IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH : BANGALORE
BEFORE SHRI. B. R. BASKARAN, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA No.1054/Bang/2019
Assessment Year : 2013–14

M/s Veerabhadrappa Sangappa & Co., No.2/138, Bellary Road, Sandur-583 119. PAN – AACFV 4029 J.	**Vs.**	The Asst. Commissioner of Income Tax, Circle – 1, Bellary.
APPELLANT		**RESPONDENT**

Appellant by	**:**	Shri Chythanya K.K, Advocate
Respondent by	**:**	Shri Muzaffar Hussain, CIT

Date of Hearing	**:**	11-09-2020
Date of Pronouncement	**:**	08-12-2020

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal has been filed by assessee against order dated 22/03/2019 passed by Ld.CIT(A), Kalaburgi for assessment year 2013-14 on following grounds of appeal:

1. The Order of the Learned Commissioner (Appeals) is not justified in law and on facts and circumstances of the case.
2. ***As regards disallowance of expenditure of Rs.77,71,82,151/-:***
2.1. The Learned Commissioner (Appeals) is not justified in sustaining the addition of Rs.25,59,99,429/- representing sale proceeds of declared

stocks received in the subsequent years and thus charged to tax in the subsequent years.

2. 1. 1 .The lower authorities have failed to appreciate that section 5 manifests that an income can be said to have accrued only when a person has a legal right to receive such income and its recognition is on such accrual which is tempered by section 145 r.w. Accounting Standard 9 of ICAI.

2.1.2.The lower authorities have failed to appreciate that the Appellant has not recognized the revenue attributable to sale proceeds of confiscated stock by MC [which includes the sale proceeds of declared stocks Rs.25,59,99,429/-]due to uncertainty of its recovery and in accordance with the Accounting Standard 9 issued by ICAI.

2.1.3.The Learned Commissioner (Appeals) has failed to appreciate that Accounting Standard 9 provides for postponement of recognition of revenue in case where there exists an uncertainty regarding ultimate realization.

2.1.4.The Learned Assessing Officer having noted that the Appellant has received the sale proceeds of declared stocks in subsequent years and the same is charged to tax in the subsequent years, is not justified in taxing the very same sale proceeds in the impugned year leading to double levy.

2.1.5.Without prejudice to the above, the action of the Learned Assessing Officer in taxing the aforesaid sum in the impugned year but not taking any steps to undo the levy of tax in the subsequent year vitiates his former action.

2.1.6.The Learned Commissioner (Appeals) has failed to appreciate that as very same income was taxed in the subsequent year, the entire exercise is revenue neutral as the applicable tax rates remained the same in the relevant years.

2.2. The Learned Commissioner (Appeals) is not justified in sustaining the addition of Rs.24,64,49,012/-representing the sale proceeds of undeclared stocks confiscated by the MC, when the income on such stocks never accrued to the Appellant in accordance with section 5.

2.2. 1 The lower authorities have failed to appreciate that the impugned sum retained by the MC as per the direction of Hon'ble Supreme Court cannot be construed as income accrued to the Appellant.

2.2.2.The lower authorities have failed to appreciate the undeclared stocks relate to accumulated wastes/debris not recognized by the appellant in its books, and the same were confiscated and sold by the MC but proceeds were retained as relating to undeclared stocks, and therefore, the Appellant never had any right to receive the same.

2.2.3.The lower authorities have failed to appreciate that section 5 manifests that an income can be said to have accrued only when a person has a legal right to receive such income and its recognition is on such

accrual which is tempered by section 145 r.w. Accounting Standard 9 of ICAT.

2.2.4.The lower authorities have failed to appreciate that the Appellant has not recognized the revenue attributable to sale proceeds of confiscated stock by MC [which includes the sale proceeds of undeclared stocks Rs.24,64,49,012/-]due to uncertainty of its recovery and in accordance with the Accounting Standard 9 issued by ICAI.

2.2.5.The Learned Commissioner (Appeals) has failed to appreciate that Accounting Standard 9 provides for postponement of recognition of revenue in case where there exists an uncertainty regarding ultimate realization.

2.2.6.Without prejudice to the above, the lower authorities having treated the sale proceeds of undeclared stock as revenue of the Appellant and having not disputed that the same were retained by MC as per direction of Hon'ble Supreme Court, ought to have allowed the same as business loss under Section 28.

2.2.7.Without prejudice to the above, the lower authorities having not disputed that the aforesaid sum was retained by MC as per direction of Hon'ble Supreme Court, ought to have regarded the same as having been diverted at source by overriding title.

2.2.8.Without prejudice to the above, the lower authorities ought to have allowed the above sum under section 37(1) of the Income tax Act.

2.3. As regards taxing the amounts retained towards contribution to SPV:

2.3.1 .The Learned Commissioner (Appeals) is not justified in upholding the additions made by the Learned Assessing Officer of Rs.13,10,94,826/- without appreciating that the Appellant's Mining case No.2296 is placed under 'Category A' and as per the Hon'ble Supreme Court's direction 10% of sale proceeds of confiscated stocks is to be treated as compensation towards reclamation & rehabilitation of the mining area.

2.3.2.The Learned Commissioner (Appeals) is not justified in upholding the additions made by the Learned Assessing Officer of Rs.3,18,41,886/- without appreciating that the Appellant's Mining Lease No. 2160 is placed under 'Category B' and as per the Hon'ble Supreme Court's direction 15% of sale proceeds of confiscated stocks is to be treated as compensation towards reclamation & rehabilitation of the mining area.

2.3.3.The Learned Commissioner (Appeals) has failed to appreciate that the amount deducted by MC of Rs.13,10,94,826/- and Rs.3,18,41,886/- [totaling to Rs.16,29,36,712/-] is nothing but diversion of income by overriding title and cannot be regarded as income of the Appellant.

2.3.4.The Learned Commissioner (Appeals) has failed to appreciate that the forfeited sale proceeds were diverted to the Monitoring Committee before it reached the Appellant, as per the directions of the Honourable

Supreme Court and hence it is a case of diversion of income by overriding title and not an application of income.
2.3.5.The Learned Commissioner (Appeals) has failed to appreciate that the forfeited sale proceeds never ever reached the Appellant directly or indirectly and therefore, the same did not accrue to the Appellant at all.
2.3.6.Without prejudice to the above, the lower authorities having treated the sale proceeds of confiscated stock by CEC as revenue of the Appellant and such proceeds are utilized by SPy towards reclamation & rehabilitation of the mining area as per the direction of Hon'ble Supreme Court, ought to have allowed the same as business loss under Section 28.
2.3.7.The lower authorities are not justified in adding the forfeited sales proceeds by invoking Explanation I to Section 37(1) when the said Explanation applies only to an expenditure and not to a loss.
2.3.8.Without prejudice to the above, the lower authorities having treated the sale proceeds of confiscated stock by CEC as revenue of the Appellant and such proceeds are utilized by SPV towards reclamation & rehabilitation of the mining area as per the direction of Hon'ble Supreme Court, ought to have been allowed as expenditure under section 37.
2.3.9.The lower authorities have failed to appreciate that the Hon'ble Supreme has directed the MC to deduct 10% or 15% of the sale proceeds of the stock in possession of MC as a compensation for reclamation & rehabilitation of the mining area, which, being "ameliorative and mitigative measures", is allowable expenditure under section 37 of IT Act.
2.3.10. The lower authorities are not justified in treating the aforesaid sum as being in the nature of penalty as they have failed to appreciate that the aforesaid sum does not relate to any infraction of law but towards rehabilitation more particularly in the light of the observations in para (IX) of page no. 16 of the order of the Apex court, dated 18.04.2013 in WP (C) No. 562/2009.
2.3.1 l. Without prejudice to the above, the Explanation to section 37(1) is not at all applicable as in the instant case, no illegality whatsoever was noticed in the case of Appellant in respect of lease No. 2296 which is classified as Category A.
2.3.12.The Learned Assessing officer is not justified in taking contradictory position by first calling the impugned sum is towards corporate social responsibility not relating to business and next calling it as expenditure on illegality associated with the business.
2.3.13. The Learned Assessing officer having accepted the sale proceeds transferred to SPV is part of Corporate Social Responsibility, is unjust ii denying the said expenditure which is expended towards the conservation of eco-system.
2.3.14. Without prejudice to the above, the lower authorities have failed to appreciate that the Explanation 2 to section 37 introduced by Finance Act

2015 barring the allowability of CSR applies only to the companies and not to other assesses.
2.3.15. Without prejudice to the above, the lower authorities have failed to appreciate that the Explanation 2 to section 37 is prospective and is not applicable for the impugned Assessment year.
2.4. The Learned Commissioner (Appeals) is not justified in sustaining the addition of Rs.1,48,97,000/- [1,21,94,000+27,03,000] representing probable expenditure, when the substantial amount of Rs.1,21,94,000/- has been received by the Appellant in the subsequent year and same is charged to tax in the subsequent year.
2.4.1.The lower authorities have failed to appreciate that section 5 manifests that an income can be said to have accrued only when a person has a legal right to receive such income and its recognition is on such accrual which is tempered by section 145 r.w. Accounting Standard 9 of ICAI.
2.4.2.The lower authorities have failed to appreciate that the Appellant has not recognized the revenue attributable to sale proceeds of confiscated stock by MC [which includes the sale proceeds of Rs.1,48,97,000/- due to uncertainty of its recovery and in accordance with the Accounting Standard 9 issued by ICAI.
2.4.3.The Learned Commissioner (Appeals) has failed to appreciate that Accounting Standard 9 provides for postponement of recognition of revenue in case where there exists an uncertainty regarding ultimate realization.
2.4.4.The Learned Assessing Officer failed to appreciate that the Appellant has received the sale proceeds of Rs.1,21,94,000/- in the subsequent years and the same is charged to tax in the subsequent years, thus taxing the very same sale proceeds in the impugned year leads to double levy.
2.4.5.Without prejudice to the above, the action of the Learned Assessing Officer in taxing the aforesaid sum in the impugned year but not taking any steps to undo the levy of tax in the subsequent year vitiates his former action.
2.4.6.The Learned Commissioner (Appeals) has failed to appreciate that as very same income was taxed in the subsequent year, the entire exercise s revenue neutral as the applicable tax rates remained the same in the relevant years.
2.4.7.The lower authorities have failed to appreciate that the sum of Rs.27,03,000/- retained by the MC as per the direction of Hon'ble Supreme Court cannot be construed as income accrued to the Appellant.
2.4.8.Without prejudice to the above, the lower authorities having treated the sale proceeds of Rs.27,03,000/- as revenue of the Appellant and having not disputed that the same were retained by MC as per direction

of Hon'ble Supreme Court, ought to have allowed the same as business loss under Section 28.

2.4.9.Without prejudice to the above, the lower authorities having not disputed that the aforesaid sum was retained by MC Rs.27,03,000/- as per direction of Hon'ble Supreme Court, ought to have regarded the same as having been diverted at source by overriding title.

2.5. The Learned Commissioner (Appeals) is not justified in upholding the action of the Learned Assessing Officer in disallowing the expenditure of Rs.9,69,00,000/- paid to the department of Mining and Geology on the premise that the said payment is in the nature of penalty for breach of law under Explanation 1 to section 37.

2.5.1 .The lower authorities have failed to appreciate that the amount paid to the department of Mining and Geology by way of compensation in respect of the Mining Lease No. 2160 is not punitive in nature for violation of law but in the nature of compensation to the Government for loss of revenue from such mining activity more particularly when the Appellant is classified under 'Category B'.

2.5.2.The lower authorities have failed to appreciate that the difference between the cases where the purpose of expenditure incurred itself is unlawful inviting the wrath of the Explanation 1 to section 27 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 which is outside the scope of Explanation 1 to section 37 and the case of the Appellant is covered by the latter.

3. As regards disallowance of Rs.31,27,668/- expended towards Corporate Social Responsibility:

3.1. The Learned Commissioner (Appeals) is not justified in sustaining the additions made by the Learned Assessing Officer with respect to the expenditure of Rs. 31,27,668/- incurred towards providing education to the students residing near the mining area as per the statutory direction of the Learned Deputy Commissioner, Bellary and expended as a part of goodwill gesture in order to carry out the mining business.

3.2. The lower authorities have erred in law and facts by failing to appreciate that the Appellant has satisfied all the conditions under section 37(1) of IT Act where the amount expended by the Appellant towards the education of the students residing/ studying near the mining area, which directly or indirectly influence the business of the Appellant.

3.3. The lower authorities have erred in law in failing to appreciate that the expenditure laid out or expended wholly and exclusively for the purpose of business as a part of corporate social responsibility, is an admissible expenditure under Section 37(1) of the Act.

3.4. Without prejudice to above, the lower authorities have erred in law by failing to appreciate that the Explanation 2 to section 37 introduced by

Finance(No.2) Act 2014 barring the allowability of CSR applies only to the companies and not to others.

3.5. The lower authorities have erred in law in stating that the law is settled that CSR expenditure is not allowable as expenditure under Income Tax Act, 1961, where the said prohibition has been introduced by Finance (No.2) Act, 2014 by inserting Explanation 2 to Section 37(1) of IT Act which is prospective in nature and in the impugned case the assessment year involved is prior to said amendment.

4. As regards unaccounted receipts of Rs.21,62,803/-:

4.1. The lower authorities are not justified in making additions of Rs.21,62,803/- as unaccounted receipts on the basis of amount reflected in Form 26AS, without inquiring into the nature of transaction.

4.2. The lower authorities have failed to appreciate that the said receipts reflected in Form 26AS do not relate to the Appellant except transactions with M/s. Orris Infrastructure Pvt. Ltd., of Rs.4,75,540/- and M/s. Pragathi Krishna Gramin Bank of Rs.1,14,7 10/-

4.3. The Learned Commissioner (Appeals) has failed to appreciate that the Appellant having brought to the notice of the Learned Assessing Officer during assessment proceedings that the receipts do not relate to Appellant, the Learned Assessing Officerought to have conducted enquiry in the hands of deductor.

4.4. Without prejudice to the above, the lower authorities ought to have allowed the TDS credit with respect to aforesaid receipts.

5. The Learned Commissioner (Appeals) is not justified in upholding the action of the Learned Assessing Officer in levying interest under section 234B of Rs.9,22,73,432/- and under section 234C of Rs.24,79,047/-, when the addition to the total income is not justified.

For the above grounds and for such other grounds which may be allowed by the Honourable Members to be urged at the time of hearing, it is prayed that the aforesaid appeal be allowed."

2. Application for Admitting Additional Evidences :

At the outset, Ld.Counsel filed before us Application for Admitting Additional Evidence, which consists following documents:

SN No.	Particulars	Annexure
1.	Revised Statement of e-auction details along with bifurcation sheet (Mine Lease wise and year wise)	14

2.	Year wise and mine wise details of declared stocks along with summary in respect of leases 2160, 2296 and 2296-SY for FYs 2011-12, 2012-13 and 2013-14.	15
3.	Copy of VAT- 140 return for FY 201112 for ML 2160, ML 2296, ML 2296-SY.	16
4.	Copy of VAT-140 return for FY 201314for ML 2160, ML 2296, ML 2296-SY.	17
5.	Copies of Ledger Account, Journal entry and P & L Account for the FY 2014-15.	18
6.	Copies of Ledger Account, Journal entry and P & L Account for the FY 2015-16	19
7.	Copy of the letter issued by the Monitoring Committee intimating the refund of Rs.1,21,94,000/-, dated 16.10.2018.	20
8.	Copies of Ledger Account for the FY 2018-19 for Rs.1,21,94,000/-.	21
9.	Copies of the letters dated 23.07.2012 and dated 27.11.2012 issued by the Learned Deputy Commissioner, Bellary (sample letter) towards contribution to educational activities.	22
10.	Copy of the Assessment order passed under section 143(3), dated 06.05.2014 for FY 2011-12.	23
11.	Copies of Original and revised Financials, Original and revised return of income (Acknowledgment) for the FY 2011-12.	24
12.	Statement of reconciliation between the original and revised return for the FY 2011-12	25

13.	Copy of relevant extract of CEC Report, dated 03.02.2012, wherein Mining Lease No. 2296 is classified as Category A and Mining Lease No. 2160 is classified as Category B.	26

2.1. In support of filing additional evidence at this stage, Ld.Counsel submitted that, these documents are revised working prepared on the basis of various payment advises received from monitoring committee in subsequent years which are already on record. He submitted that, some of the documents though do not refer to relevant assessment year, but would be helpful in understanding overall reconciliation in relation to the mines held by assessee for each preceding and subsequent assessment years. He also submitted that, some of the documents/letters from government was inadvertently missed out to be filed before authorities below, in support of contention regarding certain compulsive payments made by assessee, and some others were part of assessment records for immediately preceding assessment year. He also submitted that, assessee received certain refund, which was subsequent to the completion of assessment proceedings for year under consideration and therefore would be relevant to decide various claims of assessee. He thus submitted that, these documents would be relevant to ascertain revenue recognition by assessee on receipt basis in subsequent assessment years.

2.2. On the contrary, Ld.CIT.DR vehemently opposed admission of additional evidence. It was submitted that, assessee did not

produce most of the documents, though it was in possession during assessment proceedings and even before first Appellate Authority. He thus submitted that, neither Ld.AO nor Ld.CIT(A), had opportunity to verify the same. Reliance was placed on following decisions, opposing admission of additional evidence filed by assessee at this stage:

1. *Rishi Sagar vs ITO (2013) 36 Taxmann.com 508 (Chandigarh-Trib) Affirmed by P&H High Court- (2017) 88 Taxmann.com 600*
2. *Jawahar Lal Jain (HUF) vs CIT (2015) 59 Taxmann.com 374 (P&H)*
3. *Kanniappan Murugadoss Vs. ITO (2017) 79 Taxmann.com 244 (Chennai-Trib)*

Alternatively, it was submitted that, in the event this *Tribunal* intends to admit additional evidences, the same may be remanded to Ld.AO for examination/verification.

2.3. We have perused arguments advanced by both sides in light of records placed before us. We also refer to decisions relied by Ld.CIT DR.

2.3.1. As can be seen from "Index to Additional Evidence" reproduced herein above, certain documents are reconciliations of total stock sold and sale proceeds received by CEC/MC. Certain documents are VAT returns filed by MC on behalf of assessee in respect of value of goods sold for period 01/04/11 to 31/03/13. Assessee has filed ledger accounts and P&L statement for preceding and subsequent years. We note that, there are certain documents, wherein, MC issued refund to assessee. We note that Annexure R -9 and R-10 gives details of illegal mining pit, illegal dump an area of

illegal approached road as per survey conducted by CEC dated 03.12.2012.

2.3.2. Placing reliance on decisions reproduced hereinabove, LD.CIT.DR opposed admission of additional evidence, on the premise that all these documents were available with assessee, at the time of assessment proceedings and not produced before Ld.AO.

2.3.3. We have perused decisions relied by Ld.CIT.DR. We are of opinion that, they cannot be applied to present facts. In case of *Kanniappan Murugadoss vs. ITO (supra),* issue was in respect of cash deposits, and assessing officer therein doubted that documents were fabricated when subsequently produced.

In case of *Rishi Sagar vs. ITO (supra),* assessee neither responded to any notices issued, nor did establish reasonable cause for not appearing before assessing officer. It was under these circumstances that this *Tribunal* held that, additional evidence could not be accepted.

In case of *Jawahar Lal Jain (HUF) vs. CIT*, case was of penalty levied under section 271(1) (c) wherein, *Hon'ble High Court* held that, additional evidences were filed by assessee, six years after assessment and assessee did not substantiate delay with a reasonable cause.

2.3.4. On careful reading of decisions relied on by Ld.CIT DR, it is clear that facts in each case, are different. In these decisions, additional evidences were in support of new set of facts, and therefore not admitted.

2.3.5. *Per contra*, in present case before us, additional evidences filed relate to facts, that are considered by authorities below. We note that except for ledger accounts, all other documents were there on public domain. Ledger accounts filed for preceding and succeeding assessments years, cannot be considered as new documents as these are available in assessment records for relevant year. No prejudice will be caused to Revenue, if these documents are admitted. Accordingly we do not find necessary to remit the appeal back to Ld.AO for consideration. As we analyse these documents, we observe that details emanating there from, would be of assistance in deciding certain grounds before us.

We therefore admitted additional evidences filed by assessee.

3. At this stage it is necessary to discuss about the background that led to scrutiny of mining operations carried out by various mine lessees.

3.1. Background:

Hereinafter,

- Monitoring Committee, shall be referred as MC
- Central Empowered Committee shall be referred as CEC
- Special Purpose Vehicle shall be referred as SPV, and
- Reclamation and Rehabilitation Plans shall be referred as R&R Plans

3.2. Over exploitation or rampant mining in the state of Karnataka particularly in this district of Bellary, was looked into by state Government from time to time. Not satisfied with the investigation

carried in the state of Karnataka, a NGO being M/s. Samaj Parivartana Samudaya instituted a writ petition before the *Hon'ble Supreme Court*, seeking intervention in the matter and prayed for certain reliefs. *Hon'ble Supreme Court* in following decisions on mining activity observed as under;

- *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 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 pursuance to plea raised by Association of Steel Industry and other affected parties. *Hon'ble Supreme Court* therefore constituted a joint team by order dated 06/05/2011 to determine the boundaries of approved mining leases in the areas of Tumkur and Chitradurga districts.
- On 23/09/2011 *Hon'ble Apex Court* was appraised with 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', based on the extent of encroachment in respect of mining pits and overburden dumps determined in terms of percentage qua the total lease area. The Report indicated large-scale encroachment into forest areas by leaseholders and mining operations in such areas without requisite statutory approval and clearances. The report also suggested conditions subject to which reopening of the mines and resuming mining operations could be considered by the court.

3.3. The report by CEC 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.

3.4. Based on CEC report dated 03/02/2012, *Hon'ble Supreme Court* in case of *Samaj Parivartana Samudaya vs State of Karnataka, reported in (2013) 8 SCC 222* observed in para 5.1 at page 223 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."

In aforesaid para, *Hon'ble 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.

3.5. *Hon'ble Supreme Court* in case of *Samaj Parivartana Samudaya vs State of Karnataka, (supra)* in para 51 at page 194, observed that, IA Nos.74 & 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 Supreme Court* in case of *Samaj Parivartana Samudaya vs State of Karnataka, (supra)* noted that, only caveat was in regard to Category 'C' mines.

3.6. *Hon'ble Supreme Court* in case of *Samaj Parivartana Samudaya vs State of Karnataka, (supra)* categorically expressed its opinion in respect of Category 'C' in para 55 at page 196 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."*

Hon'ble Supreme Court approved sale of iron ore through e-auction and it was held that the e-auctioned shall be conducted by MC/CEC constituted by *Hon'ble Supreme Court. Hon'ble Supreme*

Court held that the quantity to be put for e-auction, its grade, lot sizes, its base/floor price and the period of delivery will be decided/provided by the respective leaseholders. It was also held that the MC may permit the leaseholders to put up for e-auction the quantities of iron or land to be produced in subsequent months. *Hon'ble Supreme Court* also decided on the financial impact that shall be paid by the concerned leaseholder is from the sale proceeds realised by MC.

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.

Hon'ble Apex Court in case of *Samaj Parivartana Samudaya vs State of Karnataka, (supra)* upheld recommendations of CEC with regard to;-

1. Categorization- CEC categorised the mines into, 'A', 'B', & 'C'

   Category A comprised of:

   (a) working leases wherein no illegality/marginal illegality were found and;

   (b) non-working leases wherein no/marginal illegality's were found.

   Category 'B' comprised of:

   (a) mining leases wherein illegal mining by way of:-

   (i) mining pits outside the sanctioned lease areas have been found to be up to 10% of lease areas, and/or;

   (ii) overburden/waste dumps outside the sanctioned lease areas were found up to 15% of lease areas and

(b) leases falling on interstate boundary between Karnataka and Andhra Pradesh and for which survey sketches have not been finalised.

(c) an estimated cost of R&R plans. For this purpose guarantee money for implementation of R&R plans was to be collected from the lessee's.

(d) Compensation under R&R Plan 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,

(e) Compensation under R&R plan 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.,

Category B lessees deposited guarantee money for implementation of R&R plans in the respective sanctioned lease areas. It was also directed that on full implementation of R&R plans to the complete satisfaction of CEC and subject to the approval by *Hon'ble Supreme Court*, guarantee money would be refundable to the leaseholders. It was also held that the lessees shall be liable to pay additional amount, if the R and R plan expenditure exceeded the estimates.

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

Category 'C' comprised of leases:

(a) the illegal mining by way of;-

(i) mining pits outside the sanctioned lease areas have been found to be more than 10% of the lease area, and/or;

(ii) overburden/waste dumps outside the sanctioned lease areas were found to be more than 15% of lease areas and/or;

(iii) the leases were found to be involved in flagrant violation of Forest (conservation) act and/or;

(iv) found to be involved in illegal mining and other lease areas.

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.

- Such leases were cancelled/determined on account of lease having been found to be involved in substantial illegal mining outside the sanctioned lease areas.
- The entire sale proceeds and existing stock of the iron ore of such leases were to be retained by the MC. And;
- The implementation of R&R plans should be at the cost of the lessee's

With above understanding of directions by *Hon'ble Supreme Court*, we shall advert to the facts in present case.

5. In the present facts of case assessee holds lease under Category 'A' and 'B'.

Ld.Counsel submitted that, assessee holds two mining licenses, in:-

1. Mining Lease no.2296, located at RAMANMALAI IRON ORE MINES, classified under Category 'A'. and;
2. Mining Lease no.2160 located at DHARMAPURI IRON ORE MINES, classified under Category B".

Brief facts of the case are as under:

5.1. Assessee is a partnership firm engaged in the business of extraction and trading of iron ore. For year under consideration, assessee filed its return of income on 26/09/2013 declaring total income of Rs.95,60,74,150/-. Assessee, thereafter revised its return

of income on 08/12/2014 by declaring revenue from mining business of Rs.95,60,74,150/-. The case was selected for scrutiny and notice under section 143(2) on the basis of revised return filed on 08/12/2014 was issued to assessee. Subsequently questionnaire along with notice under section 142(1) was also issued.

