Rs. 184,075/-

but delete the balance disallowance of Rs. 869,16,539/- out of total disallowance in that year as SPV Rs. 871,00,614/-.

Accordingly ground No. 1 raised by assessee in A. Y. 2013 – 14 stands partly allowed.

Admittedly the disallowance made by Ld.AO for assessment year 2014-15 are on identical facts except this difference that there is no previous year expenses in A. Y. 2014 – 15. Applying the same observations made hereinabove mutatis mutandis, we hold that the contribution made by assessee towards SPV in A. Y. 2014 – 15 is an allowable expenditure in the hands of assessee.

Accordingly, Ground No.1 raised for assessment year 2014-15 is allowed as indicated hereinabove.

8. There is one more issue for assessment year 2014-15, which is in respect of sum of Rs.59,45,711/- contributed towards R &R expenses by assessee. This issue has been raised by assessee as revised Ground 2 filed before us.

8.1. In respect of this issue, assessee relied on submissions made in respect of Ground No.1, reproduced herein above, to support its contention to consider contribution towards R&R plan as expenditure allowable under section 37 of the Act.

8.2. Ld. CIT DR also placed reliance on the submissions made in respect of Ground No. 1 reproduced hereinabove.

8.3. We have perused submissions advanced by both sides in light of records placed before us.

8.3.1. It is relevant to note the observations of *Hon'ble Supreme Court* in respect of such contribution, to understand its correct nature.

Hon'ble Supreme Court observed as under:

> *"II. Guarantee money for implementation of the R&R plan in the respective sanctioned lease areas.*
> *The CEC shall make an estimate of the expenses required for the full implementation of the R&R plan in each of the 63 category B mines and each of the leaseholders must pay the estimated amount as guarantee for implementation of the R&R plans in their respective sanctioned lease areas and in the areas where they carried on illegal mining activities or where used for illegal overburden dumps, roads, offices, etc beyond that the sanctioned lease areas. In case, any leaseholder defaults in implementation of the R&R plan, it will be open to the CEC to carry out the R&R plan for that leasehold through some other proper agency from the guarantee money deposited by the leaseholder. However, on the full implementation of the R&R plan to the complete satisfaction of the CEC and subject to the approval by the court, the guarantee money would be refundable to the leaseholder."*

8.3.2. We note that *Hon'ble Supreme Court* directed lease holders to give undertaking to make any additional payment. On perusal of above observation/directions by *Hon'ble Supreme Court*, we feel that the assessee could not have ignored the notice and that only upon making good such payments, assessee would have resumed its mining activity. Further it is noted that in the event assessee is not able to make good the full payment towards R&R plan as directed by CEC, the guarantee money paid by assessee would be forfeited to that extent. We therefore, cannot

concur with the observations of the authorities below that such payment is hit by *Explanation* 1 to *Section 37 (1)*. In support of the same, we refer to and rely on our observation in paragraph7.8.1 to 7.8.17 and hold that this payment is in the nature of expenditure incurred for purposes of business, and is allowable under section 37 of the Act.

Accordingly, this Ground no. 2 raised by assessee for assessment year 2014-15 stands allowed.

9. Ground No 2in A. Y. 2013 – 14 : Amount of carbon credit to be excluded for purpose of computing book profit u/s 115 JB of the Act

During the relevant previous year, the assessee credited Rs. 20,22,24,624/- on account of carbon credit to the profit and loss account. The assessee claimed the same to be capital receipt and did not offer it to tax in the normal computation of income. However, the same was offered to tax while computing Book Profit u/s 115JB of the Act. Subsequently, the assessee revised its return of income and excluded the same while computing Book Profit u/s 115JB of the Act.

9.1. The Assessing Officer did not agree with the contention of the assessee and added the amount received on sale of carbon credit under normal provisions as well as while computing Book Profit u/s 115JB of the Act

9.2. The CIT(A) partly agreed with the contention of the assessee and excluded the amount received on sale of carbon credit under normal provisions of the Act by holding it to be a capital receipt. In support of his findings, the

CIT(A) relied on the decision of the *Hon'ble Karnataka High Court* in the case of *CIT v. M/s Subhash Kabini Power* reported in *385 ITR 592*. However, he upheld the action of the Assessing Officer in taxing the same while computing Book Profit u/s 115JB of the Act since the assessee had credited the same to the profit and loss account.

