IN THE INCOME TAX APPELLATE TRIBUNAL
"C"BENCH: BANGALORE

BEFORE SHRI B. R. BASKARAN, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA Nos.1950 to 1952/Bang/2018
Assessment Years: 2015-16, 2013-14 & 2014-15

Sri K.R. Kaviraj Prop: M/s. Lakshmi Minerals, Mine Owners, 7th Cross, M J Nagar Hosapete 583 201 **PAN NO :ALGPK6521K**	**Vs.**	ACIT Circle-1 Bellary
APPELLANT		**RESPONDENT**

Appellant by	:	Shri Shiva Prasad Reddy, A.R.
Respondent by	:	Shri Pradeep Kumar, D.R.

Date of Hearing	:	09.11.2021
Date of Pronouncement	:	03.12.2021

O R D E R

PER BENCH:

All the appeals filed by the assessee are directed against the orders passed by Ld. CIT(A) Gulbarga and they relate to the assessment years 2013-14 to 2015-16. Since common issues are agitated in these appeals, they were heard together and are disposed of by this common order for the sake of convenience.

2. (a) In assessment years 2013-14 & 2014-15, the assessee is challenging the validity of assessment contending that the A.O. did not issue notice u/s 143(2) of the Income-tax Act,1961 ['the Act' for short] against the revised return filed by the assessee.

(b) In all the 3 years the assessee is challenging the disallowance deduction made by the monitoring committee out of sales proceeds as per the direction given by Hon'ble Supreme Court.

(c) In assessment year 2013-14, the assessee is challenging the validity of disallowance of compensation paid for mining and dumping material outside the leased area.

3. The assessee is engaged in the business of mining iron ore. It has got mining License Nos.2551, 2545 & 2561. Out of the above, mining license No.2551 is categorized as 'A' category mine and other two licenses are categorized as 'B' category mines. As per direction of Hon'ble Supreme Court, extracted mines were sold in auction by monitoring committee and 10% of sales value in the case of 'A' category and 15% of sales value in case of 'B' category mines were deducted by the monitoring committee. The assessee claimed the amount so deducted in all the 3 years as expenditure allowable u/s 37 of the Act. The A.O. disallowed the claim and the Ld. CIT(A) also confirmed the disallowance. The assessee also claimed compensation payment made in AY 2013-14 as deduction, which was disallowed by AO and confirmed by Ld CIT(A).

4. In AY 2013-14 and 2014-15, the assessee's contention on legal issue is that the AO has not issued notice u/s 143(2) of the Act after filing of revised return of income and hence the assessment is not valid. In this regard, the assessee has placed his reliance on the decision rendered by the co-ordinate bench in the case of Opto Circuits (India) Limited vs. DCIT (ITA No.1044/Bang/2018 dated 26.02.2020).

4.1 Though the Ld A.R did not advance his arguments on this issue, we notice that decision rendered earlier on the very same

issue by another co-ordinate bench in the case of Shilpa Medicare Ltd vs. ACIT (ITA Nos. 1351/Bang/2015 dated 06-02-2020) was not brought to the notice of the bench hearing the case of Opto Circuits (India) Ltd. We notice that the co-ordinate bench has specifically rejected an identical contention made that the issue of notice u/s 143(2) is mandatory in respect of revised return of income also. The relevant observations made by the co-ordinate bench are extracted below:-

> *"5. We have considered the submission of ld. counsel for the assessee and we find that in the present case, the AO assumed jurisdiction on the basis of original return of income filed by the assessee by issuing a notice u/s. 143(2) of the Act dated 26.8.2011 which was served on assessee on 3.9.2011. This notice having been issued and served within the period contemplated by the provisions of section 143(2) of the Act, the AO has assumed valid jurisdiction. The fact that the assessee subsequently on 28.2.2012 filed a revised return is not of any significance. The AO was already seized of the assessment proceedings. In this case, revised return was taken cognizance by the AO, whereas the decision of the Bangalore Bench of Tribunal in IDEB Buildcon P. Ltd. (supra), the revised return was not taken cognizance and therefore the decision cited by the ld. counsel for the assessee is clearly distinguishable. In our opinion, the AO has assumed valid jurisdiction in this case by issue of proper notice u/s. 143(2) of the Act within the time contemplated by law. The original return u/s. 139(1) of the Act has not been treated as non est and the revised return is only for the purpose of certain errors and mistakes in the original return. In such circumstances, there is no requirement of law to issue a notice u/s. 143(2) of the Act with reference to revised return We derive support for the aforesaid conclusions from the decision of the Hon'ble Delhi High Court in the case of Vinod Kumar Khatri v DCIT [2016] 129 DTR 377 (Del). We are therefore of the view that there is no merit in grounds No.1 & 2 raised by the assessee and accordingly the said grounds are dismissed."*