5.2. In the original return of income, assessee declared sale of iron ore at Rs.194,66,44,172/- in the revised return of income, assessee declared net sale of iron note at Rs.98,37,98,110/-. Difference in the 2 returns is because, assessee in the original return had claimed expenditure of Rs.77,71,82,153/- the details of which are as under:

Particulars	**Amount**
Sale proceeds of declared stock received in subsequent assessment years and offered to tax	25,59,99,429/-
Sale proceeds of undeclared stock	24,64,49,012/-
10% sale proceeds to the SPV-Category A	13,10,94,826/-
15% sale proceeds to the SPV-Category B	3,18,41,886/-
Compensation-category B	9,69,00,000/-
Probable expenditure for R&R retained/deducted by monitoring committee-Category B	1,48,97,000/-
Total	**77,71,82,153/-**

5.3. In the revised return filed by assessee, amount of Rs.77,71,82,153/- was reduced by assessee from sale proceeds itself on the ground that the above said amount did not accrue in

the hands of assessee as the same was retained by MC out of the sale proceeds of iron ore as per the directions of *Hon'ble Supreme Court* in case of *Samaj Parivartana Samudaya vs State of Karnataka, (supra).*

5.4. Ld.AO called upon assessee to file various details in respect of the expenditure claimed by assessee. In response, representative of assessee appeared before Ld.AO, and filed various details like; annual stock statement submitted to the Department of Mines and Geology for year under consideration, basis of valuation of closing stock, copy of bank account statements, confirmation from bank authorities about fixed deposits, reasons for filing revised return of income, details of property wise rent received with copy of lease deed and taxes paid thereon, details of unsecured loans and sundry creditors with confirmation etc. Assessee also filed details of deduction made by MC with write-up on the said expenditure, Ledger account extracts of over loading receipts, copies of partnership deed with return of income of partners, statement of reconciliation of stock during year under consideration.

5.5. Ld.AO verified details filed by assessee, in consonance with materials on record. Ld.AO noted that, assessee followed mercantile system of accounting. Ld.AO noted that, sale proceeds from declared and undeclared stock has been omitted to be offered for taxation during the year. Assessee submitted that since the receipt was highly uncertain, recognition of income was done on receipt basis. Ld.AO, after considering various submissions advanced by

assessee, passed assessment order dated 24/02/2016 by making addition of Rs.77,71,82,153/-.

5.6. Ld.AO also made disallowance of expenditure amounting to Rs.31,27,668/- incurred towards CSR and treating sum of Rs.21,62,803/- as unaccounted receipts as per 26 AS.

5.7. Aggrieved by order of Ld.AO, assessee preferred appeal before Ld.CIT (A), who upheld observations and additions made by Ld.AO in the hands of assessee.

5.8. Aggrieved by order of Ld.CIT (A), assessee is in appeal before us now.

We shall deal with observations by Ld.AO/Ld.CIT(A) while considering the grounds alleged by assessee against the disallowances made.

Ld.Counsel submitted that, **Ground No.1** is general in nature and therefore do not require adjudication.

6. Ground No.2 and its sub grounds are regarding disallowance Rs.77,71,82,151/-. Ld.Counsel submitted that each disallowance has been challenged independently by assessee in Grounds 2.1-2.5 which shall be dealt with independently as under.

6.1.<u>Ground No. 2.1& 2.2</u>

These grounds raised by assessee are against addition of sale proceeds of declared stock amounting to Rs.25,59,99,429/- and undeclared stock amounting to Rs.24,64,49,021/-.

Ld.AO observed that, sum of Rs.50,24,48,441/-(Rs.25,59,99,429/- + Rs.24,64,49,021/-), (being sale proceeds of declared and

undeclared stock), was omitted to be offered to tax for year under consideration. Placing reliance on monthly IBM(Indian Bureau of Mines) Return in respect of both Mining placed at pages 184-193 of paper book, Ld.Counsel submitted that MC calculated payment disbursable to assessee, based on stock declared in IBM returns, details of which is placed at page 198-201 of paper book. Sale proceeds of stock as per IBM returns were considered by MC as declared. Sale proceeds of stock not considered in IBM return were treated as undeclared stock by MC and transferred in entirety to SPV.

6.3. Sale of declared stock

During the year under consideration Ld.AO noticed that, MC sold iron ore belonging to assessee through E auction out of the declared stock. The sale proceeds of such declared stock was to the tune of Rs.25,52,89,418/-.

Ld.AO during assessment proceedings, called upon assessee to explain, as to why, such sale proceeds was omitted to be offered to tax, being the year of sale, relevant to assessment year under consideration. Assessee in response, submitted that, though it followed mercantile system of accounting, did not offer said sum, since receipt of the same was highly uncertain. Assessee submitted that, revenue was recognised by assessee only on receipt basis, as per AS-9 issued by ICAI. It was submitted that, since there was uncertainty about collection of said revenue, recognition of such revenue was postponed to the extent of uncertainty involved, which

was in accordance with theory of taxing only real income. It was submitted that, essential criteria for recognition of revenue is, consideration receivable from sale of goods should be reasonably determined, and since the consideration was not determinable within reasonable limits, recognition of revenue was postponed. Assessee, referred to ICDS-IV notified by Central Government for purpose of computation of income chargeable to Income tax under the head "profits and gains of business or profession". It was submitted that, MC had complete control and command over declared stock. It was also submitted that MC had sole discretion to sell the stock. It was submitted that sale proceeds were to be received by MC from the buyers. Assessee submitted that, MC after making necessary deductions would disburse balance sale proceeds to assessee. Assessee submitted before Ld.AO that, it did not have any control over the value and time of receipt of sale proceeds. It was thus contended before Ld.AO that, the amount of Rs. 25,52,89,418/- did not accrue to assessee, and therefore the same was not offered to tax during the year under consideration.

6.3.1. Assessee also submitted before Ld.AO that sum of Rs.25,52,89,418/- was received by assessee in subsequent years, and assessee offered the same to tax in assessment years being 2014-15 and 2016-17. Assessee also placed before Ld.AO, return of income and statement of computation of income for assessment years 2014-15 and 2015-16. Ld.AO observed that assessee was maintaining accounts on Mercantile system and hence the above

said amount of Rs.25,52,89,418/-, should have been recognised as income by assessee for year under consideration. The Ld.AO noticed that *Hon'ble Supreme Court* directed CEC to sell the stock on behalf of assessee and to retain the sale proceeds on account of assessee/leaseholder. CEC was authorised to deduct towards SPV contribution, estimated cost for R&R plans and compensation for illegal mining and illegal dumping and to return the balance sale proceeds to assessee.

6.3.2. Ld.AO accordingly held that, there was no uncertainty of receipt of sale proceeds of the e-auctioned iron ore by the MC.

6.4. Sale of undeclared stock:

Ld.AO noticed that MC sold stock to the tune of Rs.24,64,49,012/- during the year under consideration on behalf of assessee. It was also noticed by Ld.AO that assessee had not declared the same as its income in the original return, and it was claimed as expenditure in the revised return of income. Ld.AO noticed that, the said amount was excluded from the sales revenue itself. It was submitted by assessee that the same did not accrue, as the same was diverted to SPV by MC.

Assessee submitted that such stock sold by MC was not recognised by it in its books and was over and above the stock declared in IBM return. Assessee submitted that, such stock related to accumulated waste/debris, which was not recognised as saleable. It was submitted that, MC excavated such stock from accumulated dump, after suspension of mining activity, which was over and above stock

declared in IBM return filed by assessee. Such stock was treated as undeclared by MC in payment advises, and therefore the sale proceeds arising from sale of such stock does not belong to assessee. Assessee submitted that sale proceeds were never transferred to assessee of such undeclared stock, and the same was contributed to SPV.

6.4.1. Ld.AO therefore treated sale proceeds from such undeclared stock as income in the hands of assessee for year under consideration.

6.5. Revenue Recognition:

Ld.AO observed that MC sold iron ore of assessee by E auction to the extent of Rs.50,24,48,441/- during financial year relevant to assessment year under consideration. The Ld.AO noted that, in profit and loss account, assessee claimed sum of Rs.50,24,48,441/- as expenditure. Ld.AO rejected recognition of revenue on receipt basis, as assessee followed mercantile system of accounting. Ld.AO referred to para 9 of decision of *Hon'ble Supreme Court* in case of *Samaj Parivartana Samudaya vs State of Karnataka, (supra)* wherein *Hon'ble Court* directed CEC/MC to pay to concerned leaseholder balance amount after adjusting contributions under various heads towards SPV for implementation of R & R plan etc. Ld.AO was of the opinion that, there was no uncertainty and nowhere there was any suspense of receipt of sale proceeds of such E- auction of iron ore from MC. Therefore, as per mercantile system of accounting, right to receive such amount accrued to assessee

during the year under consideration which, cannot be diverted to subsequent assessment years. Ld.AO observed that, details of E-auction sale by MC, was in the knowledge of assessee, and assessee was well aware of receipt of sale proceeds, which should have been accounted in books of account, in the year of sale itself(year under consideration), without postponing it till date of actual receipt of proceeds. Ld.AO thus held that, assessee acquired right to receive sale proceeds during the year under consideration, and therefore has to be considered as income for year under consideration.

6.6. Ld.AO thus observed and held as under:

> ***"4.1. UNACCOUNTED SALE PROCEEDS OF -***
> ***i) DECLARED STOCKS - RS.25,59,99,429/- &***
> ***ii) UN-DECLARED STOCKS - RS.24,64,49,012/-***
> *On going through the above table of this order, at Sl.No.1 & 2 of the said table it is noticed that the assessee firm has debited an amount of Rs.25,59,99,429/- under the head Sale proceeds of declared stocks received in subsequent assessment years offered to tax and Rs.24,64,49,012/- under the head Sale proceeds of un-declare stocks - yet to be received. During the course of scrutiny proceedings, the assessee firm was requested to explain as to why the e-auctioned sale proceeds during the year of Rs.50,24,48,441/- (Rs.25,59,99,429/- + Rs.24,64,49,012/-) has been omitted to be offered to tax during the year of sale relevant to the Asst. Year under question.*
> *4.1.a In response, the assessee firm had filed the objections at Para No.12 of letter dated: 21/01/2016 filed in this office on the same date, wherein, it has stated under : Relevant portion of the letter is extracted below:*
> *"12. As regards sale proceeds of declared stocks and un-declared stocks:*
> *1) It is submitted that the Assessee did not offer to tax sale proceeds of Rs.28,55,04,732/- relating to declared stocks and sale proceeds of Rs.24,64,49,012/- relating to un-declared stocks during the impugned assessment year for the reason that receipt of the same was highly uncertain.*

2) It is submitted that in the instant case, Assessee is following mercantile system of accounting. In mercantile system, income is to be charged on accrual basis.
Income is said to be accrued when there is a reasonable certainty of receiving such income. When the same cannot be determined with reasonable certainty, the recognition of such income should be postponed.
3) In this regard a reference may be made to Accounting Standard - 9 i.e. Revenue Recognition. The relevant extract of the same reads as under.'
"9. Effect of Uncertainties on Revenue Recognition
9.1 Recognition of revenue requires that revenue is measurable and that at the time of sale or the rendering of the service it would not be unreasonable to expect ultimate collection.
9.2 Where the ability to assess the ultimate collection with reasonable certainty is lacking at the time of raising any claim, e.g., for escalation of price, export incentives, interest etc., revenue recognition is postponed to the extent of uncertainty involved. In such cases, it may be appropriate to recognise revenue only when it is reasonably certain that the ultimate collection will be made. Where there is no uncertainty as to ultimate collection, revenue is recognised at the time of sale or rendering of service even though payments are made by installments.
9.3 When the uncertainty relating to collectability arises subsequent to the time of sale or the rendering of the service, it is more appropriate to make a separate provision to reflect the uncertainty rather than to adjust the amount of revenue originally recorded.
9.4 An essential criterion for the recognition of revenue is that the consideration receivable for the sale of goods, the rendering of services or from the use by others of enterprise resources is reasonably determinable. When such consideration is not determinable within reasonable limits, the recognition of revenue is postponed.
9.5 When recognition of revenue is postponed due to the effect of uncertainties, it is considered as revenue of the period in which it is properly recognised."
4) A reference may also be made to Income Computation and Disclosure Standards (JCDS) - IV notified by the Central Government for the purposes of computation of income chargeable to income-tax under the head "Profit and gains of business or profession ". The relevant extract of ICDS —IV reads as under: "4. Revenue shall be recognised when there is reasonable certainty of its ultimate collection.
5. Where the ability to assess the ultimate collection with reasonable certainty is lacking at the time of raising any claim for escalation of price and export incentives, revenue recognition in respect of such claim shall be postponed to the extent of uncertainty involved."

5) Thus, from the perusal of Accounting Standard 9 and JCDS - IV, it is submitted that, the revenue has to be recognised when there is a reasonable certainty of its ultimate collection. If the ability to assess the ultimate collection with reasonable certainty is lacking, then the revenue recognition shall be postponed to the extent of uncertainty involved.

6) In the instant case, the MC had complete control and command over declared and undeclared stocks. As submitted above, it was the sole discretion of MC to decide to whom the aforesaid stocks have to be sold. The sale proceeds of the said stocks are received by MC from the respective buyers. MC, after making necessary deductions gives the balance sale proceeds to Assessee. In this entire process, Assessee has no control over the value and time of receipt of the sale proceeds.

7) Thus, it is submitted that as the amount of Rs. 28,55,04, 732/- and Rs. 24,64,49,0121-, did not accrue to the Assessee, there is no question of any liability of the same to tax during the impugned assessment years.

8) In the case of in State Bank of Travancore v. CIT [1986] 158 ITR 102 / 24 Taxman 337 (SC), the Honourable Supreme Court held as under:

"In determining the question whether it is hypothetical income or whether real income has materialised or not, various factors will have to be taken into account. It would be difficult and improper to extend the concept of real income to all cases depending upon the ipse dixit of the assessee which would then become a value judgment only. What has really accrued to the assessee has to be found out and what has accrued must be considered from the point of view of real income taking the probability or improbability of realisation in a realistic manner and dovetailing of these factors together but once the accrual takes place, on the conduct of the parties subsequent to the year of closing, an income which has accrued cannot be made 'no income'

9) In the case of United Nilagiri Tea Estates Co. v. Dy. CIT [2012] 210 Taxman 62 (Madras), the Honourable Madras High Court has held as under:

> *"8. In the background of the law thus laid down, what is to be looked at to test the real income that might be taken for working out an assessment for an assessee following the mercantile system of account is, the chances or probabilities of realisation in a realistic manner to hold that there was a real accrual of income to the assessee company."*

10) In the case of CIT v. Annamalai Finance Ltd. [2009] 319 ITR 1961[2010] 186 Taxman 296 (Mad.), the Honourable Madras High Court has held as under: "5. The recognition of revenue on accrual basis presupposes the satisfaction of two conditions viz., the revenue is measurable and that the revenue is collectable without any uncertainty.

11) Without prejudice to the above, it is submitted that amount of Rs.28,55,04,732/- has been received by the Assessee in the subsequent

years and the Assessee has accordingly offered the same to tax in the subsequent assessment years 2014-2015 & 2015-2016. Copy of the return of income and statement of computation of total income of the assessment years 2014-2015 & 2015-2016 is enclosed herewith as Annexure 1. Therefore, the question of taxing the some in impugned assessment year does not arise."

4.1.b. From the above submission it is evident and fact that, the Monitoring Committee has sold the iron ore of the assessee firm through e-auction to the extent of Rs.50,24,48,441/- during the F.Y-2012-13 relevant to Asst. Year-2013-14, out of which Rs.25,59,99,429/- is received in the subsequent Asst. Years - 2014-15 & 2015-16 and Rs.24,64,49,C12/- is yet to be received. Whereas, these E-auctioned sale proceeds of Rs.50,24,48,441/- have been claimed as expenditure by the assessee firm and debited to P & L Ale. However, the said sales proceeds of Rs.50,24,48,441/- is to be assessed as income on accrual basis in view of the accounting method (i.e. Mercantile System) followed by the assessee firm.

4.1.c. The submissions/explanations filed and judicial decisions relied on by the assessee firm have been gone through in detail. The contention of the assessee firm that, the Sale proceeds will be accounted and offered to tax as and when realised cannot be accepted and further, the judicial decisions relied on by the assessee firm have no direct nexus with the facts of the instant case as the Hon'ble Apex Court in its order dated: 18/04/2014 in WRIT PETITION (CIVIL) NO. 562 of 2009, referred above (in para.9) - Order that, the CEC was allowed to sell the stock on behalf of the assessee and to retain the sales proceeds on account of the assessee/leaseholder and the CEC was authorized to deduct the assessee's compensatory and penal liabilities out of such sales proceeds and to return the balance proceeds to the assessee - Here it needs to be clarified that the CEC/Monitoring Committee is holding the sale proceeds of the iron ores of the lease holders, including the 63 leaseholds being the subject of this order. In case, the money held by the CEC/Monitoring Committee on the account of any leaseholder is sufficient to cover the payments under the aforesaid three heads, the leaseholder may, in writing, authorize the CEC to deduct from the sale proceeds on its account the amounts under the aforesaid three heads and an undertaking to make payment of any additional amount as compensatory payment. On submission of such authorization and undertaking, the CEC shall retain the amounts covering the aforesaid three heads and pay to the concerned leaseholder the balance amount, if any. It is expected that the balance amount, after making the adjustments as indicated here, would be paid to the concerned leaseholder within one month from the date of submission of the authorization and the undertaking. In the case of any leaseholder, if

the money held on his account is not sufficient to cover the aforesaid three heads, he must pay the deficit within two months from today.

4.1.d. It is clear from the plain reading of the said order that there is nowhere suspense or uncertainty of Sales Proceeds of the said E-Auctioned Iron-ore from the Monitoring Committee, whereas, in all the above judicial decisions relied on by the assessee firm, there was uncertainty of receipt of money, hence, the said cases relied on by the assessee firm cannot be accepted as the facts of cases differ from the instant case. Hence, the assessee's implicit plea that, even though sales had occurred in the relevant years, no income can be said to have accrued to the firm in the relevant year and/or since, the sales proceeds are retained by the CEC and therefore, the said sales proceeds will be offered to tax in the year of realisation also cannot be accepted.

As there are only two recognized methods of accounting namely the Cash Method of Accounting and the Mercantile Method of Accounting. In Mercantile method of accounting, entries are posted in the books of account on the date of transaction when the rights accrue or liabilities are incurred, irrespective of the date of payment. / receipt. The right to receive the said retained amount has accrued to the assessee firm and it cannot be diverted on the plea contrary to the accounting practice. Since the assessee firm is following accrual method of accounting, a part of receipt cannot be taken on piecemeal / receipt basis. Hence, the assessee's contention that the said amount is not liable to tax since the said amount was not actually received from the CEC/Monitoring Committee during the financial year, cannot be accepted.

4.1.e. Thus, the E-Auction sales took place on behalf of the assessee firm and the money was received from the purchaser of Iron-ore by the CEC/Monitoring Committee on account of the assessee firm. Hence, the assessee firm was required to reflect these Sales as Trading Receipts in its Books of Account keeping in view the mercantile system of accounting followed by the assessee firm and disclose the same in its return of income filed for the A.Y- 2013-14 being the Asst. Year under question without claiming the said amount as deduction in the P & L A/c.

4.1.f Further, the details of e-auction sale are available on public domain hoisted / posted by Monitoring Committee. Similarly, the Monitoring Committee also e-auctioned material with the consent of the Mine Owners and issued a sale order for lifting the material from the mines of concerned Mine Owner. From this, it is evident that the assessee was well aware of the e-auction sales and should have accounted the same in its books of accounts in the year of sale itself without postponing the same till the date of receipt of proceeds. Income may accrue to an assessee without actual receipt of the same. If the assessee acquires a right to receive the income, the income can be said to have accrued to him though it may be received

later, on its being ascertained - CIT v. Shri Goverdhan Ltd. (1968) 69 ITR 675 (SC) / CIT v. Nandram Hunatram (1976) 103 ITR 433 (On). Receipt is not the only test of chargeability to tax, if income arises or accrues, it may become liable to tax - CIT v. Ashokbhai Chimanbhai (1965) 56 ITR 42 (SC) / CIT v. A.B.V Gowda (1986) 157 ITR 697 (Kar). Each year being a self contained unit, taxes of particular year is payable with reference to the income of that year as computed in terms of the Act - CIT Vs. British Paints India Ltd. (SC) 188 ITR 44. Accordingly, a sum equivalent to e-auction sale proceeds accrued / arised to the assessee for the financial year ending 31/03/2013 should be assessed in the relevant assessment year which is under consideration Hence, the entire E-auction sales proceeds of Rs.50,24,48,441/- (Rs.25,59,99,429/- + Rs.24,64,49,012/-) claimed as expenditure / deduction are added back to the income returned and brought to tax.

Ld.AO thus added sale proceeds amounting to Rs.50,24,48,441/in the hands of assessee for year under consideration.

Aggrieved by order of Ld.AO, assessee preferred appeal before Ld.CIT(A).

6.7. Ld.CIT(A) observed and held as under:

3.1.) *The assessee submitted that though it followed Mercantile system of accounting it did not offer the above amount of Rs.50,24,48,441/- as receipt of the same was highly uncertain and recognition of income was to be done only on receipt basis and relied on Accounting Standard-9 that is revenue recognition. It was submitted that as per Accounting Standard-9 (A S9) issued by ICAI, where there is an uncertainty about the collection of income/revenue, recognition of such income/revenue is to be postponed to the extent of uncertainty involved, which is also in accordance with the theory of taxing only the real income, which is a settled law as per various judicial proceedings. The AO however did not accept the contention of the assessee that the sale proceeds would be accounted and offered to tax as and when it was realised.*

*"**3.2.)** I have gone through the facts of the case and the submissions of the appellant. The contention of the appellant that did its income was highly uncertain is not accepted for the following reasons:*

"The CEC was allowed to sell the stock on behalf of the assessee and to read in the sale proceeds on account of the assessee/leaseholder and the CEC was authorised to deduct the assessee is compensatory and penal liabilities out of such sale proceeds and to return the balance proceeds to the assessee. The CEC is/Monitoring Committee is holding

the sale proceeds of the iron ores of the leaseholders. In case, the money held by the CEC/Monitoring Committee on the account of any leaseholder is sufficient to cover the payments under the 3 heads, the lease holder may, in writing, authorise the 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, the CEC shall retain the amounts covering the aforesaid 3 heads and pay to the concerned leaseholder the balance amount, if any. It is expected that the balance amount, after making the adjustment as indicated here, would be paid to the concerned leaseholder is within one month from the date of submission of the authorisation and the undertaking. In the case of any leaseholder, if the money held on this account is not sufficient to cover the aforesaid 3 heads, he must pay the deficit within 2 months from today".

Thus, as could be seen from the above, no where there is either suspense or uncertainty of receipt of sale proceeds of the said E-auctioned Iron Ore from the Monitoring Committee. As the assessee was maintaining mercantile system of accounting, it is bound to offer the same in the year of a curable. As the same has not been done, the AO was right in making the addition. This ground is thus dismissed."

Aggrieved by order of Ld.CIT(A), assessee is in appeal before us now.

6.8. Ld.Counsel before us placed his arguments under 2 categories:

A. Recognition of sale proceeds from declared stock, received by assessee in subsequent assessment years; and

B. Addition of sale proceeds of undeclared stock in the hands of assessee, which was not disbursed by MC.

A. <u>Recognition of sale proceeds from declared stock received by assessee</u>

Ld.Counsel impugned sale proceeds from sale of declared stock were accounted by assessee in subsequent assessment years, when it was received. He submitted that, *Hon'ble Supreme Court* in case of *Samaj Parivartana Samudaya vs State of Karnataka, (supra)* authorised MC to take control of stock, and sell the same through

E-auction, depending on demand in the market. Subsequently, sale proceeds received by MC are to be deposited in nationalised bank account, after adjusting towards royalty, taxes and expenditure. Ld.Counsel submitted that, in instant case, right and control over stock was with MC, and till such time MC parts with sale proceeds, assessee had no right to receive the same. He submitted that, sale of stock by MC cannot be regarded as sale of stock by assessee. He submitted that assessee thus accounted the sale proceeds from declared stock in subsequent assessment year, when it was actually received.

A.1. Ld.Counsel submitted that, though assessee followed mercantile system of accounting, revenue on sale proceeds of stock by MC, could be recognised and assessed to tax only on actual receipt, as assessee did not possess right to receive such income during the year under consideration. He submitted that, MC could not be considered as agent of assessee as there was no agreement between assessee and MC, for principle agent relationship to exist. Ld.Counsel submitted that, MC was acting in accordance with direction of *Hon'ble Supreme Court* vis-à-vis assessee. He also submitted that, assessee had not appointed MC to act on its behalf in order to constitute an 'Agent' under section 182 of Indian Contract Act, 1872. He thus submitted that, it is settled rule that, contract is not assignable without consent of both parties thereto, where, personal acts and qualities of one of the parties, form material and ingredient part of the contract.

A.2. Ld.Counsel argued that, revenue from declared stock was not recognised during the year under consideration due to existence of uncertainty in realisation of said amount. It has been submitted that, Section 5 of the Act, manifests that, an income can be said to have accrued, only when a person has legal right to receive such income, and its recognition is on such accrual, which is tempered by section 145 read with AS-9 of ICAI. Ld.Counsel submitted that, in order to charge an income to tax, it is necessary that such income should fall within the scope of total income, as defined under section 2(45) of the Act, and that, such income shall be charged to tax under section 5, if such income shall be received or deemed to have been received or accrue or arises or deemed to accrue or arise to a person in India, during the previous year. Ld.Counsel, thus submitted that, assessee had not derived any legal right to receive sale proceeds during previous year relevant to assessment year under consideration, and therefore, the sale proceeds cannot be construed as income in the hands of assessee for year under consideration.

A.3. Ld.Counsel submitted that, to constitute an 'income ', assessee should have absolute command, control and right of disposition of such receipts. He submitted that, in the present facts of the case, assessee has no control over the stock and sale proceeds, as sale was carried out by MC through E auction. He submitted that, revenue from sale of declared stock therefore was uncertain.

A.4. Ld.Counsel thus contended that, assessee had not acquire any right to receive income, in as much as, such right was dependent on MC disbursing such payments. He thus submitted that, sale proceeds therefore, had not received, or even deemed to have been received or accrued or arisen, or deemed to have arisen to assessee. It has been contended by Ld.Counsel that, necessary requirement under Section 5 of the Act, stands unsatisfied for recognising sale proceeds during year under consideration.