9.3. In the order passed by the Ld. CIT (A), it is held that the sale of carbon credit is chargeable u/s 115JB of the Act since the assessee has credited the same in the profit and loss account. He relied on the decision of the *Hon'ble Supreme Court* in the case of *Appollo Tyres v. CIT* reported in *255 ITR 273* to support his contention.

9.4. Ld.AR at the outset, submitted that a capital receipt does not fall within the definition of 'income' u/s 2(24) of the Act unless specifically included. A receipt which is not of the character of income, cannot be included for the purpose of computing Book Profit u/s 115JB of the Act even if the same is credited to the profit and loss account. Ld.AR placed reliance on following decisions in support of this contentions (copies already on record)

- *Shree Cement Ltd v. Addl.CIT [2014] 49 taxmann.com 274 (Jaipur - Trib.)*
- *ACIT v/sL.H.Sugar Factory Ltd. In ITA No.417,418 &339/Luck/2013 dated 09-02-2016)*
- *Deputy Commissioner of Income-tax, C.C-XXVIII, Kolkata v. Binani Industries Ltd. 178 TTJ 658 (Kol)*
- *Principal Commissioner of Income-tax, Central-2, Kolkata v. Ankit Metal & Power Ltd 416 ITR 591 (Cal)*

9.5. It is submitted that the income in question before the *Hon'ble Supreme Court* was taxable but was exempt under a specific provision of the Act and as such, it was held to be includible as a part of the book profit. *Hon'ble Calcutta High Court* in the case of *Principal Commissioner of Income-tax, Central-2, Kolkata v. Ankit Metal & Power Ltd (supra)* after considering this decision of the *Hon'ble Supreme Court* in case of *Appollo Tyres v. CIT* (supra) has held that where a receipt is not in the nature of income at all, it cannot be included in book profit for the purpose of computation under Section 115JB of the Act. It is submitted that Ld.CIT(A) accepted the contention of assessee and held that the sale of carbon credit is a capital receipt. In view of the above, it is humbly prayed that the amount received on sale of carbon credit should be excluded while computing Book Profit under Section 115 JB of the Act. Learned DR supported the order of CIT (A).

9.6. We have considered the rival submissions in the light of records placed before us.

9.6.1. We find force in the submissions of Ld.AR. We note that Ld.CIT (A) has already accepted the contention of the assessee and held that the sale of carbon Credit is a capital receipt and his finding on this aspect has attained finality because no appeal is filed by the revenue against this finding of Ld.CIT (A). Once it is accepted that the receipt in question is a capital receipt, this judgment of *Hon'ble Calcutta High Court* rendered in case of *CIT vs. Ankit Metal &*

Power Ltd. (Supra) becomes applicable. We note that, *Hon'ble Calcutta High Court* has duly considered the judgment of *Hon'ble Supreme Court* rendered in case of *Appollo Tyres vs. CIT (supra)* and held that where a receipt is not in the nature of income at all, it cannot be included in Book Profit under Section 115JB. Hence, we follow this judgment of *Hon'ble Calcutta High Court* rendered in the case of *CIT vs. Ankit Metal & Power Ltd. (Supra)* and decide this issue also in favour of the assessee in both years.

Accordingly, this Ground no.2 raised by assessee for assessment year 2013-14 stands allowed.

10. We note that an identical ground has been raised by assessee for assessment year 2014-15 being Ground No. 3.

10.1. Admittedly the addition made by Ld.AO for assessment year 2014-15 is on identical facts. Applying the above observations mutatis mutandis, we hold that the addition made by the AO in Book Profit in A. Y. 2014 – 15 is also bad in law and it is deleted.

Accordingly, Ground No. 3 raised by assessee for assessment year 14-15 stands allowed.

In the result appeal filed by assessee for A. Y. 2013 – 14 is partly allowed as indicated hereinabove whereas the appeal filed for A. Y. 2014 – 15 is allowed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-	Sd/-
(BEENA PILLAI)	**(A.K. GARODIA)**
Judicial Member	**Accountant Member**

Bangalore,
Dated: 04th November, 2020.
/NS/*AKG

Copy to:

1. Appellants 2. Respondent 3. CIT
4. CIT(A) 5. DR, ITAT, Bangalore. 6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.