It can be noticed that the co-ordinate bench has rendered its decision following the decision rendered by Hon'ble Delhi High Court in the case of Vinod Kumar Khatri (supra). Accordingly, we prefer to follow the decision rendered in the case of Shilpa Medicare Ltd (supra) and accordingly reject the legal contentions of the assessee urged in AY 2013-14 and 2014-15.

5. Before proceeding to the specific issue urged before us, it is necessary to discuss about the back ground that led to scrutiny of mining operations carried out by various lessees of mines. These details have been culled out from the order dated 18-04-2013 passed by Hon'ble Supreme Court in the same of Samaj Parivartana Samudaya & Ors vs. State of Karnataka (Writ Petition (Civil) No.562 of 2009). The decision rendered by Hon'ble Supreme Court in this case has resulted in making certain additions by the Assessing officer. Hence, it is imperative to understand and appraise the decision rendered by Hon'ble Supreme Court.

5.1 Over exploitation or rampant mining in the State of Karnataka, particularly in the district of Bellary, was engaging the attention of the State Government from time to time. Not satisfied with the investigation carried in the State of Karnataka, a NGO named M/s Samaj Parivartana Samudaya had instituted a writ petition before Hon'ble Supreme Court under Article 32 of the Constitution complaining of little or no coercive action on the part of the State; seeking Hon'ble Supreme Court's intervention in the matter and specifically praying for certain reliefs. The writ petition was entertained and a Committee called "Central Empowered Committee" (CEC) was formed and it was asked to submit a report on the allegations of illegal mining in the Bellary region of the State of Karnataka. The initial reports submitted by CEC indicated large scale illegal mining at the cost and to the detriment of the

environment. Hence, vide its order dated 29-7-2011, the Hon'ble Supreme Court imposed complete ban on mining in the district of Bellary.

5.2 The details of various orders passed by Hon'ble Supreme Court in this regard are given below:-

- *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 areas admeasuring approximately 10,868 ha, pertaining to district of Bellary.*
- *Subsequently, by order dated 26/08/2011 passed in Samaj Parivartana Samudaya vs state of Karnataka, reported in (2013) 8 SCC 209, Hon'ble Apex Court extended ban to Tumkur and Chitradurga mines, based upon a report filed by Central Empowered Committee (hereinafter referred to as CEC). Hon'ble Apex Court directed Ld. Amicus Curiae to submit quantity which could be released from existing stock of 25,000,000 Ton of iron ore, subject to reclamation and rehabilitation plans being submitted. This was pursuance to plea raised by Association of Steel Industry and other affected parties.*
- *On 23/09/2011 Hon'ble Apex Court was appraised by CEC report dated 01/09/2011, regarding 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. A Monitoring Committee (MC) was to be constituted to supervise and control E-Auction, size of lot, transportation etc. It was submitted therein that, MC would utilise sale proceeds for payment of royalty, taxes etc.*
- *Subsequently, a plea by Karnataka Iron and Steel Manufacturers Association was raised regarding shortage of supply of minerals due to suspension of mining activity, before Hon'ble Apex Court. The association also sought for a direction to reopen Category 'A' mines.*

- *Thereafter, by order dated 03/09/2012 Hon'ble Apex Court in case of Samaj Parivartana Samudaya vs state of Karnataka, reported in (2013) 8 SCC 219 approved report dated 29/08/2012 filed by CEC. Hon'ble Apex Court ordered for reopening of category 'A' mines, and vacated order dated 29/07/2011 passed in case of GOI vs. Obulapuram Mining Co. Pvt.Ltd., (supra) and order dated 26/08/2011 in case of Samaj Parivartana Samudaya vs State of Karnataka (supra).*
- *Thereafter, by order dated 28/09/2012, CEC filed detailed report dated 03/02/2012, categorising mines into 'A', 'B' and 'C', depending on various types of violations by mining lessee.*

5.3 The reports also indicated **large scale encroachment into forest areas** by leaseholders and ongoing mining operations in such areas without requisite statutory approval and clearances. Hence a Joint Team was constituted by Hon'ble Supreme Court by order dated 6.5.2011 to determine the boundaries of initially 117 mining leases, which number was subsequently extended to 166 by inclusion of the mines in Tumkur and Chitradurga districts. The CEC submitted its final report dated 3.2.2012, which made two significant recommendations:-

(A) Categorisation of mines into three categories, i.e., "A", "B" and "C" on the basis of extent of encroachment in respect of **mining pits** and **over burden dumps** determined in terms of percentage qua the total lease area.