A.5. In support of his contentions he placed reliance upon following decisions:

- *ED.Sasoon & CO Ltd vs CIT reported in (1954) 26 ITR 27 (SC)*
- *CIT vs Balbir Singh Maini reported in (2017) 398 ITR 531 (SC)*
- *CIT vs Excel industries Ltd reported in (2013) 358 ITR 295*
- *Prakashan leasing Ltd vs DCIT reported in (2012) 208 Taxmann 464 (Kar)*

A.6. Ld.Counsel also relied on CBDT Notification No.9949 (F.NO.132/7/95-TPL)/SO 69(E), Dated 25/01/1996, superseded by Notification No.32/2015 (F.N.134/48/2010-TPL)/S0 892 (E), Dated 31/03/2015, regarding AS-I, relating to disclosure of accounting policies.

A.7. Ld.Counsel submitted that, disclosure standards applicable for computation of income chargeable to tax are to be considered for recognition of revenue, arising during relevant year. He submitted that, as per disclosure standards, revenue shall be recognised when there is reasonable uncertainty of its ultimate collection. Referring to AS 9, Ld.Counsel submitted that, recognition of revenue requires

that it is measurable, and that at the time of sale or rendering of services, it would not be unreasonable to expect ultimate collection. He relied on AS-9, paragraph 9.1 and 9.2, where ability to assess ultimate collection with reasonable uncertainty is lacking at the time of raising any claim. He thus submitted that revenue recognition is to be postponed to the extent of uncertainty involved. In such circumstances, it was appropriate to recognise such revenue, only when it is reasonably certain that ultimate collection will be made. He referred to decision of *Hon'ble Supreme Court* in case of *CIT vs Woodward Governor India Pvt.Ltd.,* reported in *(2009) 312 ITR 254*, wherein, *Hon'ble Court* held that, profits and gains of previous year are required to be computed in accordance with relevant accounting standard. Referring to decision of *Hon'ble Supreme Court* in case of *JK industries Ltd vs UOI*, reported in *(2008) 297 ITR 176*, Ld.Counsel submitted that, rules by which inventories are to be valued are laid down in accounting standards , and are to be followed in determination of accounting income mandatorily. He submitted that *Hon'ble Court* also held that;

> *"8. Finally, adoption of accounting standards and of accounting income as 'taxable income' would avoid distortion of accounting income which is the real income."*

A.8. He thus submitted that it is therefore appropriate to recognise revenue only when there is a reasonable certainty, that, ultimate realisation will be made. Ld.Counsel submitted that, there is no denial by authorities below that sale proceeds were received by

assessee in subsequent financial years i.e; financial year 2013-14 to 2015-16, has been offered to tax by assessee. Ld.Counsel also submitted that, assessee received following amount in subsequent financial years which has been offered to tax as and when they were received:

Particulars	**Amount**	**Offered to tax in FY**
Payment advice dated 8/02/2014	13,60,77,524/-	2013-14
Payment advice dated 2/05/2014	22,48,13,763/-	2014-15
Release of 10% material value retained by the MC	2,50,81,553/-	2015-16
Total	**38,59,72,840/-**	

A.9. Ld.Counsel submitted that, entire amount of Rs.38,59,72,840/- includes Rs.25,59,99,429/-being sale proceeds from declared stock considered by Ld.AO as income of assessee for year under consideration. Taking support from assessment order, referring to para 4.1.b.,Ld.Counsel submitted that, Ld.AO himself records that, sum of Rs.25,59,99,429/- received in subsequent assessment years being assessment years 2014-15 and 2015-16, was offered to tax, during relevant assessment year. He submitted that having noted the fact that revenue received from declared stock has been offered to tax in subsequent years, making addition during the year under consideration would amount to double taxation in the hands of assessee. It has been submitted by Ld.Counsel that, right to receive sale proceeds, accrued to assessee

by virtue of directions of *Hon'ble Supreme Court* by *order dated 18/04/2013 (supra)*, which was in succeeding financial year, relevant to year under consideration, and has also been offered to tax on receipt basis.

A.10. <u>Alternatively,</u> Ld.Counsel submitted that, entire exercise is revenue neutral as assessee is assessed at uniform rate of tax over the years.

A.10.1 Ld.Counsel submitted that, principle of matching between revenue receipt and expenditure to be incurred is to be applied. Reference was made to decision of *Hon'ble Supreme Court* in *CIT vs. Bilahari Investment (P) Ltd.* reported in *(2008) 299 ITR 1*, wherein referring to concept of matching *Hon'ble Court* observed that:

> *"82. Matching Concept is based on the accounting period concept. The paramount object of running a business is to earn profit. In order to ascertain the profit made by the business during a period, it is necessary that "revenues" of the period should be matched with the costs (expenses) of that period. In other words, income made by the business during a period can be measured only with the revenue earned during a period is compared with the expenditure incurred for earning that revenue. However, in cases of mergers and acquisitions, companies sometimes undertake to defer revenue expenditure over future years which brings in the concept of Deferred Tax Accounting. Therefore, today it cannot be said that the concept of accrual is limited to one year.*
> *83. It is a principle of recognizing costs (expenses) against revenues or against the relevant time period in order to determine the periodic income. This principle is an important component of accrual basis of accounting. As stated above, the object of AS 22 is to reconcile the matching principle with the Fair Valuation Principles. It may be noted that recognition, measurement and disclosure of various items of income, expenses, assets and liabilities is done only by Accounting Standards and not by provisions of the Companies Act."*

A.10.2 Ld.Counsel submitted that, Ld.AO in subsequent year has not undone levy of tax of such sale proceeds. It was also been

submitted that entire exercise is revenue neutral as applicable rate of tax remain the same in the relevant year and the subsequent years.

A.11. On the contrary, Ld.CIT.DR submitted that, assessee follows mercantile system of accounting. He submitted that as per mercantile system, income accrued to assessee in the year of sale. He submitted that right to receive sale proceeds, accrued to assessee by virtue of directions of *Hon'ble Supreme Court* in case of *Samaj Parivartana Samudaya vs State of Karnataka, (supra)*, though subsequently received. He submitted that, amount to be disbursed by MC was ascertained during relevant year, being 80% of total sale proceeds. Ld.Counsel further submitted that, assessee claimed Rs.50,24,48,441/- as expenditure being total of declared and undeclared stock in IBM returns, which in any event assessee could not do, had the sale not taken place. He submitted that, sale of stock was effectuated during the year under consideration, and entire sale proceeds were received by MC during financial year relevant to assessment year under consideration. Ld.CIT.DR submitted that, assessee had given undertaking for deducting Royalty and other expenses payable to MC from such sale proceeds and the net amount that was payable to assessee by MC, which was very well ascertainable during financial year relevant to year under consideration. He thus submitted that, assessee was well within the knowledge of amount that accrued from sale of stock. Ld.CIT.DR thus submitted that, assessee was required to reflect these sales as

trading receipts in the books of account in view of mercantile system consistently followed for disclosing income. Referring to observations of Ld.AO in para 4.1.d to 4.1.f, Ld.CIT.DR submitted that, auction of declared stock took place during the year under consideration, and assessee had right to receive 80% of total sale proceeds as on the date of sale by virtue of directions of *Hon'ble Supreme Court* in case of *Samaj Parivartana Samudaya vs State of Karnataka, (supra)*. Merely because MC disbursed payments in subsequent financial year, would not postpone revenue recognition in the hands of assessee to subsequent years. He vehemently opposed argument of Ld.Counsel that, income received by assessee was un-ascertainable and hypothetical. Ld.CIT.DR submitted that, accrual of income must be judged on 'Principle of real income theory', and that, what is necessary to be considered is the true nature of transaction. Ld.CIT.DR submitted that, what has really accrued to assessee has to be found out and what has accrued must be considered from the point of view of real income, taking the probability or improbability of realisation in a realistic manner. He also submitted that, merely because receipt takes place of such accrued income by conduct of parties in subsequent year, income which has accrued for year under consideration, cannot be made as 'no income'.

A.12. Ld.CIT.DR emphasised that, admittedly, in subsequent years, assessee received 80% of total sale proceeds from E auction carried out by MC. It has been contended that income has arisen/accrued

to assessee during the year under consideration, and therefore has been rightly taxed in the hands of assessee for year under consideration.

A.13. We have perused submissions advanced by both sides in light of records placed before us. We also have perused various decisions relied upon by Ld.Counsel referred to herein above, as well as in the paper book filed before.

A.13.1. The issue that arises before us, is in respect of accrual of sale proceeds from declared stock, during the year under consideration. Following is the summary of what has been proposed by Ld.Counsel.

A.13.2. Ld.Counsel opposed for treatment of sale proceeds from disclosed stock as income in the hands of assessee for year under consideration on the ground that, it never had the 'right to accrue', due to uncertainty of the amount. It was contended that in view of uncertinity, assessee need not account for the same even under mercantile system of accounting. It was submitted that sales revenue accrued to assessee only in the year in which payment advice was issued by MC.

A.13.3. 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 book keeping 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."

A.13.4. In *CIT vs Kerala State Drugs & Pharmaceuticals Ltd.*, reported in *(1991) 192 ITR 1*, *Hon'ble Kerala High Court* observed and held as under:

"In order to tax on income, one has to see whether it is the real income or whether the income has materialised. What is necessary to be considered is the true nature of the transaction and whether in fact the transaction has resulted in profit or loss to the assessee. Once accrual takes place and income accrues, the same cannot be defeated. Even under the mercantile system of accounting, it is only the accrual of real income which is chargeable to tax. The income should not be hypothetical income, but real income. If income is given up unilaterally by the assessee after it had accrued, it could not escape liability to tax. When income is in fact received but subsequently given up it remains the income of the recipient and taxes payable. When income is not resulted at all, there is neither accrual nor receipt of income even if there is an entry to that effect in the books of account. Mere postponing of an entry in the account books would not always supply conclusive evidence on the question whether the disputed amount has accrued to the assessee or not. Mere effort on the part of the assessee to realise the amount by sending a bill or making a claim or filing a suit for recovery would not in law make it an income which has accrued in the year in question. The transfer of the amount to the profit and loss account is bereft of any significance."

A.13.5. 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."*

From the above ratios laid down by *Hon'ble Supreme Court* and many *High Courts*, it could be construed that, accrual of income must be judged, depending facts and circumstances of each case.

A.13.6. It has been vehemently contended by Ld.Counsel that, assessee did not have right to accrue such income, since its receipt was hypothetical in the year of sale. And, though assessee followed mercantile system of accounting, it had to postponed its accrual to subsequent years, when sale proceed were actually received. It was submitted by assessee that, income did not materialise during the year under consideration. It was contended that in view of uncertainty, assessee need not account for the same even under mercantile system of accounting. It was submitted that sales revenue accrued to assessee only in the year in which payment advice was issued by MC.

A.13.7. The present facts of the case, we note that, total sale proceeds as on the date of sale by virtue of directions of *Hon'ble Supreme Court* in case of *Samaj Parivartana Samudaya vs State of*

Karnataka, (supra) approved sale of iron ore through e-auction conducted by MC. It is also observed that *Hon'ble Court* directed that, the quantity to be put for e-auction, its grade, lot sizes, its base/flow price and the period of delivery would be decided/provided by the respective leaseholders. It is also noted that, MC may permit the leaseholders to put up for e-auction the quantities of iron ore planned to be produced in subsequent months. Hence, we cannot agree that, assessee was unaware regarding total quantity of iron ore sold and total sale proceeds received towards total quantities sold during the year.

A.13.8. On perusal of documents placed on record, we are of the view that, assessee was aware of total quantity of iron ore sold and dispatched, total sale proceeds received towards total quantity sold during the year and value of stock that was not considered for release. This is evident from page 178, 180-181 of paper book, wherein, date of sale, for both mining leases and amount realised are placed. Under such circumstances, assessee cannot escape from incident of accrual of such income during financial year relevant to assessment year under consideration.

A.13.9. There is no dispute with regard to the fact that, declared stock belongs to assessee and assessee has to recognise revenue arising on sale of such stock. We have already noted that the role of MC was to carry out the e-auction of the stock and sell the stock on behalf of assessee as per the directions of total sale proceeds as on the date of sale by virtue of directions of *Hon'ble Supreme Court* in

case of *Samaj Parivartana Samudaya vs State of Karnataka, (supra).* Therefore, the risk in such stock stood transferred from assessee to the buyer as on the date of sale.

Further, assessee was vested with legal right to receive sale proceeds from stocks sold by MC. Therefore, income became due to assessee as on date of sale of stock, and it became due to assessee, when sale proceeds were received by MC. We also note that under VAT, the sales have been recognised for year under consideration by assessee which further strengthens our view. In our opinion, under such circumstances, date of payment does not affect accrual of income.

A.13.10. In support, we refer to decision of *Hon'able Supreme Court* in case of *CIT vs Excel Industries Ltd (supra) . Hon'ble Court* while deciding the case referred to its coordinate bench decision in case of *Morvi Industries Ltd vs CIT* reported in *(1971) 82 ITR 835.* It was observed that income can be said to accrue, the moment it becomes due. It was further held that date of payment does not affect the accrual of income. The moment income accrues, assessee gets vested with the right to claim it, even though it may not be made immediately. Hence, receipt of the sale consideration on a later date would not postpone the accrual of income.

Under Sale of Goods Act, 1930, a key criterion for determining when to recognise revenue from a transaction involving the sale of goods is that the seller has transferred the property in the goods to the buyer for a consideration. The transfer of property in goods, in

most cases, results in or coincides with the transfer of significant risks and rewards of ownership to the buyer. Also as per ICDS-IV relating to revenue recognition, sale is completed when property in the goods transferred from the buyer to the seller for a price and further the seller retains no effective control of the goods so transferred. In present facts, iron ore stood transferred to the buyers as on the date of sale through E auction by MC. We note that assessee was aware about the amount to be received as sale consideration and the details regarding deduction is towards SPV as per the directions of *Hon'ble Supreme Court*.

A.13.11. We therefore do not find any force in the submissions made by Ld.Counsel that there is no necessity to assess the impugned sale proceeds during the year since it has been already offered to tax in subsequent assessment year and the exercise is tax neutral. Under Income tax Act, total income of each year is to be determined separately and hence income has to be assessed in the right assessment year.

Considering totality of facts in the present case, we are of the view that, sale proceeds of assessee's stock accrued to assessee during financial year relevant to assessment year under consideration.

Based on above discussions and observations, in our view, we are of opinion that, sale proceeds from disclosed stock accrued to assessee during the year under consideration and has to be considered for determining income under the head 'profits and gains from business for year under consideration.

We have already noted that assessee has offered the above sale consideration on subsequent assessment years, and income tax act does not permit to assess same income twice. Hence in our view assessee may move appropriate petition before the authorities below for exclusion of above sale proceeds from declared stock in the relevant assessment year. Ld.AO is directed to consider such application liberally by granting proper opportunity of being heard to assessee.

B. Addition of sale proceeds of undeclared stock

Ld.Counsel submitted that, sale proceeds of undeclared stock confiscated by MC cannot be construed as income in the hands of assessee, for the reason that, revenue from sale of such stock never accrued to assessee in accordance with Section 5 of the Act. He also submitted that, these alleged undeclared stock were not recognised by assessee in the books as well as in IBM returns filed. Ld.Counsel referring to payment advice dated 18/02/2014 for mining lease No.2160 at page 198-201 submitted that, total quantity of confiscated was 3,40,000 MTs of minerals/ores, out of which assessee declared 74,061 MTs of ores in IBM return. Thus MC treated 2,65,939 MTs as undeclared stock in the hands of assessee.

B.1. Referring to payment advice dated 18/02/2014 for mining lease No. 2296 placed at page 206-210 of paper book, Ld.Counsel submitted that, total quantity confiscated by MC was 6,51,894 MTs

of minerals/ores, out of which assessee declared 4,90,028 MTs in IBM returns. Thus, MC treated 1,61,812 MTs, as undeclared in the hands of assessee.

B.2. He submitted that, undeclared stock from both mining lease were sold over a period from financial year 2011-12 to financial year 2013-14. Ld.Counsel referred to Annexure 14 and 15 placed in additional evidence compilation filed before us, wherein year wise, and mine wise details are given regarding quantity sold and revenue realised from such undeclared stock.

B.3. It has been submitted by Ld.Counsel that, undeclared stocks were accumulated wastes/debris. He submitted that due to shortage iron ore on account of imposing a complete ban on mining activities, *Hon'ble Supreme Court* permitted sale of such overburden dumps. Ld.Counsel submitted that, such overburden dumps were classified into categories i.e; Fines/Lumps and Dumps by MC based on quantity of Iron(Fe) present in undeclared stock. It was submitted that, high price was sought on sale of Fines/Lumps as compared to dumps, due to presence of Iron(Fe) in high quantity. In support of his contention Ld.Counsel referred to report of CEC dated 15/02/2013, which forms part of decision of *Hon'ble Supreme Court in case of Samaj Parivartana Samudaya (supra)* in paragraph 11. He submitted that, assessee's lease No.2296 in Category 'A' was visited by CEC to ascertain availability of sub grade iron ore in existing overburden dumps, which could be removed and sold through E auction. The report also recommended sale proceeds of

such sub grade iron ore from the area outside sanctioned mining lease areas will be retained by MC, to be transferred to SPV for undertaking comprehensive environment plan for mining impact zone.

B.4. Ld.Counsel, referring to paragraph 15 of order passed by *Hon'ble Supreme Court in case of Samaj Parivartana Samudaya (supra)*, submitted that, in order to meet market demand, recommendations of CEC was approved by *Hon'ble Supreme Court*. He submitted that these dumps were lying in mining area which were not treated as part of inventory by assessee, and therefore, were neither accounted in books of accounts, not declared in IBM return. Ld.Counsel submitted that, such sale proceeds from sale of Fines/Lumps/Dumps not declared in IBM return of assessee, were wrongly treated as undisclosed income by Ld.AO. Ld.Counsel submitted that, sale proceeds were never transferred to assessee and the same were contributed to SPV for R & R plan and therefore such income never accrued to assessee.

Ld.Counsel submitted that assessee did not recognize the sales revenue relating to undeclared stock in assessment year 2012-13. Ld.Counsel submitted that return for assessment year 2012-13 was subjected to scrutiny/s.143(3) of the Act. And revenue had accepted the stand of assessee. He thus submitted that principles of consistency should be followed. He placed reliance on decision of *Hon'ble Supreme Court* in case of *Radhasomi Satsang vs.CIT* reported in *(1992) 193 ITR 321*. Ld.Counsed thus submitted that

merely because sale of undeclared stock was effectuated by MC, the same would not be come income of assessee.

B.5. On the above facts, Ld.Counsel primarily contended that, such sale proceeds, since were retained by MC as per directions of *Hon'ble Supreme Court,* ought to have been regarded as having been diverted at source by overriding title towards SPV for R & R plans.

He submitted that as per section 4, Income tax shall be charged in respect of the total income of previous year of every person. He referred to section 2(45) of the Act, that defines 'total income' to mean, total amount of income referred to in section 5, computed in the manner laid down in the Act. Further, Ld.Counsel submitted that, Section 5 of the Act deals with scope of total income, which includes all income of a previous year, of a person, who is a resident, from whatever sources derived as mentioned therein. Referring to section 2 (24) of the Act, Ld.Counsel submitted that, Income tax Act defines "income" as an inclusive definition of widest import, and therefore it is necessary to understand essential attributes of 'income'. He thus submitted that, the said sum was not entitled to be received by assessee by virtue of, overriding title, created in favor of SPV, and would get diverted at source. He thus submitted that, as alleged sum was diverted to SPV account at the threshold, it did not attain character of 'income' in the hands of assessee, and therefore cannot be taxed.

B.5.1. In support of his contention, reliance was placed on following decisions:

i. *CIT vs Sitaldas Tirathdas reported in (1961) 41 ITR 367 (SC)*
ii. *Poona Electric supply Co. Ltd. vs CIT (1965) 57 ITR 521 (SC).*
iii. *Moti Lal Chhadami Lal Jain vs CIT (1991) 190 ITR 1 (SC).*
iv. *CIT vs Modipon Ltd., (2018) 400 ITR 1 (SC).*
v. *CIT vs TJayavhandran (2018) 406 ITR 1(SC).*
vi. *Pr.CIT vs Gyan Enterprises Pvt. Ltd., SLP (CIVIL) Diary No(s). 17347/2019.*
vii. *Pr.CIT vs Gyan Enterprises Pvt. Ltd., ITA 940/2016(DEL) dated 17/05/2018.*
viii. *CIT vs United Breweries Ltd (2010) 321 ITR 4546 (KARN.).*
ix. *CIT vs Pandavapura Sahakara karkhane Ltd. (1988) 174 ITR 475 (KARN).*
x. *CIT vs Pandavapura Sahakara karkhane Ltd. (1992) 198 ITR 690 (KARN.)*
xi. *Poddar Project Ltd vs. CIT (2012) 211 Taxmann 493 (CAL)*
xii. *Invest Exports, Gmbh. vs ACIT in ITA No. 371/Vizag/2002 by Order dated 13/05/2010*

B.5.1.1. Ld.Counsel, then submitted that, there is no principal and agent relationship between assessee and CEC/MC, and that, CEC/MC was not acting on behalf of assessee, but was following directions of *Hon'ble Supreme Court*, by order dated 18/04/2013, to sell confiscated stock, retention of part of sale proceeds towards R&R plan and payment of balance to assessee. Referring to page 177-183 of paper book, Ld.Counsel submitted that, merely because VAT returns mentioned that stock were sold by MC on behalf of assessee as its principal, does not mean that MC acted as agent of assessee. It has been submitted that there has been no agreement, written or oral, entered into between assessee and MC, which could mean that MC acted as an agent of assessee. In support of Ld.Counsel relied on following decisions;

- *Hon'ble Allahabad High Court* in case of *Singhal Electric Works vs. Commissioner of Sales Tax, UP,* reported in *1972 STC 112.*
- *Morarji Premji Gokuldas vs. Mulji Ranchhod Ved & Co.* reported in *1923 SCCOnline Bom 52;*
- *P.Krishna Bhatta vs.Mundila Ganapathi Bhatta(died)* reported in *1954 SCC Online Mad 216;*
- *Laxminarayan Ram Gopal& Sons Ltd vs.Govt of Hydrabad,* reported in *(1954) 25 ITR 449(SC);*
- *Everest Coal Company(P) Ltd.vs. State of Bihar,* reported in *(1978) 1 SCC 12;*
- *Bhopal Sugar Industries Ltd. vs. STO* reported in *(1977) 3SCC 147;*

Extracts of English Case laws in following cases were also relied by Ld.Counsel in support:

- *Fisher v.City of Seattle 62 Wn.2d 800(1963), The Supreme Court of Washingtone, Department One;*
- *Lain v. Metropolitan Life Insurance , 322 III App.643;*
- *Sheppard v.Holt, 119 Okla. 168, 171(Okla.1926)*

He submitted that assessee treated the sub-grade iron as waste dumps and hence was not taken into its manufacturing stock. It was submitted that these dumps have been accumulated over a period of years and year wise breakup details are not available. Hence there was no necessity to include them, either in the opening stock or in the closing stock of earlier years. Ld.Counsel submitted that these sub grade iron ore were came to be sold only upon acceptance of recommendation of CEC by *Hon'ble Supreme Court.*

Ld.Counsel submitted that, question of suppressing any part of production does not arise, and that Ld.AO was not right in treating the same as undisclosed stock.

He submitted that as these stock were sold by MC, the entire sale proceeds was transferred to SPV, upon acceptance of

recommendation of CEC by *Hon'ble Supreme Court*. It was contended that there was no accrual of sale proceeds as assessee did not have right to receive it, by virtue of, overriding title.

B.5.2. Alternatively, Ld.Counsel submitted that, assessee do not have any say in use of corpus of SPV, which was to be spent as per directions of *Hon'ble Supreme Court,* and assessee had only two options to account for such contribution towards SPV that is:

i. to account for net of contribution of SPV, meaning thereby, to deduct such contribution as business loss while computing profits and gains under section 28 of the Act. In support of this contention, Ld.Counsel relied on decision of *Hon'ble Supreme Court* in case of *Dr.T.A Quereshi vs CIT (supra).* **OR;**

ii. To treat it as expenditure in the hands of assessee under section 37 of the Act. It has been submitted by Ld.Counsel that *Explanation 2* to section 37 is not applicable, as the same is introduced by Finance Act 2014, which is prospective in nature. It is also been submitted that *Explanation 2* is applicable to Companies and not to partnership firms like that of assessee. Ld.Counsel placed reliance upon decision of coordinate bench of this *Tribunal* in case of *ACIT vs Essel Mining & Industries Ltd* reported in *(2016)-TIOL-371-ITAT-KOL, Shyam Sel Ltd vs DCIT* reported in *(2016)-TIOL-1592-HC-KOL-IT,* decision of *Hon'ble Calcutta High Court* in case of *Mundial Export Import Finance (P) Ltd vs CIT* reported in *(2016) 238 Taxman 34* and decision of coordinate bench of this *Tribunal*

in case of *NMDC Ltd vs ACIT* reported in *(2019) 175 ITD 332 (HYD-ITAT).*

B.6. On the contrary, Ld.CIT DR submitted that, sale effected by MC was carried out on behalf of assessee. Admittedly, stock held as undeclared stock in IBM returns by MC has been excavated by assessee from in and around sanctioned lease areas held by it. He submitted that, *Hon'ble Supreme Court in case of Samaj Parivartana Samudaya (supra)* while approving report of CEC dated 15/02/2013, categorically clarified that, CEC/MC will be holding sale proceeds of iron ores on behalf of leaseholders. He submitted that, excess stock held by CEC were such stock from mining lease outside sanctioned area held by assessee. He submitted that, assessee was supposed to disclose Fines and Lumps excavated from mining lease areas in IBM returns. Thus, it is incorrect to say that, assessee necessarily is not required to disclose Lumps and Fine ores. Referring to payment advice dated 18/02/2014 in respect of both mining leases placed at page 198-210 of paper book, Ld.CIT DR submitted that, for each mining lease assessee declared in its IBM return, Fines and Lumps ores, excavated from sanctioned areas. He submitted that, payment advice reflects fines and lumps ores not declared by assessee excavated outside sanctioned area, which was found in excess of what was declared in IBM returns. He thus submitted that, MC has rightly treated such undeclared stock to be undisclosed. He submitted that, admittedly, assessee has not recorded such quantity of stock being fines and lump ores

excavated from area outside sanctioned lease, either in inventory, in books of accounts, or in IBM returns. He also submitted that, as these stocks were confiscated by MC, it is rightly considered to be assessee's undeclared stock in IBM returns, thereby treating such sale proceeds as undisclosed income in the hands of assessee.

B.6.1. Further, referring to observations by *Hon'ble Supreme Court in case of Samaj Parivartana Samudaya (supra)*, Ld.CIT.DR submitted that, *Hon'ble Court* permitted undeclared stock to be within 15% range of declared stock. Ld.CIT.DR submitted that, in present facts of case, quantity of undeclared stock by assessee exceeds by 127% from mining lease No.2160(Category B) and 34.15% of fines/lumps/ROM and 11.61% of dumps/SG, from mining lease No.2296(Category A) of the total declared stock with IBM. He submitted that such quantity of fine /lumps from Category 'B' is due to illegal mining outside the sanctioned area. He submitted that, said percentage has been calculated by monitoring committee in its payment advice dated 18/02/2014 placed at page 198-210, issued in respect of both mining leases held by assessee. Ld.CIT.DR submitted that, concentration of iron ore in the undeclared stock was found to be more that 15%. He also submitted that, Dumps in such undeclared stock was 11%.

B.6.2. Ld.CIT.DR submitted that, sale proceeds from such undeclared stock in IBM returns, was not parted to assessee, due to excessive salable iron ore, over and above the declared stock. He submitted that, alternative treatment of considering such sale

proceeds of undeclared stock in the hands of assessee is irrelevant, as it qualifies to be income in the hands of assessee, though tainted.

B.6.2. Ld.CIT.DR submitted that, as the sable stock from overburden dumps exceeded 15% allowed by *Hon'ble Supreme Court*, MC did not part with such sale proceeds. He submitted that merely because the sale proceeds were to paid to assessee, does not mean it did not accrue to assessee, for the reason that the salable stock eminated from the overburden dumps in and around sanctioned lease areas of assessee. He thus supported addition of such sale proceeds from undeclared stock for year under consideration, even though the same was not paid to assessee.

B.7. We have perused submissions advanced by both sides in light of records placed before us. We also have perused various decisions relied on by Ld.Counsel referred to herein above, as well as in the paper book filed before.

Issue before us, is regarding assessment of sale proceeds from undeclared stock, during the year under consideration. Following were the arguments advanced by Ld.Counsel.

- Ld.Counsel opposed treatment of sale proceeds from undeclared stock as income in the hands of assessee, by virtue of overriding title, as it was transferred to SPV.
- He submitted that, in the event it is to be treated as income in the hands of assessee, it may be considered either of the following:

- Alternatively he proposed that, such receipts could be considered as business loss under Section 28 of the Act, since such proceeds were utilised by SPV towards reclamation and rehabilitation of mining areas, as per direction of *Hon'ble Supreme Court*.
- Without prejudice to the above arguments, Ld.Counsel also proposed that, such proceeds utilised by SPV, should have been allowed as expenses under section 37 (1) of the Act.

B.7.1. Whereas, Ld.CIT.DR contends that these were undeclared stock of assessee sold by MC from overburden dumps in and outside sanctioned lease area. It was submitted by him that, such stock contained Fines, Lumps and Dumps. He emphasized that, MC in payment advice dated 18/02.2014 catagorised undeclared stock as Fines, Lumps and Dumps. He also emphasized that percentage of undeclared stock exceeds 15% allowed by *Hon'ble Supreme Court* vis-à-vis declared stock.

B.7.2. We note that, undeclared stock was computed to be 34.15% of fines/lumps/ROM and 11.61% of dumps/SG, from mining lease No.2160 of total declared stock with IBM. Extract of CEC report, along with category in which mining lease owned by assessee falls, is placed in Additional evidence compilation as Annexure 26 at page314, filed by assessee before us. As per the document, assessee has illegally mined 0.46 ha of pit, illegally dumped on 2.50 ha of land and approach road of 4.40 ha.

B.7.3. While the issue was posted for clarification, Ld.Counsel emphasized that, what is considered to be undisclosed, are over burden dumps in Category A &B, sold by MC, subsequent to permission obtained from *Hon'ble Supreme Court,* based on Report by CEC dated, 15/02/2013. It was submitted by Ld.Counsel that, there is no illegal mining in Category A. Further from Report of CEC dated 15/02/2013, filed by Ld.Counsel at the time of clarification. Ld.Counsel submitted that, what is considered by revenue as undeclared stock in IBM returns, are over burden dumps under Category 'A' &B, that are not considered salable. It was for this reason that these were relevant to be considered in IBM return.

B.7.4. We refer to Annexure R-10 at page 112 of Additional Evidence filed by assessee. We also refer to, and rely on details emanating from page 207-208 of paper book filed by assessee.

Valuation of excess quantity dispatched for which payment was been made in respect of Fines/Lumps in Category 'A'(ML No.2296)

Particulars	**Fines/Lumps (Mts)**
Quantity dispatched for which payment has been made/proposed	6,51,894
Quantity declared by IBM	4,90,082
Excess quantity for which payment has been made	1,61,812

Valuation of excess quantity dispatched for which payment has been made in respect of Dumps/ Mineral Rejects:

Particulars	**Dumps/ Mineral Rejects (Mts)**
Quantity dispatched for which payment has been made/claimed (379972 Mts + 79995)	4,59,967
Quantity declared to IBM	4,21,253
Excess quantity for which payment has been made/claimed	38,724

Valuation of excess Fine/Lumps/Dumps in Category B(ML no.2160):

Particulars	**Fines/Lumps/ ROM (Qty.)**	**Dumps/SG (Qty.)**	**Total (Qty.)**
Allotted quantity (MTs.)	1,68,000	1,72,000	3,40,000
Quantity declared to IBM (MTs.)	74,061	Nil	
Excess quantity(MTs.)	93,939	1,72,000	2,65,939
% of excess of allotted quantity over IBM declared quantity	126.84		
Quantity eligible for payment	74,061	Nil	

It has been submitted by assessee that, in Category 'B', out of total quantity (1,68,000 + 1,72,000) took over by MC for sale, assessee declared 74,061 of iron ore in IBM return and balance 2,65,939 was treated by MC as undisclosed. We also note that, assessee was called upon to re deposit Rs.53,92,346/- being, value of quantity supplied in excess of what was declared in IBM return (refer page 208-209 of paper book).

B.7.4. As per directions of *Hon'ble Supreme Court* in case of *Samaj Parivartana Samudaya Vs.State of Karnataka(supra)*, since assessee did not consider above stock in the IBM return, sale proceeds from sale of such stock was not parted to assessee, and was transferred to SPV account for R&R plans. In our review the sale proceeds arises out of the stock which was the outcome of mining by assessee under Category A, B, in course of its regular business. It therefore assumes character of income in the hands of assessee. Also that, such income accrued to assessee, on the date of sale of by MC. We refer to and rely on the discussion in para A-13 to A13.12.

B.7.6. Ld.Counsel raised argument of nonexistence of principal agent relationship between assessee and CEC/MC, and that, CEC/MC was not acting on behalf of assessee. This argument was advanced because of standard format of VAT returns filed by MC, more particularly placed in compilation of additional evidence as Annexure 16-17, at page 266-280. Plethora of decisions was relied on by Ld.Counsel, to support his submission that, necessary circumstances/ ingredients to establish principal-agent relationship between assessee-MC does not exist. In our opinion MC was acting according to directions by *Hon'ble Supreme Court*, and not on the authority envisaged by assessee. Further, there is no legal relation that is created between assessee and third party purchasers

through MC. Even Ld.AO has not made additions in the hands of assessee by holding MC to be assessee's agent.

Whether an Expenditure:

B.7.7. We cannot agree with proposition of treating such receipts from sale proceeds of such undeclared stock to be expenditure under section 37 (1) in the hands of assessee, as the said sum was contributed to SPV for R&R Plans. Ld.Counsel placed reliance on decision of *Hon'ble Karnataka High Court* in case of *Prakash Leasing Ltd., Vs. DCIT* reported in *(2012) 208 Taxman 464*, in support his contention.

B.7.7.1. In our view, what could be considered under section 37, are probable expenditure for purposes of earning income. On perusal of decision in case of *Prakash Cotton (Supra)*, *Hon'ble Court* was considering determination of real income in case of 'finance lease' that forms part of 'lease Rentals'. *Hon'ble Karnataka High Court* following decision of *Hon'ble Delhi High Court* in case of *CIT Vs. Virtual Soft Systems Ltd.*, reported in *(2012) 205 Taxman 257*, held that, only financing charges represents real income, and not capital receipt, though both have been accrued and received.

B.7.7.2. In present facts there is no doubt that sale proceeds from undeclared stock assume character of income in the hands of assessee. Merely because sale proceeds were not parted to assessee, it cannot be considered as probable expenditure u/s 37(1).

Hence we reject this contention.

B.7.8. Whether to be treated as diversion of income by overriding title or Trading Loss:

Assessee is originally in the business of mining, and alleged income is generated out of undeclared stock derived from mining. It is submitted by Ld.Cousel that, undeclared stock was accumulated overburden waste dumps which had sub grade iron ore. Whereas Ld.CIT submitted that the stock containing high Fe content is outcome of illegal miming outside sanctioned area.

B.7.8.1 During the survey Joint committee, encountered certain difficulties as the sanctioned lease sketch did not had any reference point and with reference to which the location of the lease could be decided. There was a mismatch between the locations of the reference points on the grounds vis-a-vis the details of such reference points provided in the lease sketches. The reference points were destroyed/altered on the ground and the survey demarcation sketches did not tally with the lease sketches. To overcome such difficulties before the survey was undertaken, pre-survey examination was undertaken to identify the boundary pillars, rock marks, revenue points, etc as shown in the lease sketches this was done with the help of government staff as well as the representative of the lease concerned. The survey sketch prepared was superimposed on the digital test lease sketches to ascertained the encroachment if any. Also the details of survey sketch were superimposed on the satellite images to further verify the correctness of the process of survey undertaken. Due to these

reasons there is difference in sanctioned lease areas of all mining lessees. We note that as per Annexure 26 at page 314, filed in Additional evidence compilation by assessee is found to illegally mined 0.46 ha of pit, illegally dumped on 2.50 ha of land and approach road of 4.40 ha in Category "B' lease held by it.

B.7.8.2. CEC filed a report indicating the categorisation of mines as A, B, C, before *Hon'ble Supreme Court*, in terms of classification on the basis of level of illegalities found as under:

> *"7. We may now proceed to notice the relevant part of the 2 reports of CEC dated 03/02/2012 and 13/03/2012 as referred to herein above:*
>
> *IV.* ***Classification of pleases in different categories on the basis of level of illegalities found***
>
> *27. CEC, based on the extent of illegal mining found by the joint team and is appropriately modified by CEC in its preceding dated 25/01/2012 and after considering the relevant information and has classified the mining leases into 3 categories namely Category 'A', Category 'B' and Category'C'.*
>
> *28. Category 'A' comprises of (a) nonworking leases wherein no marginal/illegalities have been found. The number of such leases come to 21 and 24 respectively.*
>
> *29. Category 'B' comprises of: (a) mining leases wherein 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, and/or (ii) overburden/waste dumps outside the sanctioned lease areas have been found to be up to 15% of the lease areas, and (b) leases falling on interstate boundary between Karnataka and Andhra Pradesh and for which survey sketches have not been finalised. ……*
>
> *30. Category 'C' comprises of leases wherein: (i) illegal mining by way of:- (a) mining pits outside the sanctioned lease area have been found to be more than 10% of the lease area, and/or (b) overburden/waste dumps outside the sanctioned lease areas have been found to be more than 15% of the lease areas, and/or (ii) the lease is found to be involved in flag and void relation of the forest (conservation is) act and/or found to be involved in illegal mining in other lease areas. The No. of such* leases come to 49.

B.7.8.3. Ld.CIT.DR submitted that illegal mining has been carried out over and above the sanctioned leased area. Assessee holds Category 'A' and 'B' leases in the present case. Mining pits outside sanctioned lease up to 10% and overburden dumps outside the sanctioned lease up to 15% of the lease areas fall within the Category 'B'.

B.7.8.4. At this juncture, it would be apposite to extract the recommendations made by CEC in respect of over burden dumps and the direction by *Hon'ble Supreme Court*. Clause XIV of the recommendation made by CEC in its report dated 03-2-2012 reads as under:-

> *"**XIV**. The monitoring Committee may be authorised to sell low grade/sub grade iron ore to cement plants, red oxide and other similarly placed industries. **It may also be authorised to supply iron ore required for construction of nuclear plants at the rates mutually agreed upon between the Monitoring Committee and the authorities concerned provided no middleman is involved."***

B.7.8.5. The CEC gave another report dated 15.2.2013 indicating the present status of preparation and implementation of the lease wise R & R Plans and resumption of mining operations by Category "A" and Category "B" mines and compliance of the preconditions for opening of Category "B" mines. *Hon'ble Supreme Court* took note of paragraph 13 of its order dated 18-04-2013. The said recommendation, inter alia, includes the following:-

> ***"IV. SALE OF SUB GRADE IRON ORE AVAILABLE IN THE EXISTING OVERBURDEN DUMPS.***
> ……
> ***RECOMENDATIONS:***

……
(iii) CEC/Monitoring Committee may be authorised to remove and sell through e-auction the sub grade iron ore available in the existing overburden dumps in and around the lease area subject to the condition that such removal and sale is not likely to have significant adverse impact on the existing tree growth/vegetation and and/or stability of the overburden dumps. ***The Monitoring Committee may be authorised to retain the entire sale proceeds in respect of the dumps located outside the sanctioned and presently valid lease areas for the purpose of transfer to the SPV for the implementation of the Comprehensive Environment Plan for Mining Impact Zone (CEPMIZ)****.*

B.7.8.6. The above recommendation of CEC was accepted by *Hon'ble Supreme Court* in paragraph 17 of its order with the following observations:-

"17……It would also be convenient to take note of the fact that as per the CEC"s report dated 15-2-2013 sale of almost the entire quantity of illegally extracted iron ore has been effected through the Monitoring Committee and the sub grade iron ore lying in dumps in and round several lease areas may not have adequate commercial potential. Besides removal thereof for sale, in many cases, may also give rise to environmental problems in as much as removal of such dumps may constitute a hazard to the stability of the dumps which have been in existence for many years. Permission for sale of sub grade iron ore, only when the same is commercially viable and removal thereof from the dumps is an environmentally safe exercise, has been sought by CEC in its last report dated 15.2.2013. ***We do not find any impediment in accepting the recommendations of CEC in the report dated 15.2.2013 in respect of removal and sale of sub grade iron ore.*** *Similarly, we do not find any difficulty in continuing our previous orders permitting sale of iron ore to be mined after resumption of operations through the Monitoring Committee on the same terms and conditions as presently in force."*

B.7.8.7. It is observed from the reports of the CEC, referred to by *Hon'ble Supreme Court*, that the over-burden/sub grade material was dumped as it was not feasible to use it in the process of manufacture. This sub-grade material found market, in view of acute shortage of

Iron-ore and the technology of processing such waste was available. Hence the CEC recommended for sale of sub grade iron ore, which was also accepted by the *Hon'able Supreme Court* subject to conditions mentioned therein.

B.7.8.8. It was as per the recommendation of CEC that *Hon'ble Supreme Court* permitted to ascertain availability of sub grade iron ore in the existing overburden dumps in and around mining leases in which assessee was also considered. Therefore, stock considered by MC as undeclared is out of overburden dump in and around assessee's mining lease. In directions *by Hon'ble Supreme Court*, we note that what is to be contributed to SPV out of such sale proceeds of overburden dumps outside sanctioned lease areas. Hence there is a possibility that the sale proceeds in respect overburden dumps located inside the sanctioned and presently valid lease areas may be payable to assessee. Viewed from this angle, there is uncertainty about receipt of sale proceeds relating to overburden dumps located inside the sanctioned and valid lease area. Hence it cannot be said that any sale proceeds accrued to assessee on the date of sale. We are of the view that sale proceeds from undeclared stock, if any, is received by assessee, shall be taxable when it is actually received. We note that MC while calculating the sub grade iron from overburden dump has not quantified the stock that fell in and outside the sanctioned lease area separately. It was submitted by Ld.Counsel that relevant information would be available with MC.

B.7.8.9. We refer to observation by *Hon'ble Supreme Court* in case of *CIT vs Sitaldas Tirathdas (supra). 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*

B.7.8.10. Ld.Counsel also relied on decision of *Hon'ble Supreme Court,* in case of, *CIT vs Modipon Ltd(supra),* wherein ratio expressed by *Hon'ble Karnataka High Court* in case of *CIT vs Pandavpura Sahakara Sakkare Karkhane Ltd (supra)* was upheld. Yet another decision relied upon by Ld.Counsel is decision in case of *Moti Lal Chadami Lal Jain vs CIT (supra),* wherein, doctrine of 'diversion of income by overriding title' was analysed and followed.

7.8.11. On careful perusal of these decisions, we note a common thread runs in facts of these cases analysed by *Hon'ble Supreme*

Court and *Hon'ble Karnataka High Court*, that is, recognition of a superior title, so that, when received income is received by an assessee, it has willy-nilly to pass it on to a third-party, and therefore, such portion so passed on, or which is liable to be so passed on, was not held to be income of assessee.

7.8.12. Alternatively, Ld.Counsel, submitted, to treat such amount as trading loss, and to be taken into account for computing income under the head business and profession.

7.8.13. There is no doubt that, sale proceeds arises out of dump considered by assessee to be not saleable that was generated in course of its regular business. Therefore, such undeclared stock, in principle belongs to assessee and sale proceeds of such undeclared stock assume character of income in the hands of assessee when sale proceeds are recovered by assessee. Hence in priciple, such income should be considered as accrued to assessee on the date of sale by MC. However we have already observed on the basis of surrounding facts and observation by Hon'ble Supreme Court as under:

"7.8.8. *.....*

Hence it cannot be said that any sale proceeds accrued to assessee on the date of sale. We are of the view that sale proceeds from undeclared stock, if any, is received by assessee, shall be taxable when it is actually received."

Accordingly, we are of the view that, even if the receipt is considered as taxable on accrual basis, the same is deductable as trading loss.

Accordingly, we allow Ground No. 2.2 to 2.2.7 and dismiss Ground No.2.2.8.

7. Ground No.2.3.1-2.3.9, 2.3.12-2.3.15 have been raised in respect of addition on account of Category A-10% of confiscated sale proceeds utilised towards SPV amounting to Rs.13,10,94,826/- and addition on account of Category B-15% of confiscated sale proceeds, utilised towards SPV, amounting to Rs.3,18,41,886/-. Assessee debited Rs.16,29,36,712/- to profit and loss account, under the head SPV charges.

Facts relating to this issue are as under:

7.1. *Hon'ble Supreme Court* in case of *Samaj Parivartana Samudaya & Ors. Vs. State of Karanataka & Ors. (supra),* approved the recommendation of CEC for deducting and retaining part of sale proceeds for purpose of taking various ameliorative and mitigative measures. CEC recommended retaining of 10% of sale proceeds. *Hon'ble Supreme Court* accepted 10% for Category "A" mines and increased deduction to 15% for Category "B" mines. These amounts were directed by *Hon'ble Supreme Court* to be used to implement R & R plans, for taking ameliorative and mitigative measures. During the year under consideration, amount deducted from sale proceeds as per Ld.AO was Rs.16,29,36,712/- and Rs.17,05,60,822/- as per the assessee. However the fact remains that the amount of Rs.16,29,36,712/- has been included in aggregate amount of Rs.77,71,82,153/-, which was claimed as expenditure in the original return of income and excluded from the sales revenue in

the revised return of income contending that the same is diversion by overriding title. Hence, what was claimed/excluded in the returns of income and what was assessed by Ld.AO was Rs.16,29,36,712/- as per the assessment order.

7.2. Ld.AO called for information/detail in respect of the claim of deduction of Rs.16,29,36,712/-. Assessee vide letter dated 21/01/2016 filed detailed submissions. Ld.AO after considering the submissions held as under:

> *"**4.2.b.** The assessee's Consolidated submissions on deductions made by the monitoring committee mentioned in above table 3, 4, 5 and 6 in para (4) have been carefully perused and the same are not found acceptable for following reasons detailed below. However, the disallowance on the above deduction will be dealt with separately. In respect of explanation for allowability of expenditure claimed under the head SPV charges of Rs.16,29,36,712/-(Rs.131094826 + Rs.3018041886), the submissions are not acceptable for the following reasons. Entire sale proceeds as per the E auction bid sheets/invoices has to be assessed as trading receipts. The amount retained by the CEC/monitoring committee, as per the directions of the Supreme Court on behalf of the assessee, for SPV purposes is on account of damages and loss caused to the environment by contravention of loss. The said amount cannot be allowed as deduction out of sale proceeds even after accrual of such liability which is being compensation and penalty in nature for contravention of loss. As observed by the Supreme Court, category "A" mines comprises of mines where there is marginal illegality as found by CEC.*
>
> ***4.2.c.** The following observations were made by Honorable Supreme Court in its order dated 18/0412013, in the case of WRIT PETITION (CIVIL) NO. 562 of 2009 Samaj Parivartana Samudaya & Ors .... Petitioner (s) Versus State of Karanataka & Ors. . .. Respondent(s) WITH SLP (C) Nos.7366-7367 of 2010, SLP (C) Nos.32690-32691 of 2010, WP (CrI.) No.66 of 2010, SLP (C) Nos.17064-17065 of 2010, SLP (C) No (CC No.16829 of 2010), SLP (C)No ……(CC No. 16830 of 2010), WP (C) No.411 of 2010, SLP (C) No.353 of 2011 and WP (C) No.76 of2012:*
>
> *"5. We may now proceed to notice the relevant part of the two Reports of the CEC dated 3.2.2012 and 13.3.2012, as referred to herein above.*
>
> *"IV' CLASSIFICATION OF LEASES IN DIFFERENT CATEGORIES ON THE BASIS OF THE LEVEL OF ILLEGALITIES FOUND.*

27. The CEC, based on the extent of illegal mining found by the Joint Team and as appropriately modified by the CEC in its Proceeding dated 25th January, 2012 and after considering the other relevant information has classified the mining leases into three categories namely "Category-A ", "Category-B" and "Category-C".

28. The "Category-A" comprises of (a) working leases wherein no illegality/marginal illegality have been found and (b) nonworking leases wherein no marginal/illegalities have been found. The number of such leases comes to 21 & 24 respectively.

29. "Category-B" comprises of (a) mining leases wherein 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 and/ or (ii) over burden/waste dumps, outside the sanctioned lease areas have been found to be up to 15% of the lease areas and (b) leases falling on interstate boundary between Karnataka and Andhra Pradesh and for which survey sketches have not been finalized.

The numbers of such leases in "Category-B" comes to 72.

30. The "Category-C" comprises of leases wherein (i) the illegal mining by way of (a) mining pits outside the sanctioned lease area have been found to be more than 10% of the lease area and/or (b) over burden/waste dumps outside the sanctioned lease areas have been found to be more than 15% of the lease areas and/or (ii) the leases found to be involved in flagrant violation of the Forest (Conservation) Act and/or found to be involved in illegal mining in other lease areas. The number of such leases comes to 49.

RECOMMENDATIONS (as modified by CEC by its Report dated 13.3.2012. Items 1 to IV of the Report dated 3.2.2012 stood replaced by Items A to I of the Report dated 13.3.2012 which are reproduced below along with Items V to XIV of the initial Report dated 3.2.2012).

(E) the sale of the iron ore should continue to be through e-auction and .the same should be conducted by the Monitoring Committee constituted by this Hon'ble Court. However, the quantity to be put up for e-auction, its grade, lot size, its base / floor price and the period of delivery will be decided / provided by the respective lease holders. The Monitoring Committee may permit the lease holders to put up for e-auction the quantities of the iron ore planned to be produced in subsequent months. The system of sale through the Monitoring Committee may be reviewed after say two year;

(F) 90% of the sale price (excluding the royalty and the applicable taxes received during the e-auction may be paid by the buyer directly to the respective lease holders and the balance 10% may be deposited with the Monitoring Committee along with the royalty, FDT and other applicable Taxes / charges;

(V) In respect of the mining leases falling in "CATEGORY-B" (details given at Annexure-R-10 to this Report) it is recommended that: .

ii) for carrying out the illegal mining outside the lease area, exemplary compensation/penalty may be imposed on the lessee. It is recommended that:

a) For illegal mining by way of mining pits outside the leases area, as found by the Joint Team, the compensation/ penalty may be imposed at the rate of

Rs. 5.00 Crore (Rs.FiveCrore only) for per ha. of the area found by the Joint Team to be under illegal mining pit; and
b) For illegal mining by way of over burden dump(s) road, office, etc. outside the sanctioned lease area, the compensation/penalty may be imposed @ is. 1.00 crores (Rs. One Crores only) for per ha. of the area found to be under illegal over burden dump etc.
v) Out of the sale proceeds of the existing stock of the mining leases, after deducting:
a) The penalty/compensation payable;
b) Estimated cost of the implementation of the R& R Plan; and
c) 10% of the sale proceeds to be retained by the Monitoring Committee for being transferred to the SPV
d) The balance amount, if any, may be allowed to be disbursed to the respective lessees.
(VI)In respect of the mining leases falling in "CATEGORY-C" (details are given at annexure-R-11 to this Report) it is recommended that (a) such leases should be directed to be cancelled / determined on account of these leases having been found to be involved insubstantial illegal mining outside the sanctioned lease areas (b) the entire sale proceeds of the existing stock of the iron ore of these leases should be retained by the Monitoring Committee and (c) the implementation of the R&R Plan should be at the cost of the lessee;
(IX)A Special Purpose Vehicle (SPV) under the Chairmanship of Chief Secretary, Government Karnataka and with the senior officer of the concerned Departments of the State Government as Members may be directed to be set up for the purpose of taking various ameliorative and mitigative measures in Districts Bellary, Chitradurga and Tumkur. The additional resources mobilized by (a) allotment / assignment of the cancelled mining leases as well as the mining leases belonging to MIs. MML,
(b) the amount of the penalty/compensation received! receivable from the defaulting lessee,
(c) the amount received/receivable by the Monitoring Committee from the mining leases falling in "Category-A" and 'Category-B",
(d) amount received! receivable from the sale proceeds of the confiscated material etc., may be directed to be transferred to the SPV and used exclusively for the socio-economic development of the areal local population, infrastructure development, conservation and protection of forest, developing common facilities for transportation of iron ore (such as maintenance and widening of existing road, construction of alternate road, conveyor belt, railway siding and improving communication system,.
(X) Out of the 20% of sale proceeds retained by the Monitoring Committee in respect of the cleared mining leases falling in "Category-A ", 10% of the sale proceeds may be transferred to the SPV while the balance 10% of the sale proceeds may be reimbursed to the respective lessees. In respect of the mining leases falling in "Category-B", after deducting the penalty/compensation, the estimated cost of the implementation of the R&R Plan, and IO% of the sale proceeds to be retained for being transferred to the SPV, the balance amount, if any, may be reimbursed to

the respective lessees;
(XIII) the confiscated iron ore pertaining to the cancelled stock yards will be sold by the Monitoring Committee and the sale proceeds will be retained by the Monitoring Committee,'
... (XIV) the Monitoring Committee may be authorized to utilize up to 25% of the interest received by it for engaging reputed agencies for the monitoring of the various parameters relating to mining. "
... III. In addition to the above, each leaseholder must pay a sum equivalent to 15% of the sale proceeds of its iron ore sold 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 @ 10% of the sale proceeds, having regard to the overall facts and circumstances of the case, we have enhanced this payment to 15% of the sale proceeds. Here it needs to be clarified that the CEC/Monitoring Committee is holding the sale proceeds of the iron ores of the lease holders, including the 63 leaseholds' being the subject of this order. In case, the money held by the CEC/Monitoring Committee on the account of any leaseholder is sufficient to cover the payments under the aforesaid three heads, the leaseholder may, in writing, authorize. the CEC to deduct from the sale proceeds on its account the amounts under the aforesaid three heads and an undertaking to make payment of any additional amount as compensatory payment."

4.2.d. *As could be seen from the above observations of the Hon'ble Supreme Court the mine owners were placed in different category based on the illegal or marginal illegal mining done by them. The CEC was established to monitor the e-auction sale of the Iron-ore belonging to the mine-owners. The CEC is authorized to retain the portion of sale proceeds of the Ores collected from successful bidders. Further, the amount retained out of sale proceeds by the CEC has to be adjusted against penalty and compensation for illegal mining depending on Category of the mine owners i.e., 10% or 15% of the amount has to be deposited under Spy "for the purpose of taking various ameliorative and mitigative measures in Districts of Bellary, Chitradurga and Tumkur"*

4.2.e. *The amount to be retained out of sale proceeds after e-auction on behalf of the assessee against its penal liabilities is a part of sale proceeds and hence, the said amount is liable to be assessed to tax as trading receipts during the financial year of e-auction in view of the mercantile method of accounting followed by the assessee. In other words, the retention money is a part of the sale. proceeds and it ought to be recognized as a revenue. There are only two recognized methods of accounting namely the cash method of accounting and the mercantile method of accounting. In mercantile method of accounting, entries are posted in the books of accounts on the date of transaction when the rights accrue or liabilities are incurred, irrespective of the date of payment. The right to receive the said retained amount has accrued to the assessee and it cannot be diverted on the plea contrary to the accounting practice, since*

the assessee firm is following accrual method of accounting, a part of receipt cannot be taken on piecemeal receipt basis. Hence, the assessee's contention that, the said amount do not even constitute the income of the assessee, cannot be accepted.

4.2.f. *The part of the sale proceeds to be retained by the CEC / Monitoring Committee for SPV and for adjusting penalty and other liabilities, is nothing but appropriation of the profit of the assessee. As per doubly entry system of accounting, the assessee should have accounted the entire sales consideration in its P & L Account and balance of sale amount should have been shown as receivable from Government. The balance of the sale amount will be reflecting as payable to seller-assessee in the accounts of the Government.*

4.2.g. *Further, the said SPV is Special Purpose Vehicle for social economic development of the mining area which is nothing but relating to corporate social responsibility only. The deduction claimed towards SPY vis-a-vis against the amount retained by the Monitoring Committee is not allowable under section 37(1) of the Income Tax Act, 1961 as it was not incurred by the assessee wholly and exclusively for the purpose of business. The said part of the proceeds are retained to meet the penal and other liabilities for contravention of law and therefore, the said amount retained by the CEC/Monitoring Committee cannot be allowed as deduction in view of the specific Explanation to section 37(1) of the Act.*

4.2.h. *The Hon'ble Supreme Court thought on the lines of 'Corporate Social Responsibility' much before its actual introduction in the Act and wanted to improve the lives of people & environment affected by the mining activities. On this line of thought, the Apex Court wanted the CEC/MC to collect certain amount of profit from the beneficiaries of mining lease and use the same exclusively for the socio-economic development of the area / local population, infrastructure development, conservation and protection of forest, developing common facilities for transportation of iron ore (such as maintenance and widening of existing road, construction of alternate road, conveyor belt, railway siding and improving communication system, etc.), From this, it is evident that the amount recovered towards SPV is nothing but an appropriation of profits earned by the mine owners and cannot be said to have incurred for the purpose of business or earning the profits. Hence, the assessee's claim of deduction towards SPY Charges cannot be allowed. Accordingly, the entire sale proceeds are assessed as trading receipts on accrual basis keeping in view the mercantile method of accounting followed by the assessee and no deduction is allowed in respect of amount retained for SPV purpose keeping in view the provisions of section 37 of the Act.*

4.2.i*. Reliance is placed on the decision of the Hon'ble Supreme Court in the case of CIT Vs K.C.P Limited (SC) 245ITR 421 Dated: 0910812000.*

Wherein, "the assessee transferred the excess realization to fund in 1997. It was held that the excess amount was realized in the ordinary course of its business activity as price of sugar sold by the assessee. Accordingly, the Hon'ble Supreme Court has rightly held that excess collected is income in the year of collection even if it is retained in separate a/c and subsequently transferred to Sugar Equalization Fund of the Government."
***4.2.j**. Further, Reliance may be placed on the following decisions wherein, it is held that the transaction cannot be split in to Mercantile and Cash method of accounting*
- G. Padmanabha Chattiyar & Sons Vs CIT 182 ITR 1,5 (Mad.),
- Reform Flour Mills Pvt. Ltd., Vs CIT 132 ITR 184, 196 (Cal),
- CIT Vs A Krishnaswamy Mudaliar & Others 53 ITR 122 (SC).
***4.2.k.** In view of above facts brought on record, the amount of Rs.16,29,36,712/-(Rs.13,10,94,826+Rs.3,18,41,886) claimed as expenditure under SPY Charges and debited to P & L A/c is disallowed and added back to the returned income and brought to tax.*

Aggrieved by addition made by Ld.AO, assessee preferred appeal before Ld.CIT (A).

7.3. Ld.CIT(A) observed and held as under:

"4.4) The facts of the case, submissions made by the assessee and the assessment order passed by the AO has been carefully considered. In connection with the illegal mining activities in Karnataka, the Hon'ble Supreme Court has established a Monitoring Committee called Central Empowered Committee (CEC) to monitor the e-auction sales of the iron ore and other related work entrusted to it. In this regard, the Hon'ble Apex Court has passed various judgments in the case of Samaj Parivarthana Samudaya &others Vs. State of Karnataka & Others, on various dates in Writ Petition No. 562 of 2009 along with SLP No. 7366-7367. The Hon'ble Supreme Court in its order dated 18.04.2013 in the same case of Samaj Parivarthana Samudaya & Others V/s. State of Karnataka & Others has pronounced its important judgment on illegal mining in the state of Karnataka and accordingly, a Central Empowered Committee (CEC)has identified three category of mining cases, Category - A, B & C. The assessee falls under the Category-B mines, the issues pertaining to category 'B' mines is discussed. B-Category mines comprises (a) mining leases wherein illegal mining by way of (i) mining pits outside the sanctioned lease areas have been found to be upto 10% of the lease areas and/or (ii) over burden/waste dumps outside the sanctioned lease areas have been found to be upto 15% of the lease areas and (b) leases falling on

interstate boundary between Karnataka and Andhra Pradesh and for which survey sketches have not been finalized.
4.5) Further, the sale of Iron Ore should be through e-auction and the same should be conducted by Monitoring Committee constituted by the CEC and the sale proceeds are to be retained / disbursed to mine owner based on certain conditions.
4.6) The Hon'ble Apex Court in its order dated 23.09.2011 has described the modalities for the sale of iron ore and has clearly mentioned the procedure to be adopted for e-auction of iron ore and procedure for accounting of sale proceeds. The account of sale proceeds is being maintained by the Government under double entry system of accounting which is duly being monitored by CEC.
4.7) The Hon'ble Supreme Court of India in SLP No. 7366 to 7361/2010 dated 29.07.2011 had banned the activity of mining of Iron Ore in the districts of Bellary, Tumkur and Chitradurga of Karnataka districts. In compliance with the orders of theHon'ble Supreme Court of India, the mining activity had been suspended by the appellant. It may be further stated that the Iron Ore held in the stock was not permitted to be sold by the appellant. However, subsequently, i.e., on 03.09.2012, the Hon'ble Supreme Court had lifted the ban and permission was given for resumption of mining operation in category B' mines.
4.8) The assessee is in Category 'B' where illegal mining was found to have been done in the manner described above. In respect of category "B" mines the Supreme Court ordered that compensation/ penalty has to be imposed on the lessee and accordingly it was observed by the court as under :
"(V) In respect of the mining leases falling in "CATEGORY-B" (details given at Annexure R-10 to this Report) it is recommended that : .....(ii) for carrying out the illegal mines out the lease area, exemplary compensation/penalty may be imposed on the lessee. It is recommended that:
a) For illegal mining by way of mining pits outside the leases area, as found by Joint Team, the compensation/penalty may be imposed at the rate of Rs. 5.00 Crore (Rs. Five Crore only) for per ha. Of the area found by the Joint Team to be under illegal mining pit; and
b) For illegal mining by way of over burden dump(s) road, office, etc. outside the sanctioned lease area, the compensation/penalty may be imposed @Rs. 1.00 crores (Rs. One Crore only) for per ha. Of the area found to be under illegal over burden dump etc.
.....
v) Out of the sale proceeds of the existing stock of the mining leases, after deducting :
a) The penalty/ compensation payable;

b) Estimated cost of the implementation of the R&R Plan; and
c) 10% of the sale proceeds to be retained by the Monitoring Committee for being transferred to the SPV
d) The balance amount, if any, may be allowed to be disburses to the respective lessees.
4.9) A perusal of the directions of the Supreme Court shows that the part proceeds are retained to meet the penal and other liabilities for contravention of law and therefore the said amount was retained by the CEC/Monitoring Committee. The Hon'ble Supreme Court wanted the CEC/MC to collect certain amount of profit from the beneficiaries of mining lease and use the same exclusively for the socio-economic development of the area / local population, infrastructure development, conservation and protection of forest, developing common facilities for transportation of iron ore etc. Hence, it is evident that the amount recovered towards SPV is nothing but appropriation of profits earned by the mine owners and cannot be said to have incurred for the purpose of business or earning the profits.
4.10) In view of the above, the AO was correct in adding the amount of Rs.16,29,36,712/- under SPV Charges. Further, the entire sale proceeds are assessed as trading receipts on accrual basis keeping in view the mercantile method of accounting followed by the assesee and no deduction is allowed in respect of the amount retained for SPV for the purpose in view of the provisions of section 37 of the Act. This ground fails.

7.4. Aggrieved by observations of Ld.CIT(A), assessee is in appeal before us now.

Before us, Ld.Counsel submitted that, amount retained by CEC/MC towards SPV is nothing but diversion of income by overriding title for following reasons:

i. MC to control of existing stock;
ii. MC received sale proceeds directly from buyers;
iii. MC was responsible for depositing statutory levies like royalty, taxes, fees, e-auction service fee etc on behalf of assessee.

7.5. On the above facts, Ld.Counsel primarily contended that, such sale proceeds since were retained by MC as per directions of

Hon'ble Supreme Court in case of *Samaj Parivartana Samudaya & Ors. Vs. State of Karanataka & Ors. (supra),* ought to have been regarded as having been diverted at source by overriding title towards SPV for R & R plans of mining areas. Ld.Counsel placed reliance on following decisions in support:

(a) CIT vs. SitaldasTirathdas (1961)(41 ITR 367)(SC)
(b) Motilal Chhadami Lal Jain vs. CIT (1991)(190 ITR 1)(SC)
(c) CIT vs. Sunil J Kinariwala (2003)(259 ITR 10)(SC)
(d) CIT vs. Karnataka State Agricultural Produce Processing & Export Corporation Ltd (2015)(377 ITR 496)(Kar)
(e) CIT vs. United Breweries Ltd (2010)(321 ITR 546)(Kar)
(f) CIT vs. A Tosh & Sons (P) Ltd (1987)(166 ITR 867)(Kol)
(g) Shroff Eye Centre vs. ACIT
(h) Sri T Jayachandran vs. DCIT (2012-TIOL-977-HC-MAD-IT)
(i) FR Sabu P Thomas vs. UOI (2015-TIOL-514-HC-Kerala-IT)
(j) A F Ferguson & Co vs. ACIT (2011-TIOL-604-ITAT-Mum)
(k) CIT vs. PandavapuraSahakaraSakkareKarkhane Ltd (1988)(174 ITR 475)(Kar)
(l) CIT vs. PandavapuraSahakaraSakkareKarkhane Ltd (198 ITR 690 (Kar))

7.6. Ld.Councel submitted that the amount retained by MC for contribution to SPV is not taxable in the hands of the assessee, as the same has been diverted at source by overriding title as per the orders of *Hon'ble Supreme Court*. He submitted that there is no principal and agent relationship between the assessee and MC. Hence it cannot be said that the MC was acting on behalf of the assessee. In fact, the MC is acting as per the directions given by *Hon'ble Supreme Court*. It was submitted that assessee did not have absolute command, control and right of disposition of this receipt. Ld.Counsel thus submitted that this receipt has been diverted at source and cannot constitute income of the assessee.

7.7. **Alternatively,** he also proposed that, such receipts could be considered as business loss under Section 28 of the Act, since such proceeds were utilised by SPV towards reclamation and rehabilitation of mining areas, as per direction of *Hon'ble Supreme Court*. Ld.Counsel placed reliance on following decisions in support:

(a) Dr. T.A. Quereshi vs. CIT (2006)(287 ITR 547)(SC)
(b) CIT vs. S.N.A.S.A. Annamalai Chettiar (1972)(86 ITR 607)(SC)
(c) CIT vs. S.C.Kothari (1971)(82 ITR 794)(SC)
(d) CIT vs. Piara Singh (1980)(124 ITR 40)(SC)
(e) CIT vs. T.C. Reddy (2013)(356 ITR 516)(AP)
(f) RamachandarShivnarayan vs. CIT (1978)(111 ITR 263)(SC)
(g) Bipinchand K Bhatia vs. DCIT (Tax appeal No.107 of 2004 dated 16.10.2014)
(h) BadridasDaga vs. CIT (1958)(34 ITR 10)(SC)
(i) Poona Electric Supply Co Ltd vs. CIT (1965)(57 ITR 521)(SC)

7.7.1. Ld.Counsel, thus, submitted that the amount deducted by MC may also be taken as business loss and hence the same is deductible u/s.28 of the Act. Ld.Counsel placed reliance on decision of *Hon'ble Supreme Court* in the case of *Dr.T.A.Quereshi vs. CIT (Supra)* and also the decision rendered in the case of *CIT vs. S C Kothari (1971)(82 ITR 794)(SC)*.

7.8. **Without prejudice to the above arguments**, Ld.Counsel proposed that, such proceeds utilised by SPV, should be allowed as expenses under section 37(1) of the Act. Ld.Counsel submitted that amount deducted by MC is meant to be used for socio economic development and hence *Explanation 1* to *Section 37* will not apply. It was submitted that *Explanation 1* to *Section 37* would cover only such payments which is an offence or which is prohibited by law. He placed reliance on following decision in support:

(a) Jai Surgicals Ltd vs. ACIT (2014)(33 ITR (Trib) 86)(Del)
(b) Prakash Cotton Mills (P) Ltd vs. CIT (1993)(201 ITR 684)(SC)
(c) M P Gupta vs. ITO (2014-TIOL-957-ITAT-Mum)

7.8.1. Ld.Counsel submitted that *Hon'ble Supreme Court* directed MC to deduct such amount in order to resume the mining activity. Hence it was incurred wholly and exclusively for the purpose of business and hence the same is allowable u/s.37 of the Act. Ld.Counsel, inter alia, placed reliance on following decisions:-

(a) ACIT vs. Essel Mining &Inds. Ltd (2016-TIOL-371-ITAT-Kol)
(b) NMDC Limited vs. ACIT (ITA No.1823 and 182/Hyd/2017)
(c) Obulapuram Mining Company (P) Ltd (160 ITD 224)(Bang)

7.8.2. He submitted that deduction made by MC towards contribution to SPV for the purpose of restoration of environment is based on the principle, *"Polluter pays principle"* held by *Hon'ble Clacutta High Court* in the case of *Shyam Sel Ltd vs. DCIT* reported in *(2016) 72 taxmann.com 105.* Ld.Counsel submitted that, Ld.AO was not justified in invoking *Explanation 1 to sec. 37(1)*, which relates to the expenses incurred towards infraction of law. He submitted that the deduction was made by MC as per the directions of *Hon'ble Supreme Court* and the same cannot be equated with infraction of law. He submitted that MC deducted 10% of sale proceeds from Category "A" mine (Lease No.2296), where no illegality was found. He submitted that, the amount so deducted was contributed to the SPV for taking ameliorative measures and hence it is in the nature of compensation and not penal in nature. Further *Explanation 1* shall apply only if the purpose of expenditure is for an offence or prohibited by law. Hence, *Explanation 1 to sec.37*

is not applicable to this payment. Ld.Counsel relied on following decisions in this regard:-

(a) ITO vs. Reliance Share and Stock Brokers Ltd (ITA No.274/Mum/2013)
(b) CIT vs. Ajanta Pharma Ltd (2017)(85 taxmann.com 252)(Bom)
(c) CIT vs. Regalia Apparels (P) Ltd (2013)(352 ITR 71)(Bom)
(d) CIT vs. Vikas Chemicals (2015)(53 taxmann.com 171)(Delhi)

7.8.3. He submitted that *Hon'ble Hyderabad Tribunal* examined identical issue in the case of *NMDC Ltd (supra)* and the deductions made by MC have been allowed as business expenditure.

7.9. Ld.CIT.DR supported orders passed by authorities below. According to Ld.CIT DR, *Hon'ble Supreme Court* in case of *Samaj Parivartana Samudaya & Ors. Vs. State of Karanataka & Ors. (supra)*, directed assessee to contribute 10%/15% under category 'A'/'B' towards SPV account. Referring to paragraph 10 for Catagory 'A' and paragraph 11(III) for Category 'B' at page 171-173 of decision by *Hon'ble Supreme Court (supra)*, Ld.CIT.DR submitted that, assessee was also directed to give authorisation letter to CEC/MC for contributing such sum of sale proceeds equivalent to 10% and 15% of its iron ore sold through MC, towards SPV account, which would be utilised for rehabilitation and reclamation activities. It was submitted that, subject to such contributions, assessee would be granted permission to resume its business of extracting of iron ore. He thus submitted that, such payment therefore cannot be treated as diversion of income, but has to be taxed in the hands of assessee. Ld.CIT.DR submitted that decision

of *Hon'ble Supreme Court, is* clear regarding categorization that is drawn based on percentage of violations carried by mining lessees. It was thus submitted that, payments have been attributed for infraction of law committed by assessee.

7.9.1. Ld.CIT.DR once again emphasised on true nature of obligation attached to the alleged sum, which is the factor, to decide whether, such sum has been diverted before it reached assessee as held by *Hon'ble Supreme Court* in case of *CIT vs Sitaldas Tirathdas (supra).* Ld.CIT.DR.

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

7.10.1. Ld.Counsel again raised 3 prepositions before us in respect of the contribution made to SPV account from the sale proceeds.

- Primarily he contended that there is diversion of income by overriding title to SPV account, and therefore such amount is not liable to tax in the hands of assessee.
- Alternatively he submitted that the said sum may be treated as loss under section 28 while computing profit and loss under the head income from business and profession. Or
- He submitted that it may be treated as an expenditure incurred by assessee for purposes of business.

7.10.2. On the contrary, Ld.CIT DR submitted that it is an application of income and therefore has to be disallowed in the hands of assessee. He submitted that Ld.AO in support of disallowing the claim of expenditure relied on following decisions:

- *CIT vs.KCP Ltd. reported in 245 ITR 421(SC)*
- *G.Padnabha Chettiyar & Sons vs.CIT reported in 182 ITR 1(Mad)*
- *ReformFlour Mills Pvt.Ltd Vs.CIT reported in 132 ITR 184,196(Cal)*
- *CIT vs.A.Krishnaswamy udaliar & Ors reported in 53 ITR 122(SC)*

We note that these decisions are on the accrual of income, which has been considered by us in forgoing paras. We have already held that entire income accrued to assesee while deciding grounds 2.1 &2.2. In the issue of contribution towards SPV, one has to consider its correct nature. In our opinion these decisions do not assist revenue in any manner.

7.10.3. On careful reading of decision of *Hon'ble Supreme Court* in case of *Samaj Parivartana Samudaya & Ors. Vs. State of Karanataka & Ors. (supra)*, it is clear that 10%/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 categories 'A' and 'B' respectively.

7.10.4. With this background, we once again refer to and rely on observations by *Hon'ble Supreme Court* in case of *CIT vs Sitaldas Tirathdas (supra). 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

7.10.5. Applying, thin line of difference interpreted by *Hon'ble Supreme Court* to present facts, we are of the opinion that, contribution to SPV account, cannot be considered to be diversion of income. This is because, we have already held while deciding ground 2.1 and 2.2 hereinabove, that entire sale proceeds accrued to assessee, and it is only due to direction of *Hon'ble Supreme Court* that such amount was contributed to SPV account, for which assessee was to authorise CEC/MC in relevant paragraph 11(III) refer to and relied by Ld.CIT DR.

7.10.6. In the present facts of the case, we note that 10%/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* in case of *Samaj Parivartana Samudaya & Ors. Vs. State of Karanataka & Ors. (supra),* as a precondition to resume mining operations under Category 'A and 'B'. At this juncture we also emphasise that, but for the intervention by *Hon'ble Supreme Court*,

assessee would not have contributed 10%/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.

7.10.7. In our view contributing 10%/15% to SPV account on account of Category 'A'/ 'B' respectively, 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 10%/15% of sale proceeds, under category A/B, cannot be treated as penal in nature.

7.10.8. We note that *co-ordinate Hydrabad bench of Tribunal* in NMDC (supra) was the case of Category 'A' wherein it was allowed as expenditure by observing as under:

"2. Brief facts of the case are that the assessee-company, a Public Sector Undertaking, engaged in the business of 'mining of iron ore diamonds; and generation and sale of wind power', filed its return of income for the relevant Assessment Years 2013-14 and 2014-15 both under the normal provisions as well as u/s 115JB of the Act for the relevant AYs. During the assessment proceedings u/s 143(3) of the Act, the A.O. observed that the assessee-company is carrying out mining activity in India and particularly in Karnataka and that the Hon'ble Supreme Court of India took note of the large scale illegal mining activity carried on by various companies in Karnataka at the cost or detriment of environment and delivered their judgment on 18.04.2013 levying appropriate charges on the leaseholders. A.O. also observed that the Hon'ble Supreme Court, based on the extent of illegal mining, classified the mining leases into three categories viz., Category "A", "B" and "C" and that the assessee is falling in Category-B in respect of Donimali Complex and that in their order, the Apex Court observed that before consideration of any resumption of mining operations by Category-B leaseholders, each of the lease holder must pay compensation for the areas under illegal mining pits outside the sanctioned area at the rate of Rs. 5 Crs per hectare and for illegal overburden for at the rate of Rs. 1 Cr per hectare. Further, A.O. observed that the said direction of the Apex Court was subject to the final determination of the notional loss caused by the illegal mining and illegal use of the land; and that the Hon'ble Supreme Court had directed that each of the leaseholder should pay a sum equivalent to 15% of the sale proceeds of its iron ore sold through the Monitoring Committee. In accordance with the said direction, the assessee made payment of Rs. 337.13 Crs towards contribution for the Special Purpose Vehicle and the sum of Rs. 68.66 Crs towards penalty / compensation for encroachment of the mining area beyond the sanctioned / leased area. The A.O. observed that the total of the above payment of Rs. 405.79 Crs was punitive in nature and accordingly sought to disallow the same by issuance of a show-cause notice.

……

4. The A.O. however did not accept the assessee's explanation and held that the assessee, being a Category-B leaseholder, has been directed to make the payment for infringement of MMDR Act and other allied laws. Therefore, he observed that the payment of Rs. 405.79 Crs is punitive in nature and brought it to tax.

…….

10. Thus, from the table reproduced above, it is seen that the assessee has been classified as Category-'A' whereas the Assessing Officer has considered the assessee as Category-'B' company. The Hon'ble Supreme Court has clearly indicated that Category-A comprises of (i) 'working

leases' wherein no illegality / marginal illegality have been found and (ii) 'non-working leases' wherein no marginal / illegalities have been found, whereas Category-B comprises of (i) mining leases wherein illegal mining is 10% to 15% of the sanctioned lease areas. However, CEC had recommended that both "A" and "B" categories may be allowed to resume the mining activity subject to the payment of penalty / compensation decided by the Court. Thus, according to the assessee, the said expenditure is nothing but a payment which was required to be made without which the assessee could not have carried on the mining activities and therefore, it is a 'business expenditure'. Since the CEC had categorised the assessee as a Category-A company and the Hon'ble Supreme Court has accepted the said categorization, there would have been marginal illegalities committed by the assessee and the compensation / penalty as directed by the Hon'ble Supreme Court is only to compensate the Government for the loss of revenue from such mining or marginal illegalities and not as a penalty. Though the nomenclature given is "penalty" it is not for infraction or violation of any law to hold it to be punitive in nature, as presumed by the Assessing Officer. Learned Counsel for the Assessee placed reliance on various case law, particularly the decision of the Coordinate Bench of the ITAT, Kolkata in the case of Essel Mining & Industries Ltd vs. Addl. CIT (ITA No. 352/Kol/2011 and others, dated 20.05.2016); ACIT vs. Freegade& Co. Ltd (ITA No.934/Kol/2009, dated 05.08.2011) and also the decision of the Hon'ble Calcutta High Court in the case of ShyamSel Ltd vs. DCIT (72 Taxmann.com 105) (Cal.). On going through the said decisions, we find that the Hon'ble Calcutta High Court has considered the case of an assessee who failed to install Pollution Control Device within factory premise within prescribed time and that the assessee had to pay Rs. 12.50 lakh for compensating damage to environment and the same was recovered by State Pollution Control Board on the principle of 'polluter pays' and the A.O. had treated it as penalty and did not allow the same as business expenditure. The Hon'ble High Court had taken note of the fact that the assessee's business was not illegal and that compensation was paid because of its failure to install pollution control device within prescribed time and therefore, such payment was undoubtedly for the purpose of business and in consequence of business carried on by the assessee and was thus covered by section 37 of the Act. For coming to this conclusion, Hon'ble High Court has also considered the judgment of the Hon'ble National Green Tribunal in the case of State Pollution Control Board vs. Swastik Ispat (P.) Ltd wherein at para 38 of the judgment the Tribunal held as under:-

> *"Being punitive is the essence of 'penalty'. It is in clear contradistinction to 'remedial' and / or 'compensatory'. 'penalty' essentially has to be for result of a default and imposed by way of*

punishment. On the contrary, 'compensatory' may be resulting from a default for the advantage already taken by that person and is intended to remedy or compensate the consequences of the wrong done. For instance, if a unit has been granted conditional consent and is in default of compliance, causes pollution by polluting a river or discharging sludge, trade affluent or trade waste into the river or on open land causing pollution, which a Board has to remove essentially to control and prevent the pollution, then the amount spent by the Board, is thus, spent by encashing the bank guarantee or is adjusted thread and this exercise would fall in the realm of compensatory restoration and not a penal consequence. In gathering the meaning of the word 'penalty' in reference to a law, the context in which it is used is significant."

11. Applying this ratio to the facts of the case before us, we find from para 43 of the Hon'ble Supreme Court's order reproduced above that the condition of payment for resuming the mining activity by Categories 'A' & 'B' companies is to not to punish the companies for any violation of law but is to ensure scientific and planned exploitation of mineral resources in India. Further the Hon'ble Supreme Court had directed as under:-

"(X) Out of the 20% of sale proceeds retained by the Monitoring Committee in respect of the cleared mining leases falling in "Category- A", 10% of the sale proceeds may be transferred to the SPV while the balance 10% of the sale proceeds may be reimbursed to the respective lessees. In respect of the mining leases falling in "Category-B", after deducting the penalty / compensation, the estimated cost of the implementation of the R & R Plan, and 10% of the sale proceeds to be retained for being transferred to the SPV, the balance amount, if any may be reimbursed to the respective lessees;"

The fact that the compensation is proportionate to area of illegal mining outside the leased area and that the assessee has paid the proportionate compensation for mining in the areas outside the sanctioned area allotted to it and that 10% of sum is to be transferred to SPV and the balance 10% is to be reimbursed to the respective lessees, according to us, proves that it is a payment made as 'compensation' for extra mining, without which the assessee could not have resumed its activities. Therefore, we are inclined to accept the contention of the assessee that it is compensatory in nature and is a 'business expenditure' and is allowable u/s 37(1) of the Act. Thus, Grounds No.2 and 3 raised by the assessee are allowed."

7.10.9. We also notice that the *co-ordinate Bangalore bench of Tribunal* has also considered identical issue in the case of *Ramgad Minerals & Mining Ltd (ITA No.1270 & 1271/B/2019 dated 04-11-2020)* being Category 'B', an identical addition made by Ld.AO was held to be allowable as expenditure with following observations:-

> ***"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 SitaldasTirathdasreported 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."*

7.10.10. We note that the CEC, vide its report dated 3-2-2012 and 13-3-2012 made recommendations with regard to setting up of SPV, transfer of funds collected from all lease holders under various heads, manner of utilisation of said funds etc., to *Hon'ble Supreme Court,* which is incorporated in Paragraph 7 at Page 164 to 171 as under:

> *"(IX) A Special Purpose Vehicle (SPV) under the Chairmanship of Chief Secretary, Government Karnataka and with the senior officers of the concerned Departments of the State Government as Members may be directed to be set up for the purpose of taking various ameliorative and mitigative measures in Districts Bellary, Chitradurga and Tumkur. The additional resources mobilized by (a) allotment/ assignment of the cancelled mining leases as well as the mining leases belonging to M/s. MML, (b) the amount of the penalty/ compensation received/ receivable from the defaulting lessee, (c) the amount received/ receivable by the Monitoring Committee from the mining leases falling in "Category- A" and "Category-B", (d) amount received/ receivable from the sale proceeds of the confiscated material etc., may be directed to be transferred to the SPV and* ***used exclusively for the socio- economic development of the area/local population, infrastructure development, conservation and protection of forest, developing common facilities for transportation of iron ore (such as maintenance and widening of existing road, construction of alternate road, conveyor belt, railway siding and improving communication system, etc.).*** *A detailed scheme in this regard may be directed to be prepared and implemented after obtaining permission of this Hon'ble Court;"*

7.10.11. *Hon'ble Supreme Court* at 176 of its order made following observations with regard to SPV:-

> *"By order dated 28-09-2012, this Court had constituted a Special Purpose Vehicle (for short "SPV") on the suggestion of the learned amicus curiae. The purpose of constitution of the SPV, it may be noticed, is for taking of ameliorative and mitigative measures as per the "Comprehensive Environment Plans for Mining Impact Zone (CPEMIZ) around mining leases in Bellary, Chitradurga and Tumkur. By order dated 28-09-2012, the Monitoring Committee was to make available the payments received by it under different heads of receivables to the SPV"*

7.10.12. It is noticed that amounts collected from assessee are directed to be given to the SPV, which will in turn take various types of ameliorative and mitigative steps in the interest not only of the environment and ecology but the mining industry as a whole so as to enable the industry to run in a more organized, planned and disciplined manner. Under these set of facts, it cannot be said that these amounts are penal in nature. We notice that the *Hyderabad bench of Tribunal* in the case of *NMDC Ltd (supra)* and *Co-ordinate bench of Bangalore Tribunal* in *Ramgad Minerals (supra)* came to the same conclusion. We note that in *NMDC case (supra)*, *Hon'ble Hydrabad Tribunal* followed decision of *Hon'ble Kolkatta High Court* in the case of *ShyamSel Ltd (supra)* and *State Pollution Control Board vs. Swastik Ispat (P) Ltd (supra)*, wherein identical types of payments made to remedy the river pollution caused by the parties were held to be compensatory in nature. Hence the provisions of *Explanation 1 to sec.37* will not apply to these payments. We also note that *Hon'ble Supreme Court* at page 171 observed that, these payments are necessary to be made by the mining lease holders. Hence there is merit in the submission of Ld.Counsel that, without making these payments, assessee could not have resumed the mining operations. Hence, these expenses are incidental to carrying on the business and hence allowable u/s 37(1) of the Act.

7.10.13. Based on above discussions and analysis, we are of opinion that contribution to SPV being 10%/15% of sale proceeds, under category A/B, is to be allowable as expenditure for year

under consideration. Thus, alternative plea raised by assessee in ground 2.3.6 and 2.3.7 does not arise. In any event, such payment cannot be considered to be loss in the hands of assessee.

Accordingly we allow grounds 2.3.8-2.3.9 and dismiss grounds 2.3.1-2.3.7.

8. Ground No.2.5 has been raised against the disallowance of Rs.9,69,00,000/-, by treating it as penalty.

Ld.AO observed that, for year under consideration, assessee debited sum of Rs.9,69,00,000/- under the head, compensation for Category 'B'. It was observed that, the said amount have been deducted by MC towards penalty/compensation for various irregularities found by CEC being illegal mining pit, illegal dumping of waste, illegal encroachment of wrote and other violations by assessee. It was also noted by Ld.AO that, said amount has been retained by CEC as per directions of *Hon'ble Supreme Court*, out of sale proceeds for purpose of taking various ameliorative and mitigate of measures as penal payment. Ld.AO noted that, said retention was towards damages caused to Forest and Environment by contravention of law and cannot be said to have incurred wholly and exclusively for purpose of business within the meaning of provisions of section 37 of the Act as expenditure.

8.1. Ld.AO also noted that, Department of Mines and Geology, Bangalore, vide notice dated 28/02/2013, in obedience to order of *Hon'ble Supreme Court*, directed assessee to make immediate payment of Rs.5 crore per hectare for illegal mining and Rs.1 crore

per hectare for dumping of waste outside sanctioned lease area for involving illegal Act. Ld.AO observed and held as under:

4.3 DISALLOWANCE OF EXPENDITURE –
i) COMPENSATION – CAT- "B" – Rs.9,69,00,000/- &
ii) PROBABLE EXPENDITURE FOR R & R Rs.1,48,97,000/-

Further, on going through the above table detailed in para (4) of this order at SI.No.5 & 6 of the said table, it is noticed that the assessee firm has debited an amount of Rs.9,69,OO,OOO/- under the head Compensation - Cat- "B" & Rs.1,48,97,OOO/- under the head Probable Expenditure for R & R retained/deducted by Monitoring Committee - Cat- "B" and charged the same to the Profit & Loss Nc. The said amounts have been deducted by Monitoring Committee towards Penalty/Compensation for various irregularities found by the CEC in Mining area of the assessee firm viz., Illegal Mining Pit, Illegal dumping of waste, Illegal encroachment of road & Other violations. The said amount was retained by the Central Empower Committee (CEC) as per the directions of the Supreme Court out of sale proceeds for the purpose of taking various ameliorative and mitigative measures as a penal payment. Further, the said retention of penal payment is towards damages caused to the forest and environment by contravention of laws. The said payment cannot be said to be incurred wholly and exclusively for the purpose of business within the meaning of the provisions of section 37 of the IT Act as the expenditure is penal in nature. Further, the Dept., of Mines and Geology, Bangalore vide its Lr.F.No.DMGIR& RlNotice/2012-13/11 Dated: 28/02/2013 in obedience to the Order of Hon'ble Supreme Court has issued notice to the assessee firm as under: The relevant portion of the letter is extracted below:

" The Central Empowered Committee had noticed during the Survey by Joint Team that you, holder of Mining Lease No.2160 in PMB range, Sandur taluk, Bellary, have illegally conducted mining operations and / or illegally dumped the waste outside the lease area and committed certain other illegalities. Accordingly, in the reports dated: 03/02/2012 and 13/03/2012 submitted to the Hon'ble Supreme Court, the Central Empowered Committee had recommended imposing a penalty of Rs. 5 Crores per hectare for illegal mining and Rs.l Crore per hectare for dumping the waste outside the lease area on you for involving yourself in the above illegal act. The Hon'ble Supreme Court in its Orders dated: 13/04/2012 and 28/09/2012 referred to at Sl.No. (2) above accepted the recommendations of the Central Powered Committee."

In the circumstances, you are hereby called upon to pay immediately, by way of penalty, a total amount of Rs.9.69 Crores for committing various irregularities such as (i) illegal mining pit in 0.46 Hectares (Rs.2.30 Crores), (ii) illegal dumping of waste in 2.50 Hectares (Rs.2.50 Crores), (iii) illegal approached road 4.40 Hectares (Rs.4.40 Crores) and other violations (Rs.0.49

Crores) in proportion to the area encroached by you outside the lease area in contravention of the relevant provisions of the MMDR Act, 1957, MC Rules, 1960 and MCD Rules, 1988 respectively. At the same time, in pursuance of the order dated: 28/09/2012 of the Hon'ble Apex Court, you are also hereby called upon to make a payment of Rs.148.97 Lakhs towards the probable expenditure indicated by ICFRE for implementation of R & R Plan in respect of your mining lease.

You are hereby directed to make the above payments immediately failing which action will be initiated to recover the dues from you in accordance with law."

4.3.a. It is evident from the above Notice (emphasis added) that the demand raised by the Dept., of Mines and Geology, Bangalore is in the nature of penalty for various irregularities committed by the assessee in the mining area like Illegal Mining, Illegal Dumping of Waste and Other Violations like Encroachments, etc., Since the said expenditure is penalty imposed by the DM&G for various violations, the same cannot be allowed as a deduction U/S 37 of the Act while computing the profits and gains of business. In view of this, it was put across to the assessee with a proposal to disallow the assessee's claim of expenditure of Rs.9,69,00,000/- vide Para No.(11) of this office Lr:F.No.55/Scr./ACIT/C-I/BLY/2015-16 Dated: 04/12/2015. Further, in the same para of the proposal the amount of Rs.l,48,97,000/- debited under the head probable expenditure for R & R referred above was also proposed to be disallowed as the said amount is a provision made by the assessee and provisions are 'not a allowable expenditure u/s 37 of the Act. Accordingly, the assessee firm was asked to file / furnish objections, if any, along with the necessary details and evidences .

4.3.b. In response to the said proposition the assessee firm filed consolidated objections in its letter dated 21/01/2016, which have already been enumerated above in para No.(4.1.a) of this order.

4.3.c. As already discussed above as per the Order of the Hon'ble Apex Court, the mine owners were placed in different category based on the illegal or marginal illegal mining done by them. The CEC had noticed during the Survey by Joint Team that the assessee holding a Mining Lease No.2160 in PMB Range, Sandur Taluk, Bellary have illegally conducted mining operations and illegally dumped the waste outside the lease area and committed certain other illegalities. In view of this, the DM&G has imposed certain penalty· on the assessee firm as per the recommendations of the Apex Court and further has called upon the assessee firm to made payment towards the probable expenditure by ICFRE for implementation of R & R Plan. Out of this, the assessee has claimed a deduction towards penalty imposed at Rs. Rs.9,69,00,000/- and probable expenditure for implementation of R & R Plan Rs.l,48,97,000/- respectively, during the previous year in question.

4.3.d. The explanation offered by the assessee firm for claiming deduction of

said expenditure has been perused and found not acceptable. The various case laws relied on by the assessee firm have no direct nexus to the facts of the instant case, hence, fail to give support the assessee firm's stand that the expenditure incurred is Compensatory/Compounding fee and paid as a Commercial expediency. Further, the assessee's contention that, the said expenses are in nature of Compensatory/ Compounding fee paid to regularise the pending issue and by doing so the Company is allowed to commence its business operations be treated as payment made under commercial expediency cannot be considered and allowed as deduction.

4.3.e. The part of the sale proceeds retained by the CEC / Monitoring Committee are to meet the penal and other liabilities in the form of penal nature for contravention of law, is nothing but assessee firm's personal expenditure, which is not allowable as per the specific Explanation to Section 37(1) of the Act.

4.3.f. It is a General rule that, if an assessee is penalised under one Act, he cannot claim that the amount to be set off against his income under another Act, because that will be frustrating / defeating the entire object of imposition of penalty. If the assessee resorts to unlawful means to augment his profits or reduce his loss, then the expenditure incurred for these unlawful activities cannot be allowed to be deducted whether the business is lawful or otherwise. Even if the entire business of the assessee is illegal and income is sought to be taxed by the Assessing Officer, the expenditure in the illegal activities is not deductible after the insertion of Explanation to Section 37(1) by the Finance Act, 1998. It has been consistently held by the Courts that fines or penalties payable for violation of law of the land cannot be permitted as deduction under the Income-tax Act. That will be against public policy to allow the benefit of deduction under one statute, of any expenditure incurred in violation of the provisions of another statute or any penalty imposed under another statute [Maddi Venkataramana & Co (P) Ltd Vs CIT (1998) 229 ITR 534 (SC)]. Even though the need for making such payments arose out of trading operations, the payments were not wholly and exclusively for the purpose of the trade. In the instant case, if the deductions claimed are allowed, the penalty provisions as per the MMDR Act, 1957, MC Rules, 1960 and MCD Rules, 1988 respectively will become meaningless. It has also to be borne in mind that evasion of law cannot be trade pursuit. The penalties paid for violating the law in the course of the conduct of business cannot be regarded as deductible expenditure, as the assessee is expected to carry on the business in accordance with law and not in violation of law. In the instant case, the assessee has violated the law and has formed Illegal Mining Pits and Illegal Dumping of waste, whereby, the Hon'ble Apex Court on the recommendation of the CEC has directed to collect the amounts as penalty for violation of such law.

4.3.g. Infraction of the law is not a normal incident of business and, therefore,

no expense which is paid by way of penalty for breach of the law can be said to be an amount wholly and exclusively laid for the purpose of business [Haji Aziz & Abdul Shakoor Bros. Vs. CIT (1961) 41 CTR 350 (SC)J. A payment made under a statutory obligation, because the assessee was in default could not constitute expenditure laid out for the purpose of assessee's business [Indian Aluminium Co. Ltd. Vs CIT (SC) 79 ITR 514].

4.3.h. Further, probable expenditure for implementation of R & R Plan Rs.l,48,97,000/- claimed by the assessee firm is a provisional & probable one. Provisions are contingent liabilities which do not constitute expenditure and cannot be the subject matter of deduction even under the mercantile system of accounting. Further, it is well established fact that the assessee has carried out illegal mining over a period of time and hence, cannot be related and allowed in the year under consideration. Further, allowing such huge deduction though not only belongs to the previous year in question but also for earlier years is against the "Principle of Consistency" which disturbs uniform earning capacity of the firm.

4.3.i. In view: of above facts brought on record, the amount of Rs.ll,17,97,000/- (Rs.9,69,00,000/- + Rs.l,48,97,000/-) being penalty for breach of law & provisions but claimed as expenditure under the head Reclamation & Rehabilitation and debited to P & L A/c is disallowed and added back to the returned income and brought to tax.

8.2. Aggrieved by observations of Ld.AO, assessee preferred appeal before Ld.CIT(A).

Assessee contested that, expenditure was incurred as compensatory/compounding fee, and paid as commercial expediency to regularise pending issues and by doing so, assessee was allowed to commence its business operations.

8.3. However, Ld.CIT(A) observed that, assessee had violated law and formed illegal mining pits and illegal dumping of waste, whereby, *Hon'ble Supreme Court* on recommendation of CEC directed to collect such amounts for violated of laws under relevant statutes governing miming activities in the State. Ld.CIT(A) observed and held as under:

"5.0) The next ground is disallowance of expenditure towards compensation of "Cat - B" of Rs.9,69,00,000/- and probable expenditure for R&R of Rs. 1,48,97,000/-. The AO observed that the above two amounts were deducted by the Monitoring Committee towards penalty/ compensation for various irregularities found by the CEC in the Mining area of the assessee and retained by the CEC as per the directions of the Supreme Court out of sale proceeds for the purpose of taking various ameliorative and mitigative measures as a penalty payment. Further, the said retention for penalty payment is towards damages caused to the forest and environment by contravention of laws and hence the payment could not be said to be incurred wholly and exclusively for the purpose of business within the meaning of the provisions of section 37 of the Act, as the expenditure is penal in nature.

5.1) The assessee contested that the expenditure was incurred as compensatory/ compounding fee and paid as a commercial expediency to regularize the pending issue and by doing so the company was allowed to commence its business operations. As such the payment made under commercial expediency be considered for allowing the same as deduction.

5.2) I have gone through the facts of the case and the submissions of the appellant. As per the directions of the Supreme Court part proceeds are to be retained by the CEC/Monitoring Committee to meet the penal and other liabilities for contravention of law. Further, if an assessee is penalized under one Act, he cannot claim that the amount to be set off against his income under another Act, because that will be frustrating/ defeating the entire object of penalizing under the other Act. If the assessee resorts to unlawful means to augment his profits or reduce his loss, then the expenditure incurred for these unlawful activities cannot be allowed to be deducted whether the business is lawful or otherwise. Even if the entire business of the assessee is illegal and income is sought to be taxed by the Assessing Officer, the expenditure in the illegal activities is not deductible after the insertion of Explanation to Section 37(1) by the Finance Act, 1998. It has been consistently held by the Courts that fines or penalties payable for Violation of law of the land cannot be permitted as deduction under the Income-tax Act. That will be against public policy to allow the benefit of deduction under one statute, of any expenditure incurred in violation of the provisions of another statute or any penalty imposed under another statute[Maddi Venkataramana & Co. (F) Ltd vs. CIT (1998) 229 ITR 534 (SC)]. Even though the need for making such payments arose out of trading operation, the payments were not wholly and exclusively for the purpose of the trade.

5.3) Infraction of the law is not a normal incident of business and therefore, no expense which is paid by way of penalty for breach of the law can be said to be an amount wholly and exclusively laid for the

purpose of business [Haji Aziz & Abdul Shakoor Bros. Vs. CIT (1961) 41 ITR 350 (SC)]. A payment - made under a statutory obligation because the assessee was in default could not constitute expenditure laid out for the purpose of assessee's business [Indian Aluminium Co. Ltd Vs. CIT (SC) 79 ITR 514].In the case of Indian Aluminum Co. Ltd Vs. CIT (SC) 79 ITR 514 it was held by the Apex Court that - A payment made under a statutory obligation because the assessee was in default could not constitute expenditure laid out for the purpose of assessee's business.It is not out of place to emphasize once again the judgment in the ,Z case of Maddi Venkataraman & Co. (P) Ltd Vs. CIT (1998) 229 ITR 534 (SC)" wherein the Hon'ble Supreme Court has held that - Even if the entire business of the assessee is illegal and income is sought to be taxed by the assessing Officer, the expenditure in the illegal activities is not deductible after the insertion of Explanation to Section 37(1) by the Finance Act, 1998. It has been consistently held by the Courts that fines or penalties payable for Violation of law of the land cannot be permitted as deduction under the Income-tax Act. That will be against public policy to allow the benefit of deduction under one statute, of any expenditure incurred in violation of the provisions of another statute or any penalty imposed under another statute. The fines/penalties paid for violating the law in the course of the conduct of business cannot be regarded as deductible expenditure, as the assessee is expected to carry on the business in accordance with law and not violation of law. In the instant case, the assessee has violated the law and has formed Illegal Mining Pits and Illegal Dumping of waste, whereby, the Hon'ble Apex Court on the recommendation of CEC has directed to collect the amounts for violation of such law. In view of the above, the said deduction cannot be allowed which is being compensation and penalty in nature for contravention of laws. This ground is dismissed."

Aggrieved by order of Ld.CIT(A), assessee is in appeal before us now.

8.4. Before us, Ld.Counsel referred to breakup of Rs.9,69,00,000/- at page 201 of paper book:

Compensation (mining pit) 0.4 6Ha	Rs.2,30,00,000
Compensation (dump, received etc, 2.50 HA)	Rs.2,50,00,000
Encroachment of road (4.40 HA)	Rs.4,40,00,000
Other category (0.49 HA)	Rs. 49,00,000

8.5. Ld.Counsel submitted that payment advises issued by Department of Mines and Geology, clearly mentions that, above amounts retained by MC are towards R&R plan as compensation, and that, no where in the payment advise, the term, "penalty" is used. Ld.Counsel, therefore, emphasised that, lower authorities erred in treating said compensation as penalty. He thus submitted that the said amount ought to have been allowed as expenditure in the hands of assessee incurred for the purpose of business.

8.6. Alternatively, Ld.Counsel submitted that, since said amount has been diverted to SPV account by direction of *Hon'ble Supreme Court*, the said sum must be treated as having diverted at source by overriding title.

8.7. It was also submitted that failing the above two submissions, the said sum may be treated as business loss under section 28 as the amount retained by MC has rightly forwarded to SPV for reclamation and rehabilitation of mining area as per directions of *Hon'ble Supreme Court*.

8.8. On the contrary, Ld.CIT.DR submitted referred to para 20, 32-33 of the decision of *Hon'ble Supreme Court*, which are reproduced hereunder:

> *"20. Relying on the provisions of the Mines and Minerals (Development & Regulation) Act, 1957; Forest (Conservation) Act, 1980 and Environment (Protection) Act, 1986 (hereinafter referred to as "MMDR Act", "FC Act" and "EP Act" respectively) it is argued that each of the statutes contemplate a distinct and definite statutory scheme to deal with the situations that have allegedly arisen in the present case. To resolve the said issues it is the statutory scheme that should be directed to be followed and resort to the powers of this Court under Article 32 read*

with Article 142 of the Constitution, when a statutory scheme is in existence, would be wholly uncalled for. Specifically, it has been pointed out that none of the conditions that are required to be fulfilled by Category 'A' leaseholders and none of the compulsory payments contemplated for Category 'B' leaseholders for recommencement of operation are visualized in any of the statutory schemes. Insofar as Category 'C' leaseholders are concerned, it is contended that cancellation, if any, has to be in accordance with the statute which would provide the lease holder with different tiers of remedial forums as compared to the finality that would be attached if any order is to be passed by this Court. In this regard, several earlier opinions of this Court, details of which will be noticed in the discussions that follow, had been cited at the bar to persuade us to take the view that we should desist from exercising our powers under the Constitution and instead relegate the parties to the remedies provided by the statute.

8.9. Ld.CIT.DR submitted that, *Hon'ble Supreme Court* summarised arguments advanced by leaseholders as under:

27. On the above issue the short and precise argument on behalf of the leaseholders is that the provisions of each of the statutory enactments, i.e., the MMDR Act, FC Act and EP Act prescribe a distinct statutory scheme for regulation of mining activities and the corrective as well as punitive steps that may be taken in the event mining activities are carried out in a manner contrary to the terms of the lease or the provisions of any of the statutes, as may be. The argument advanced is that as the statutes in question contemplate a particular scheme to deal with instances of illegal mining or carrying on mining operations which is hazardous to the environment, the CEC could not have recommended the taking of any step or measure beyond what is contemplated by the statutory scheme(s) in force. It is argued that it will not be proper for this Court to act under Article 32 and to accept any of the said recommendations which are beyond the scheme(s) contemplated by the Statute(s). In other words, what is sought to be advanced on behalf of the leaseholders is that no step should be taken or direction issued by this Court which will be contrary to or in conflict with the provisions of the relevant statutes. Several judgments of this Court, which are perceived to be precedents in support of the proposition advanced, have been cited in the course of the arguments made.

8.10. Ld.CIT.DR referring to paragraph 37 of the order, submitted that *Hon'ble Supreme Court* after considering arguments advanced by both sides observed as under:

37. Even if the above observations is understood to be laying down a note of caution, the same would be a qualified one and can have no application in a case of mass tort as has been occasioned in the present case. The mechanism provided by any of the Statutes in question would neither be effective nor efficacious to deal with the extraordinary situation that has arisen on account of the large scale illegalities committed in the operation of the mines in question resulting in grave and irreparable loss to the forest wealth of the country besides the colossal loss caused to the national exchequer. The situation being extraordinary the remedy, indeed, must also be extraordinary. Considered against the backdrop of the Statutory schemes in question, we do not see how any of the recommendations of the CEC, if accepted, would come into conflict with any law enacted by the legislature. It is only in the above situation that the Court may consider the necessity of placing the recommendations made by the CEC on a finer balancing scale before accepting the same. We, therefore, feel uninhibited to proceed to exercise our constitutional jurisdiction to remedy the enormous wrong that has happened and to provide adequate protection for the future, as may be required.

8.11. It was thus been submitted by Ld.CIT.DR that, *Hon'ble Supreme Court* in cognizance of enormous wrong happened to the environment due to illegal mining, illegal dumping, illegal encroachment of road etc by the lessees directed such payments from lease holders. He thus relying on above categorical observations by *Hon'ble Supreme Court*, submitted that, sum of Rs.9,69,00,000/- should be treated as penalty for infraction of law. He thus supported order passed by authority below.

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

8.12.1. Ld.AO took the view that these payments are penal in nature as they have been levied for contravention of laws by way of damages caused to forest and environment. Ld.AO referred to the

letter F.No.DMG/R & R/Notice/2012-13/11 dated 28-02-2013 issued by Department of Mines and Geology, Bangalore demanding the payment from the assessee. It is pertinent to note that the above said letter uses the expression "penalty" for these payments. Accordingly, the AO took the view that these payments are in the nature of penalty for various irregularities committed by the assessee in the mining area like illegal mining, illegal dumping of waste and other violations like encroachment etc. Ld.AO relied upon following case laws to buttress his view that the penalty is not allowable as deduction:-

(a) Maddi Venkataramana& Co (P) Ltd vs. CIT (1998)(229 ITR 534)(SC)
(b) Haji Azis& Abdul Shakoor Bros. Vs. CIT (1961)(41 ITR 350)(SC)

(c) Indian Aluminium Co. Ltd vs. CIT (79 ITR 514)(SC)

8.12.2. Assessee claimed Rs.9,69,00,000/- as expenditure in the original return of income and excluded the same from Sales revenue in the revised return of income contending that the same is diversion by overriding title.

8.12.3. Ld.CIT.D.R placed his reliance on certain observations made by *Hon'ble Supreme Court* in *M/s Samaj Parivartana Samudaya and Oth. Vs.State of Karnataka & Oth.(supra).* First of all, there should not be any dispute that the writ petition filed by M/s Samaj Parivartana Samudaya and Others was admitted by *Hon'ble Supreme Court* under Article 32 of the Act. Hence the lessees, inter alia, challenged before *Hon'ble Supreme Court*, the necessity to invoke Article 32 and Article 142 of the Act.

8.12.4. In the CEC report dated 3/02/2012 and 13/03/2012, following recommendations were provided in respect of Category B lease holders. *Hon'ble Supreme Court* extracted the same at page 166 of its order which is as under:

*"**(V) In respect of the mining leases falling in "CATEGORY-B" (details given at Annexure-R-10 to this Report) it is recommended that:***

i) the R&R Plan, under preparation by the ICFRE, after incorporating the appropriate changes as per the directions of this Hon'ble Court, should be implemented in a time bound manner by the respective lessees at his cost. In the event of his failure to do so or if the quality and/or the progress of the implementation of the R&R Plan is found to be unsatisfactory by the Monitoring Committee or by the designated officer(s) of the State of Karnataka, the same should be implemented by the State of Karnataka through appropriate agency(ies) and at the cost of the lessee;

ii) for carrying out the illegal mining outside the lease area, exemplary compensation/ penalty may be imposed on the lessee. It is recommended that:

a) For illegal mining by way of mining pits outside the leases area, as found by the Joint Team, the compensation/ penalty may be imposed at the rate of Rs. 5.00 crore (Rs. Five Crore only) for per ha. of the area found by the Joint Team to be under illegal mining pit; and

b) For illegal mining by way of over burden dump(s) road, office, etc. outside the sanctioned lease area, the compensation/ penalty may be imposed @ Rs. 1.00 crores (Rs. One Crores only) for per ha. of the area found to be under illegal over burden dump etc.

iii) Mining operation may be allowed to be undertaken after (a) the implementation of the R& R Plan is physically undertaken and is found to be satisfactory based on the pre-determined parameters, (b) penalty/ compensation as decided by this Hon'ble Court is deposited and (c) the conditions as applicable in respect of "Category-A" leases are fulfilled/followed;

iv) In respect of the seven mining leases located on/nearby the interstate boundary, the mining operation should presently remain suspended. The survey sketches of these leases should be finalized after the interstate boundary is decided and thereafter the individual leases should be dealt with depending upon the level of the illegality found; and

v) Out of the sale proceeds of the existing stock of the mining leases, after deducting :

a) The penalty/compensation payable;

b) Estimated cost of the implementation of the R& R Plan; and

c) 10% of the sale proceeds to be retained by the Monitoring Committee for being transferred to the SPV
d) The balance amount, if any, may be allowed to be disbursed to the respective lessees".

8.12.5. *Hon'ble Supreme Court* in para 11 at page 172 accepted the recommendation of CEC by observing as under:

*"**11**. The order of the Court dated 28.9.2012, laying down certain conditions "as the absolute first step before consideration of any resumption of mining operations by Category–'B' leaseholders" would also be required to be specifically noticed at this stage.*

"I. 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 the 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 lease area, as found by the Joint Team (as might have been finally held by the CEC) at the rate of Rs.1 crore per hectare.

It is made clear that the payment at the rates aforesaid is the minimum payment and each leaseholder 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 also give an undertaking to the CEC for payment of the additional amounts, if held liable on the basis of the final determination.

At the same time, we direct for the constitution of a Committee to determine the amount of compensatory payment to be made by each of the leaseholders having regard to the value of the ore illegally extracted from forest/non-forest land falling within or outside the sanctioned lease area and the profit made from such illegal extraction and the resultant damage caused to the environment and the ecology of the area.

The Committee shall consist of experts/officers nominated each by the Ministry of Mines and the Ministry of Environment and Forests. The convener of the Committee will be the Member Secretary of the CEC. The two members nominated by the Ministry of Mines and the Ministry of Environment and Forests along with the Member Secretary, CEC shall co-opt two or three officers from the State

Government. The Committee shall submit its report on the aforesaid issue through the CEC to this Court within three months from today. The final determination so made, on being approved by the Court, shall be payable by each of the leaseholders."

8.12.6. *Hon'ble Supreme Court* further directed as under(page 173 clause):

*"**III.**. In addition to the above, each leaseholder must pay a sum equivalent to 15% of the sale proceeds of its iron ore sold 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 @ 10% of the sale proceeds, having regard to the overall facts and circumstances of the case, we have enhanced this payment to 15% of the sale proceeds.*

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

In the case of any leaseholder, if the money held on his account is not sufficient to cover the aforesaid three heads, he must pay the deficit within two months from today.

8.12.7. The contentions of the lessees have been succinctly stated as under by *Hon'ble Supreme Court* in paragraph 20 of the order, which is extracted below:-

"To resolve the said issues it is the statutory scheme that should be directed to be followed and resort to the powers of this Court under Article

32 read with Article 142 of the Constitution, when a statutory scheme is in existence, would be wholly uncalled for."

8.12.8. This contention was discussed in detail as "Issue 2" in paragraphs 27 to 37 (pages180 to 187) Hon'ble Supreme Court. Following are the observations of *Hon'ble Supreme Court*:

27. On the above issue the short and precise argument on behalf of the leaseholders is that the provisions of each of the statutory enactments, i.e., the MMDR Act, FC Act and EP Act prescribe a distinct statutory scheme for regulation of mining activities and the corrective as well as punitive steps that may be taken in the event mining activities are carried out in a manner contrary to the terms of the lease or the provisions of any of the statutes, as may be. The argument advanced is that as the statutes in question contemplate a particular scheme to deal with instances of illegal mining or carrying on mining operations which is hazardous to the environment, the CEC could not have recommended the taking of any step or measure beyond what is contemplated by the statutory scheme(s) in force. In other words, what is sought to be advanced on behalf of the leaseholders is that no step should be taken or direction issued by this Court which will be contrary to or in conflict with the provisions of the relevant statutes. Several judgments of this Court, which are perceived to be precedents in support of the proposition advanced, have been cited in the course of arguments made.

29. According to Shri Divan (Amicus Curiae), the present is a case of mass tort resulting in the abridgment of the fundamental rights of a large number of citizens for enforcement of which the writ petition has been filed under Article 32. Shri Divan has submitted, by relying on several decisions of this Court, that in a situation where the Court is called upon to enforce the fundamental rights and that too of an indeterminate number of citizens there can be no limitations on the power of Court. It is the satisfaction of the Court that alone would be material. Once such satisfaction is reached, the Court will be free to devise its own procedure and issue whatever directions are considered necessary to effectuate the Fundamental Rights. The only restriction that the Court will bear in mind is that its orders or directions will not be in conflict with the provisions of any Statute. However, if the statute does not forbid a particular course of action it will be certainly open for the Court under Article 32 to issue appropriate directions…..

31. The question that has been raised on behalf of the leaseholders is whether the aforesaid provisions under the different statutes should be

resorted to and the recommendations made by the CEC including closure of Category- "C" mines should not commend for acceptance of this Court.
32. In Bandhua Mukti Morcha Vs. Union of India &Ors. (1984) 3 SCC 161, this Court had the occasion to consider the nature of a proceeding under Article 32 of the Constitution which is in the following terms :-

> *"32. Remedies for enforcement of rights conferred by this Part.*
> *(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.*
> *(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.*
> *(3) Without prejudice to the powers conferred on the Supreme Court by clause (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).*
> *(4)The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution."*

33. In M.C. Mehta Vs. Union of India &Ors. (1987) 1 SCC 395, this Court not only reiterated the view adopted in Bandhua Mukti Morcha (supra) but also held that the power under Article 32 would be both injunctive as well as ***remedial and the power to grant remedial relief,*** *naturally, would extend to a wide range of situations and cannot be put in a straight jacket formula.*

8.12.9. In the case of *M C Mehta vs. Union of India (2009)(6 SCC)*, it was contended that *Hon'ble Supreme Court* cannot exercise powers under Article 142 of the Constitution when specific provisions are made under various forest and environmental laws dealing with the manner and procedure for cancellation/determination of mining leases. This argument was rejected by *Hon'ble Supreme Court* with the following observations:-

> *"44. We find no merit in the above arguments. As stated above, in the past when mining leases were granted, requisite clearances for carrying out mining operations were not obtained which have resulted in land and environmental degradation. Despite such breaches, approvals had been*

granted for subsequent slots because in the past the authorities have not taken into account the macro effect of such wide-scale land and environmental degradation caused by the absence of remedial measures (including rehabilitation plan). Time has now come, therefore, to suspend mining in the above area till statutory provisions ***for restoration and reclamation are duly complied*** *with, particularly in cases where pits/quarries have been left abandoned.*

45. ***Environment and ecology are national assets. They are subject to intergenerational equity.*** *Time has now come to suspend all mining in the above area on sustainable development principle which is part of Articles 21, 48-A and 51-A(g) of the Constitution of India. In fact, these articles have been extensively discussed in the judgment in [M.C. Mehta case (2004) 12 SCC 118] which keeps the option of imposing a ban in future open."*

8.12.10. After considering all these judgments rendered by earlier bench, *Hon'ble Supreme Court*, observed as under:-

"35. The issue is not one of application of the above principles to a case of cancellation as distinguished from one of suspension. The issue is more fundamental, namely, ***the wisdom of the exercise of the powers under Article 32 read with Article 142 to prevent environmental degradation and thereby effectuate the Fundamental Rights under Article 21.***

36. We may now take up the decisions cited on behalf of the leaseholders to contend that the power under Articles 32 and 142 ought not to be exercised in the present case and instead remedies should be sought within the relevant statutes. The sheet anchor is the case of Supreme Court Bar Association Vs. Union of India and Another reported in (1998) 4 SCC 409. We do not see how or why we should lie entrapped within the confines of any of the relevant Statutes on the strength of the views expressed in Supreme Court Bar Association (supra). The observations made in para 48 of the judgment and the use of words "ordinarily" and "are directly in conflict" as appearing in the said paragraph (underlined by us) directly militates against the view that the lease holders would like us to adopt in the present case.

> *"48. The Supreme Court in exercise of its jurisdiction under Article 142 has the power to make such order as is necessary for doing complete justice "between the parties in any cause or matter*

pending before it". The very nature of the power must lead the Court to set limits for itself within which to exercise those powers and ordinarily it cannot disregard a statutory provision governing a subject, except perhaps to balance the equities between the conflicting claims of the litigating parties by "ironing out the creases" in a cause or matter before it. Indeed this Court is not a court of restricted jurisdiction of only dispute-settling. It is well recognised and established that this Court has always been a law-maker and its role travels beyond merely dispute-settling. It is a "problem-solver in the nebulous areas" [see K. Veeraswami v. Union of India (1991) 3 SCC 55)] but the substantive statutory provisions dealing with the subject-matter of a given case cannot be altogether ignored by this Court, while making an order under Article 142. Indeed, these constitutional powers cannot, in any way, be controlled by any statutory provisions but at the same time these powers are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in a statute dealing expressly with the subject."

(Emphasis supplied)

37. *Even if the above observations is understood to be laying down a note of caution, the same would be a qualified one and can have no application in a case of mass tort as has been occasioned in the present case. The mechanism provided by any of the Statutes in question would neither be effective nor efficacious to deal with the extraordinary situation that has arisen on account of the large scale illegalities committed in the operation of the mines in question resulting in grave and irreparable loss to the forest wealth of the country besides the colossal loss caused to the national exchequer. The situation being extraordinary the remedy, indeed, must also be extraordinary. Considered against the backdrop of the Statutory schemes in question, we do not see how any of the recommendations of the CEC, if accepted, would come into conflict with any law enacted by the legislature. It is only in the above situation that the Court may consider the necessity of placing the recommendations made by the CEC on a finer balancing scale before accepting the same. We, therefore, feel uninhibited to proceed to exercise our constitutional jurisdiction to remedy the enormous wrong that has happened and to provide adequate protection for the future, as may be required.***"**

8.12.11. Ld.Counsel, during his arguments, pointed out that the CEC used the expression "Compensation/penalty" in its recommendations. But *Hon'ble Supreme Court*, while accepting such recommendations used the expression "Compensation" for such payments. From the observations reproduced herein above, it can be noticed that *Hon'ble Supreme Court* exercised its power under Article 32 and Article 142 to protect fundamental rights of public in order to prevent environmental degradation, i.e., the cost imposed on leaseholders to remedy the enormous wrong that has happened and to provide adequate protection for the future.

8.12.12. We note that *Hyderabad bench of Tribunal* in case of NMDC held that the above payment is not penal in nature, but a payment made for compensation. For the sake of convenience, we extract below the final decision rendered by *Hyderabad bench of Tribunal*:-

> *The fact that* ***the compensation is proportionate to area of illegal mining outside the leased area and that the assessee has paid the proportionate compensation for mining in the areas outside the sanctioned area allotted to it*** *and that 10% of sum is to be transferred to SPV and the balance 10% is to be reimbursed to the respective lessees, according to us, proves that it is a payment made as 'compensation' for extra mining, without which the assessee could not have resumed its activities. Therefore, we are inclined to accept the contention of the assessee that it is compensatory in nature and is a 'business expenditure' and is allowable u/s 37(1) of the Act. Thus, Grounds No.2 and 3 raised by the assessee are allowed."*

8.12.13. We notice that, *Hyderabad bench* held the compensation paid @ Rs.5 crores and Rs.1.00 crores for illegal mining and illegal overburden dumps to be in construed in the nature of

compensation. The Ld.CIT.DR placed reliance on the letter issued by Department of Mines and Geology, wherein these payments have been referred to as "penalty". However going by the observations of *Hon'ble Supreme Court*, these were payments formimg part of SPV to be used for developing ecology in the mining affected areas.

8.12.14. We note that *Hon'ble Supreme Court* directed that the funds so collected to be transferred to SPV. These funds were to be used for R & R Plans, which inter alia, would include following measures:- (Page 171 of *Hon'ble Supreme Court's order*)

> ***"E) SOIL AND MOISTURE CONSERVATIONS, AFFORESTATION AND OTHER MEASURES***
> *26. The R&R plan would inter alia provide for:*
> *i) broad design/ specification for:*
> *b) retaining walls*
> *c) check dams*
> *d) gully plugs and/or culverts (if required)*
> *e) geo textile/geo matting of dumps*
> *f) afforestation in the safety zones*
> *g) afforestation in peripheral area, road side, over burden dumps and other areas*
> *ii) dust suppression measures at/for loading, unloading and transfer points, internal roads, mineral stacks etc.*
> *iii) covered conveyor belts (if feasible) – such as down hill conveyor, pipe conveyor etc.*
> *iv) specification of internal roads,*
> *v) details of existing transport system and proposed improvements*
> *vi) railways siding (if feasible)*
> *vii) capacity building of personnel involved in the mining and environmental management*
> *viii) rain water harvesting"*

8.12.15. We note that *co-ordinate bench of Tribunal* considered an identical issue in the case of *Mysore Minerals Ltd vs. ACIT (ITA No.679/Bang/2010 dated 2.11.2012).* In this case, the assessee

was engaged in the business of mining of iron ore, other minerals and granite. In consequence to the order passed by *Hon'ble Supreme Court* in the case of *T.N Godavarman Tirumalpad vs. UOI*, the assessee was liable to pay to Compensatory afforestation fund equal to net present value for diversion of forest land for non-forest purposes. The assessee paid a sum of Rs.5,02,59,000/- to the fund and claimed the same as expenditure. The question that arose before the *Tribunal* was whether the amount so paid by the assessee is deductible as expenses are not? *Tribunal* therein noticed that an identical issue was examined in case of *M/s Ramgad Minerals & Mining P Ltd (ITA No.1012/Bang/08 dated 9.4.2009)* and was decided in favour of the assessee. Accordingly, the Tribunal decided this issue, with the following observations, in favour of the assessee:-

> *"5.4 We have heard both parties and carefully perused the material on record and the judicial decisions cited and placed reliance upon. We have perused the decision of the co- ordinate bench of this Tribunal in the case of Ramgad Minerals & Mining Pvt Ltd Vs.ACIT in ITA No.1012/Bang/08 dt.9.4.2009 and find that in the cited case too a similar / identical issue was considered on the payments made towards contribution for compensatory afforestation as per the direction of the Hon'ble Apex Court when the mines are exploited on forest land. The Hon'ble Tribunal in para 5 of its order held that the amount expended on this count was incurred as a revenue expenditure and was directed to be allowed in the year in which it was incurred. The operative part of the order in para 5 at pages 7 and 8 is extracted and reproduced here under :*
>
> > *" We find force in the submission of the learned counsel that payments to the government are to be paid once the mining lease is obtained and such payments are governed by various Acts along with the Apex Court making a ruling for State Governments to participate in the granting of mining lease by recovering compensation when their forests are uprooted. Therefore for this*

purpose, the funds are used for a natural regeneration which the assessee participates indirectly. Therefore at no point of time could it be said that the assessee had incurred a capital expenditure giving the assessee a benefit of enduring nature for the purpose of earning segmented income to render the same to income tax. In other words, the authorities below have not pointed out the income generated against the purported deferred Revenue expenditure so proposed by them in their impugned orders. The amount was incurred as a Revenue expenditure and is directed tobe allowed in the year it has been incurred."

Respectfully following the decision of the co-ordinate bench of the Bangalore Tribunal, in the case of Ramgad Minerals & Mining P. Ltd. (supra), we hold that the entire expenditure of Rs.5,02,59,000 incurred by the assessee of net present value to CAMPA in the relevant period are to be allowed as revenue expenditure for Assessment Year 2004-05."

8.12.16. Above decision of this *Tribunal* in case of *M/s.Mysore Minerals(supra)* was upheld by *Hon'ble Karnataka High Court* in the appeal filed by revenue against order of this *Tribunal*. Relevant extract of the view taken by *Hon'ble High Court* in *CIT vs. M/s Mysore Minerals Ltd* in *ITA No.144/2013 dated 08/03/2017* is as undere:-

"2. As such, in our view, the only question of law which may arise is, whether the payment made by way of compensation of Rs.5,02,59,000/- by the assessee as per the direction of the Apex Court for mining lease to the Forest Department can be said as a revenue expenditure or a capital expenditure?

3. We have heard Mr.Sanmathi, learned counsel for the appellant-revenue and Mr.A.Shankar, learned counsel for the respondent-assessee.

4. As such, the Tribunal in the impugned order has relied upon its earlier decision in case of M/s.Ramgad Minerals and Mining Pvt.Ltd., vs. ACIT in ITA 1012(BNG)/2008 dated 9.4.2009. It has been brought to our notice by the learned counsel for respondent-assessee that the very decision of the Tribunal in case of Ramgad Minerals (supra) was carried before this Court in ITA 5021/09 and this Court has dismissed the appeal of the Revenue and it has been further stated that SLP was preferred against the aforesaid decision of this Court in case of Ramgad supra and the said SLP has also been dismissed.

5. We may record that in view of aforesaid decision as such, no substantial questions of law would arise for consideration. But even if it is to be examined, in view of the aforesaid decision that the decision of the Tribunal has been not interfered with by this Court and SLP is dismissed, the question has to be answered against the Revenue and in favour of Assessee."

8.12.17. In the present fact of case, *Hon'ble Supreme Court* observed large scale encroachment in forest areas and illegal mining. *Hon'ble Court* directed collection of such amount to be used for public purposes listed above, which includes afforestation etc. Further we note that these amounts have not been collected for violation under any specific Acts applicable to Mining. It for these reasons that *Hon'ble Supreme Court* used the term 'Compensation' as against the term 'Penalties' recommended by CEC. However it is also noticed that subsequent to the order passed by *Hon'ble Supreme Court*, State Act, controlling mining activity were amended. We further notice that assessee could not have commenced its operations without paying these amounts. Hence there is commercial expediency in incurring these expenses.

8.12.18. Ld.AO invoked Explanation-1 u/s 37(1) of the Act in support of the disallowance made him. As per the provisions of Explanation 1 to sec.37(1) refers to any expenditure incurred by the assessee for any purposes which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure. A careful perusal of the above said provision would show that the "purpose of

expenditure" should be an offence or prohibited by law. In the instant cases, the purpose of payments is for "R & R plans" and the same cannot be considered as payment for the purposes, which is an offence or which is prohibited by law. Hence *Explanation 1 to section 37* is not applicable to these payments.

8.12.19. Respectfully following *Hyderabad bench of Tribunal* in case of *NMDC Ltd (supra) and Bangalore Tribunal M/s Mysore Minerals Ltd (supra)* which has been upheld by *Hon'ble Karnataka High Court*, the payment of Rs.9,69,00,000/- is compensatory in nature only as these funds are meant to be used for public purposes and the assessee could not have commenced its operations without paying the same, the same is allowable as revenue expenditure. We are therefore of the view that payment made as compensation is not hit by *Explanation 1 to Section 37(1)* and is an allowable expenditure.

Accordingly this ground raised by assessee stands allowed.

9. Ground 2.4 is in respect of addition on account of probable expenditure for R&R plan amounting to Rs.1,48,97,000/-.

9.1. Ld.AO observed that assessee has debited sum of Rs.1,48,97,000/-under the head, probable expenditure for R&R retained/deducted by monitoring committee under Category 'B'. It was observed that assessee had charged the said sum to the profit and loss account for year under consideration. Ld.AO referred to notice dated 28/02/2013 issued by Department of Mines and Geology, wherein, assessee was called upon to make payment for

further sum of Rs.1,48,97,000/-. Relevant observations of Ld.AO on this issue has been extracted in para 8.3 herein above.

9.1.1. Ld.AO thus disallowed provisions were holding that, these are contingent liabilities and cannot be subject matter of deduction.

9.2. On an appeal before Ld.CIT(A), said sum was disallowed by holding that, assessee has not submitted any details with regard to R&R expenditure and its nature and for what purpose the amount was spent.

9.2.1. Ld.CIT(A) observed as under:

> *"6.0) The next ground is the amount booked by the assessee in the form of probable expenditure for implementation of R&R Plan of Rs.1,48,97,000/- in its P&L A/c. The AG held that since this is only provisional and probable one, the provision for contingent liabilities do not constitute expenditure and deduction cannot be allowed. Secondly, he has held that since the assessee has carried out illegal mining over a period of time, the same cannot be related and allowed in the year under consideration since allowing such huge deduction though not only belong to the previous year in question but also for earlier years was against the "Principle of Consistency", which disturbs the uniform earning capacity of the firm.*
>
> *6.1) The assessee in course of proceedings has not submitted any details with regard to R&R expenditure and its nature and for what purpose the amount was spent. In absence of any details, the expenditure incurred is disallowed and the action of the AO is upheld. The grounds raised are dismissed.*
> *7.0) The next ground is with regard to addition made under the head Corporate Social Responsibility (CSR) Expenses of Rs.31,27,668/-. The AG in course of assessment proceedings has noted that the assessee firm has debited an amount of Rs.31,27,668/- under the head Corporate Social Responsibility (CSR) Expenses. The assessee submitted that during the year under consideration, the amount was spent towards payment of school fees for students, providing books and also expenditure incurred in response to the appeal made by the Govt. of Karnataka. Accordingly, it sought deduction u/s 37(1) of the Act.*

7.1) The AG however held that the said expenditure was of personal expenditure and not a capital and accordingly denied the deduction to be allowable u/s 37(1) of the Act.
7.2) I have gone through the facts of the case and the submissions of the appellant including judicial decisions on the issue. Placing reliance on the Hon'ble Supreme Court's decision in the case of 'Indian Molasses Co (P) Ltd Vs CIT 37 ITR 66 (SC), the appellant's claim for deduction u/s 37(1) cannot be considered. Reliance is also placed in the case of CIT Vs Infosys Technologies Ltd 2013-TIOL-507 (HC)(Karn), wherein, the Hon'ble High Court of Karnataka has held that any expenditure incurred which is not a business expenditure or which is not of commercial expediency, cannot be allowed as business expenditure u/s 37 of the I.T.Act. Hence, the appellants contribution towards payment of school fees and school books cannot be considered as allowable expenditure and the same is disallowed u/s 37(1) of the Act. This ground is rejected."

9.2.2. Ld.CIT(A) thus, in absence of details, dismissed the plea of assessee.

Aggrevied by order of Ld.CIT(A) assessee is in appeal before us now.

9.3. Before us, Ld.Counsel submitted that, assessee has not recognised the revenue attributable to sale proceeds of confiscated stock by MC of Rs.1,48,97,000/- due to uncertainty of its recovery in accordance with accounting standard 9 read with section 145.

9.3.1. Ld.Counsel submitted that assessee does not have any control over the sale of iron-ore, the deductions made there from etc. It is the MC, which has made the sales and also deducted the above said amount from the sale proceeds. Since the above said amount has been deducted by MC in the payment advice dated 18.02.2014 and since the said payment advice was related to the sales effected during the year under consideration, the assessee had to account for the said deduction in the accounting year ending

31.3.2013. He submitted that the assessee has to bear proportionate cost of R & R Plans for its Category-B mines, which condition was prescribed by *Hon'ble Supreme Court* for commencement of its business operations. Accordingly, the assessee has made a provision for the same in the books of account, as per mercantile system of accounting and claimed the same as expenditure. He submitted that some part of the "R & R Plans" was executed by SPV and hence the above said deduction was made by MC from sale proceeds. Hence, the details of R & R plans will be available with the SPV only and not with the assessee. He thus submitted that, Ld. CIT(A) was not justified in holding that the assessee has failed to furnish the details.

9.3.2. Ld.Counsel submitted that the MC refunded a sum of Rs.1,21,94,000/- out of the above amount and the assessee has also offered the same in FY 2018-19 relevant for assessment year 2019-20. He submitted that the assessee did not have any control over the amount so deducted, how it was used etc. Accordingly, he submitted that the provision so made by the assessee is allowable as deduction.

9.3.3. Ld.Counsel submitted that, amount retained by CEC/MC towards SPV is nothing but diversion of income by overriding title for following reasons:

iv. MC to control of existing stock;

v. MC received sale proceeds directly from buyers;

vi. MC was responsible for depositing statutory levies like royalty, taxes, fees, e-auction service fee etc on behalf of assessee.

9.3.4. He thus submitted that, the said sum was not entitled to be received by assessee by virtue of an overriding title, created in favour of SPV and would get diverted at source. He thus submitted that, as alleged sum was diverted to SPV account at the threshold, it did not attain character of 'income' in the hands of assessee, and therefore cannot be taxed.

9.3.5. Alternatively it was submitted that the amount may be treated as expenditure in the hands of assessee under section 37 of the Act. It has been submitted by Ld.Counsel that *Explanation 2* to section 37 is not applicable, as the same is introduced by Finance Act 2014, which is prospective in nature. It is also been submitted that *Explanation 2* is applicable to Companies and not to partnership firms like that of assessee. Ld.Counsel placed reliance upon decision of coordinate bench of this *Tribunal* in case of *ACIT vs Essel Mining & Industries Ltd* reported in *(2016)-TIOL-371-ITAT-KOL, Shyam Sel Ltd vs DCIT* reported in *(2016)-TIOL-1592-HC-KOL-IT,* decision of *Hon'ble Calcutta High Court* in case of *Mundial Export Import Finance (P) Ltd vs CIT* reported in *(2016) 238 Taxman 34* and decision of coordinate bench of this *Tribunal* in case of *NMDC Ltd vs ACIT* reported in *(2019) 175 ITD 332 (HYD-ITAT).*

9.4. On the contrary, Ld.CIT.DR submitted that the provision made for Probable expenditure cannot be allowed as deduction, as the

same is contingent in nature. Further, the assessee is not aware of details of R & R expenditure. Further, it is in the nature of penalty for causing damage to the environment.

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

9.5.1. We note that, *Hon'ble Supreme Court* directed lease holders to give undertaking to make any additional payment. In present issue, we note that assessee was called upon to make such payment, as is evident from notice issued by Department of Mines and Geology, dated 28/02/2013. It is a fact that, assessee could not have ignored the notice and that upon making good such payments, assessee would have resumed its mining activity.

9.5.2. As per the order of *Hon'ble Supreme Court*, the assessee itself has to undertake "R & R Plans", which shall be monitored by MC/CEC. In addition to the above, a SPV has been set up to which all the deductions made by MC from sale proceeds under various categories shall be contributed. The SPV, in turn, will incur expenses towards "R & R Plans". We have also noticed earlier that the *Hon'ble Supreme Court* has imposed above said conditions for reopening of mines. With regard to R&R Plans, *Hon'ble Supreme Court* has also held that the lessees would be liable to pay additional compensation, in case of necessity.

9.5.3. *Hon'ble Supreme Court* in respect of R & R Plans observed as under at page 168:-

"8. As previously noticed, the CEC in its Report dated 13.3.2012 had set out in detail the objectives of the Reclamation and Rehabilitation (R&R) plans and the guidelines for preparation of detailed R & R plans in respect of each mining lease. The origins of the idea (R & R plans) are to be found in an earlier Report of the CEC dated 28.7.2011. As the suggestions of the CEC with regard to preparations of R & R plans for each mine is crucial to scientific and planned exploitation of the mineral resources in question it will be necessary for us to notice the said objectives and the detailed guidelines which are set out below. In this connection it would be worthwhile to take note of the fact that the guidelines in question have been prepared after detailed consultation with different stakeholders including the Federation of Indian Mineral Industries (FIMI) which claims to be the representative body of the majority of the mining lessees of the present case.

II. BROAD OBJECTIVES/PARAMETERS OF R&R PLANS

8. The broad objectives/parameters of the R&R Plans would be:

i) to carry out time bound reclamation and rehabilitation of the areas found to be under illegal mining by way of mining pits, over burden/waste dumps etc. outside the sanctioned areas;

ii) to ensure scientific and sustainable mining after taking into consideration the mining reserves assessed to be available within the lease area;

iii) to ensure environmental friendly mining and related activities and complying with the standards stipulated under the various environmental/mining statutes e.g. air quality (SPM, RPM), noise/vibration level, water quality (surface as well as ground water), scientific over burden/waste dumping, stabilization of slopes and benches, proper stacking and preservation of top soil, sub grade mineral and saleable minerals, proper quality of internal roads, adequate protective measures such as dust suppression/control measures for screening and crushing plants, beneficiation plants, provision for retention walls, garland drains, check dams, siltation ponds, afforestation, safety zones, proper covering of truck, exploring possibility of back filling of part of over burden/waste dumps in the mining pits, sale/beneficiation of sub grade iron ore, water harvesting, etc.

iv) for achieving (ii) and (iii) above, fixation of permissible annual production; and

v) regular and effective monitoring and evaluation.

9.5.4. *Hon'ble Supreme Court* in para 14 recorded lease wise R & R Plans in continuation of the above said observations. We note that

a written undertaking was directed to be given by lease holder by observing as under at page 172:

> *"(III) a written undertaking by the leaseholders that they would fully abide by the Supplementary Environment Management Plan (SEMP) as applicable to the leasehold area and shall also abide by the Comprehensive Environment Plan for Mining Impact Zone (CEPMIZ) that may be formulated later on and comply with any liabilities, financial or otherwise, that may arise against them under the CEPMIZ."*

9.5.5. *Hon'ble Supreme Court* further at page 173 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 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 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.*

9.5.6. *Hon'ble Supreme Court* while considering the acceptability of CEC recommendations at page 194 held as under:

> ***(ii) Conditions which have been suggested for opening of Category 'A' mines and additionally the R& R Plans for Category 'B' mines***
> *52. The conditions subject to which Category 'A' and 'B' mines are to be reopened and the R&R Plans that have been recommended as a precondition for reopening of Category 'B' mines are essentially steps to ensure scientific and planned exploitation of the scarce mineral resources of the country. The details of the preconditions and the R&R plans have already been noticed and would not require a repetition. Suffice it would be to say that such recommendations are wholesome and in the interest not only of the environment and ecology but the mining industry as a*

whole so as to enable the industry to run in a more organized, planned and disciplined manner. FIMI was actively associated in the framing of the guidelines and the preparation of the R&R Plans. There is nothing in the preconditions or in the details of the R&R plans suggested which are contrary to or in conflict or inconsistent with any of the statutory provisions of the MMDR Act, EP Act and FC Act. In such a situation, while accepting the preconditions subject to which the Category 'A' and 'B' mines are to be reopened and the R&R plans that must be put in place for Category 'B' mines, we are of the view that the suggestions made by the CEC for reopening of Category 'A' and 'B' mines as well as the details of the R&R plans should be accepted by us, which we accordingly do.

9.5.7. From the above it is clear that assessee was directed to make such payments in order to resume the mining activity. It is also clear that payment intimations may be issued as and when found necessary by the Department of Mining. Assessee cannot ignore such intimations for its smooth functioning of business. We therefore are of the opinion that these are expenditure incurred by assessee in lieu of business. We therefore reject the argument of revenue that such payment is hit by *Explanation* to *section 1 to Section 37*.

9.5.8. Ld.Councel submitted that in lieu of above directions, assessee was refunded Rs.1,21,94,000/- out of Rs,1,48,97,000/-, during the financial year relevant to the assessment year 2019-20, which has been offered to tax. This fact supports the submission of assessee that, it did not have any control over the amount so deducted. Accordingly, demand raised by the Department of Mining in its letter would create a liability on assessee. Aassessee was therefore justified in creating provision for this expenditure. Since

the provision for expenses so made is related to the business activities of assessee, the same is allowable as deduction. Accordingly, we Ld.AO to delete the disallowance of Rs.1,48,97,000/-.

Accordingly, this ground raised by assessee stands allowed.

10. Ground No.3 is in respect of disallowance of Rs.31,27,668/- expended towards Corporate Social responsibility.

10.1. Ld.AO noted that assessee has claimed deduction of Rs. 31,27,668/- as expenditure under section 37(1). Assessee submitted that it had made such payment in view of complying the directions of government of Karnataka towards payment of school fees of students in providing of books to the students and hence the expenditure incurred is not of capital or personal in nature.

10.2. Ld.AO disallowed the said sum by holding that it was not incurred for purposes of business. He placed reliance upon decision of *Hon'ble Supreme Court* in case of *Indian Molasses Co. (P) Ltd vs CIT* reported in *37 ITR 66* and decision of *Hon'ble Karnataka High Court* in case of *CIT vs Infosys Technologies Ltd.,* reported in reported in *203-TOIL-507-High Court-Kar-IT*.

10.3. On an appeal before Ld.CIT(A), observations of Ld.AO was upheld.

10.4. Aggrieved by the order of Ld.CIT(A), assessee is in appeal before us now..

10.4.1. Ld.Counsel placed reliance on page 290 of paper book, wherein, Deputy Commissioner, Bellary, directed assessee to contribute towards education of students residing/studying in schools around mining area. It has been submitted that assessee is engaged in business of mines on the land leased by government, activity consumes enormous amount of natural resources in surrounding area, and that, such amount was paid to support welfare of the locality. He also submitted that *Explanation 2* to *Section 37* of the Act, is introduced by Finance Act 2014, which is in relation to CSR contributed by companies, whereas, assessee is a partnership firm.

10.4.2. Ld.Counsel submitted that commercial expediency should be judged in the context of prevailing social economic condition and that business undertaking is a product of combined effort's of all. He submitted that such expenditure incurred by assessee satisfies the requirement of commercial expediency in the present scenario. He placed reliance on order dated 31/07/2019 by *Hon'ble Karnataka High Court, Dharwad Bench*, in case of *Kanhaiyalal Dudheria vs JCIT* in ITA NO. 100016/2018 c/w. ITA NO. 100017/2018. He submitted that mining activity in the lease areas causes ecological disbalances thereby hampering inhabitation in the nearby villages. Assessee incurred expenses towards re-establishing various facilities to support livelihood of people living in nearby villages.

10.4.3. On the contrary, Ld.CIT.DR placed reliance on observations of authorities below.

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

10.5.1. We heard rival contentions and perused the record. We notice that an identical issue was examined by the *Hon'ble Karnataka High Court* in the case of *Kanhaiyalal Dudheria (supra)*. In the case before *Hon'ble High Court*, the assessee was carrying on the business of extraction of iron-ore and also trading in iron-ore. Assessee had incurred expenses of Rs.1,61,30,480/- and Rs.55,90,080/- in FY 2010-11 and 2011-12 towards construction of houses in certain flood affected villages as per MOU entered with Government of Karnataka. Assessee's claim of above said expenses were disallowed on the ground that it was not incurred in the course of business but for philanthropic purposes. *Hon'ble Karnataka High Court*, however, held that it is allowable as deduction. The relevant observations made by *Hon'ble High Court* are extracted below:-

> *"8. It is not in dispute that an MOU came to be entered into between appellants and the Government of Karnataka, represented by jurisdictional Deputy Commissioner on 02.07.2010, a copy of which has been made available for our perusal. It would clearly indicate on account of unprecedented floods and abnormal rain which severely ravaged the North Interior Karnataka during last week of September and first week of October, 2009, which claimed more than 226 human lives and loss of nearly 8000 head of cattle, flattened about 5.41 lakhs houses and destroyed standing crops in about 25 lakh hectares of land huge destruction of infrastructure, Government of Karnataka which was facing an undaunted task of rehabilitating the persons who were in destitute and to restore the normalcy for nearly about 7.2 lakh people and to build 5.41*

lakhs houses spread over 12 affected districts, an appeal came to be made by then Hon'ble Chief Minister to all to lend their hands for restoring normalcy.

.....

13. A plain reading of Section 37 would also indicate that emphasis is on the expression "wholly and exclusively for the purposes of the business or profession". These two expressions namely, "wholly" and "exclusively" being adverb, has reference to the object or motive of the act behind the expenditure. If the expenditure so incurred is for promoting the business, it would pass the test for qualifying to be claimed as an expenditure under Section 37 of the Act. What is to be seen in such circumstances is, what is the motive and object in the mind of the two individuals namely, the person who spend and the person who receives the said amount. Thus, the purpose and intent must be the sole purpose of expending the amount as a business expenditure. If the activity be undertaken with the object both of promoting business and also with some other purpose, such expenditure so incurred would not be disqualified from being claimed as a business expenditure, solely on the ground that the activity involved for such expenditure is not directly connected to the business activity. In other words, the issue of commercial expediency would also arise.

.....

20. In fact, the Hon'ble Apex Court approving the observation of ATHERTON's case - 1926 AC 205 in the matter of EASTERN INVESTMENT LIMITED vs COMMISSIONER OF INCOME TAX reported in (1951) 20 ITR 1, held:

> *"..a sum of money expended, none of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily on the grounds of commercial expediency, and in order indirectly to facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purposes of the trade", can be adopted as the best interpretation of the crucial words of Section 10(2)(xv). The imprudence of the expenditure and its depressing effect on the taxable profits would not deflect the applicability of the section.*

The acid test, "did the expenditure fall on the assessee in this character as trader and was it for the purpose of the business".

21. The co-ordinate Bench in the matter of CIT & ANOTHER vs INFOSYS TECHNOLOGIES LIMITED reported in (2014)360 ITR 174(Kar) while examining the claim of the assessee to treat the expenditure incurred by it for installing the traffic signals as business expenditure under Section 37(1) of the Act, had held " for purpose of business" used in Section 37(1) of the Act should not be limited to meaning of earning profit alone

and it includes providing facility to its employees also for the efficient working . It came to be held:

> *24. As is clear from the case of Mysore Kirloskar Ltd, the expenditure claimed need not be necessarily spent by the assessee. It might be incurred voluntarily and without any necessity, but it must be for promoting the business. The fact that somebody other than the assessee is also benefited by the expenditure should not come in the way of an expenditure being allowed by way of deduction under Section 37(1) of the Act, if it satisfies otherwise the tests laid down by law. Similarly, the words 'for the purpose of business' used in Section 37(1) of the Act, should not be limited to the meaning of earning profit alone. Business expediency or commercial expediency may require providing facilities like schools, hospitals, etc., for the employees or their children or for the children of the ex- employees. The employees of today may become the ex-employees tomorrow. Any expenditure laid out or expended for their benefit, if it satisfied the other requirements, must be allowed as deduction under Section 37(1) of the Act. Expenditure primarily denotes the idea of spending or paying out or away. It is something which is gone irretrievably, but should not be in respect of an unascertained liability of the future. Expenditure in this sense is equal to disbursement which, to use a homely phrase means something which comes out of the traders pocket."*

.....

23. In the matterof SRI VENKATASATYANARAYANARICE MILL CONTRACTORSCOMPANY vs CIT reported in (1997) 223 ITR 101 (SC), ***question arose as to whether contribution made to District Welfare Fund maintained by the District Collector would be against public policy or is an expenditure allowable under Section 37(1) of the Act and it came to be held that such contribution is not against public policy and would be allowable under Section 37(1) of the Act.*** *It was also held 'any contribution made by an assessee to a public welfare fund which is directly connected or related with the carrying on the assessee's business or which results in the benefit of the assessee's business has to be regarded as an allowable deduction under Section 37(1)'. In the facts obtained in the said case, it was noticed that assessee was doing business of export of rice and contributing 50 paise per quintal to the district welfare fund maintained by the District Collector, without which contribution, he would not get permit and as such, it came to be held that expenditure so incurred by way of contribution is directly connected with the assessee's carrying on the business. It is further held:*

> *"10. From the abovesaid discussion it follows that any contribution made by an assessee to a public welfare fund which is directly*

connected or related with the carrying on of the assessee's business or which results in the benefit to the assessee's business has to be regarded as an allowable deduction under s. 37(1) of the Act. Such a donation, whether voluntary or at the instance of the authorities concerned, when made to a Chief Minister's Drought Relief Fund or a District Welfare Fund established by the District Collector or any business, cannot be regarded as payment opposed to public policy. It is not as if the payment in the present case had been made as an illegal gratification. There is no law which prohibits the making of such a donation. The mere fact that making of a donation for charitable or public cause or in public interest results in the Government giving patronage or benefit can be no ground to deny the assessee a deduction of that amount under s.37(1) of the Act when such payment had been made for the purpose of assessee's business."

.....

28. In the light of the analysis of the case laws above referred to, it cannot be gain said by the revenue that contribution made by an assessee to a public welfare cause is not directly connected or related with the carrying on of the assessee's business. As to whether such activity undertaken and discharged by the assessee would benefit to the assessee's business has to be examined in the light of the observations made by us herein above. Tribunal committed a serious error in arriving at a conclusion that MOU entered into between the assessee and the Government of Karnataka is opposed to public policy and void under Section 23 of the Contract Act. In fact, Hon'ble Apex Court in case of SRI VENKATA SATHYANARAYANA RICE MILL CONTRACTORS COMPANY's case referred to herein supra has held that where a donation, whether voluntary or at the instance of the authorities concerned, when made to a Chief Ministers Drought Relief Fund or a District Welfare Fund established by the District Collector or any other fund for the benefit of the public and with a view to secure benefit to the assessee's business cannot be regarded as payment opposed to public policy. It came to be further held making of a donation for charitable or public cause or in the public interest results in the Government giving patronage or benefit can be no ground to deny the assessee a deduction of that amount under Section 37(1) of the Act, when such payment has been made for the purposes of assessee's business. In fact, it can be noticed under the MOU in question which came to be entered into by the assessee with Government of Karnataka was on account of the clarion call given by the then Chief Minister of Karnataka in the hour of crisis to all the Philanthropist, industrial and commercial enterprises to extended their whole hearted support and the entire logistic support has been extended by the Government of Karnataka namely, providing land and design of the

house to be constructed, approval of layout and to take care of all local problems. In fact, the State Government had also agreed to exempt such of those persons who undertake to execute the work from the purview of sale tax, royalty, entry tax and other related State taxes and is said to have extended to the appellant also. In this background it cannot be construed that MOU entered into between the assessee and the Government of Karnataka is opposed to public policy.

29. In the facts on hand, it requires to be noticed that assessee is carrying of business of iron ore and also trading in iron ore. Thus, day in and day out the assessee would be approaching the appropriate Government and its authorities for grant of permits, licenses and as such the assessee in its wisdom and as prudent business decision has entered into MOU with the Government of Karnataka and incurred the expenditure towards construction of houses for the needy persons, not only as a social responsibility but also keeping in mind the goodwill and benefit it would yield in the long run in earning profit which is the ultimate object of conducting business and as such, expenditure incurred by the assessee would be in the realm of "business expenditure". Hence, the orders passed by the authorities would not stand the test of law and is liable to be set aside.

30. However, it requires to be noticed that while examining the claim for deduction under Section 37(1) of the Act the assessing officer would not blindly or only on the say of the assessee accept the claim. In other words, assessing officer would be required to scrutinise and examine as to whether said deduction claimed for having incurred the expenditure has been incurred and only on being satisfied that expenditure so incurred is relatable to the work undertaken by the assessee namely, only on nexus being established, assessing officer would be required to allow such expenditure under Section 37(1) of the Act and not otherwise.

31. For the reasons afore stated, we are of the considered view that substantial question law formulated herein is to be answered in the negative i.e., against the revenue and in favour of the assessee."

10.5.3. In the instant case also, the assessee has contributed funds at the specific request of local administration, which is meant to be used for the benefit of public. As observed in the above said case, the assessee would also be required to approach the appropriate Government and its authorities for grant of permits, licenses. Hence it is a prudent decision of the assessee to oblige to the appeal

made by the local administration and incurred the expenses for public purposes. Hence the assessee has incurred expenses not only on account of social responsibility, but also keeping in mind the goodwill and benefit it would yield in the long run in earning profit. Hence this expenditure would be in the realm of "business expenditure". Accordingly, we hold this expenditure is allowable as deduction. Accordingly, we set aside the order passed by Ld.CIT(A) on this issue and direct the AO to delete this disallowance.

11. Ground No.4 is regarding addition of unaccounted receipts of Rs.21,62,803/- being the difference between books of accounts and Form No.26AS

11.1. Ld.AO added the difference cited above and it is noticed that AR of assessee who appeared before Ld.AO did not object to the said addition. Assessee challenged the same in an appeal filed before Ld.CIT(A), but the Ld.CIT(A) also confirmed the same.

11.2. We heard the parties on this issue. The difference noticed by Ld.AO has been tabulated by him as under:-

Sl. No.	Name of the Company/ Deductor	Receipts as per Books	Receipts as per 26AS/ TRACES	Difference in Receipts
1	M/s Kinesis Films Pvt., Ltd.,	0	451,391	451,391
2	M/s Neptune Developers Ltd.,	0	70,903	70,903
3	M/s Oceanus Dwellings Pvt., Ltd.,	0	16,215	16,215
4	M/s Orris Infrastructure Pvt., Ltd.,	1,946,531	2,422,071	475,540
5	M/s Pragathi Krishna Gramin Bank	8,125,720	8,240,430	114,710
6	M/s Stellar Films Pvt., Ltd.,	0	472,386	472,386
7	M/s Transrail Logistics Ltd.,	0	89,273	89,273
8	M/s Waterfront Films Pvt., Ltd.,	0	472,385	472,385
	TOTALS			**2,162,803**

11.3. Before us, the Ld.Counsel submitted that assessee has entered transactions with M/s Orris Infrastructure Ltd (Rs.4,75,540/-) and M/s Pragathi Krishna Gramin Bank (Rs.1,14,710/-) only. He submitted that the assessee has not entered into any transaction with other companies mentioned in the table. Accordingly, he submitted that the addition made in respect of other companies is not justified. He submitted that the assessee may be provided with an opportunity to reconcile the amount received from the above said two companies also.

11.4. Ld.CIT.DR submitted that the assessee did not object to his addition before Ld.AO and hence the addition should be confirmed.

11.5. We heard the parties on this issue and perused the record.

11.5.1. There is no estoppel against law. Hence, if the assessee proves that any transaction does not belong to it, then no addition is called for. Hence acceptance of any addition, which is against law, will not bar the assessee from contesting the same. However, it is the responsibility of the assessee to substantiate its claim. It is also quite possible that some of the companies might have rectified their Statement of TDS in order to correct mistakes, if any. Hence the position available in Form 26AS as on today may depict different picture. Accordingly, we are of the view that the assessee may be provided with an opportunity to reconcile the differences in respect of two companies cited above and also to prove that it did not have transactions with other companies.

Accordingly, we set aside the order passed by Ld.CIT(A) on this issue and restore the same to the file of the AO for examining it afresh. After affording adequate opportunity of being heard, Ld.AO may take appropriate decision in accordance with law.

Accordingly this ground raised by assessee stands allowed for statistical purposes.

In the result appeal filed by assessee stands partly allowed.

Order pronounced in open court on 8th December,2020.

Sd/-	**Sd/-**
(B. R. BASKARAN)	**(BEENA PILLAI)**
Accountant Member	**Judicial Member**

Bangalore,
Dated, the 8th December, 2020
/Vms/

Copy to:

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

By order

Assistant Registrar,
Income-Tax Appellate Tribunal.
Bangalore

		Date	**Initial**	
1.	Draft dictated on	On Dragon		Sr.PS
2.	Draft placed before author	-12-2020		Sr.PS
3.	Draft proposed & placed before the second member	-12-2020		JM/AM
4.	Draft discussed/approved by Second Member.	-12-2020		JM/AM
5.	Approved Draft comes to the Sr.PS/PS	-12-2020		Sr.PS/PS
6.	Kept for pronouncement on	-12-2020		Sr.PS
7.	Signed Order comes back to Sr.PS/PS	-12-2020		Sr.PS
8.	Date of uploading the order on Website	-12-2020		Sr.PS
9.	If not uploaded, furnish the reason	--		Sr.PS
10.	File sent to the Bench Clerk	-12-2020		Sr.PS
11.	Date on which file goes to the AR			
12.	Date on which file goes to the Head Clerk.			
13.	Date of dispatch of Order.			
14.	Draft dictation sheets are attached	No		Sr.PS