(B) Conditions subject to which reopening of the mines and resumption of mining operations were to be considered by the Court.

A set of modified recommendations along with a set of detailed guidelines for preparation and implementation of Reclamation and Rehabilitation Plans (R & R) were also submitted to the Hon'ble Supreme Court by CEC on 13.3.2012.

5.4 The CEC categorised the mines into "A", "B" and "C" on the following basis:-

(a) The Category "A" comprises of (a) working leases wherein no illegality/marginal illegality have been found and (b) non-working leases wherein no/marginal illegalities have been found.

(b) The 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 **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 finalised.

(c) 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.

5.5 The Hon'ble Supreme Court also approved sale of iron-ore through e-auction and it was further held that the e-auction shall be conducted by the Monitoring Committee (MC) constituted by Hon'ble Supreme Court. However, **the quantity to be put up for e-auction, its grade, lot sizes, its base/floor price and the period of delivery will be decided/provided by the respective lease holders.** It was also held that the Monitoring Committee may

permit the lease holders to put up for e-auction the quantities of iron ore planned to be produced in subsequent months.

5.6 The categorisation of mines into "A", "B" and "C" had following financial impact:-

(A) From sale proceeds realised by MC on sale of iron-ore belonging to Category A mining leases, 10% shall be retained by the MC. Balance 90% shall be paid to the concerned lessees. The above said 10% shall be transferred to Special Purpose Vehicle (SPV).

(B) From the sale proceeds realised by MC on sale of iron-ore belonging to Category B mining leases, following amounts shall be deducted retained by MC:-

(a) 15% of sale proceeds to be transferred to SPV.

(b) Compensation for illegal mining and illegal dumping computed

(i) @ Rs.5.00 crores per Ha of the area found by the Joint Team to be under illegal mining pit; and

(ii) @ Rs.1.00 crore per Ha of area for illegal mining by way of over burden dump(s), road, office etc outside the sanctioned lese area.

(c) The estimated cost of Reclamation and Rehabilitation Plans (R & R plans). For this purpose, a Guarantee money for implementation of R & R plans shall be collected.

Category B lessees have to deposit a Guarantee money for implementation of R & R Plans in the respective sanctioned lease areas. On full implementation of the R & R Plans to the complete satisfaction of the CEC and subject to the approval by Hon'ble Supreme Court, the guarantee money would be refundable to the lease holder. It was also stated that the lessees shall be liable to

pay additional amount, if the R & R Plan expenditure exceeded the estimates.

(C) In respect of mining leases falling under Category C:-

(a) such leases are cancelled/determined on account of the leases having been found to be involved in substantial 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 MC and

(c) the implementation of the R & R plan should be at the cost of the lessee.

6. With the above back ground, we shall examine the issues urged before us on merits. The common issue relates to the disallowance of claim of the amount of 10%/15% deducted from the sale proceeds retained by monitoring committee. The yearwise details of deduction claimed by the assessee are tabulated below:-

Assessment year	Amount claimed
2013-14	3,22,02,370
2014-15	73,73,095
2015-16	1,42,82,673

6.1. The Ld. A.R. submitted that an identical disallowance made in the case of other mining companieshave been deleted by the coordinate benches of the Tribunal in the following cases:-

a) M/s. VeerabhadrappaSangappa& Company Vs. ACIT (ITA No.1054/Bang/2019 dated 8.12.2020).

b) M/s. Ramgad Minerals & Mining Ltd. Vs. ACIT (ITA Nos.1270 & 1271/Bang/2019 dated 4.11.2020).

The Ld. A.R. submitted that, in the above said cases, it has been held by the Tribunal that the amount of 15% retained by the

monetary committee is assessable as trading receipts but allowable as business expenditure, net effect of which is NIL addition. Accordingly, he submitted that the addition made by the A.O. is liable to be deleted.

6.2 The Ld. D.R., however, placed his reliance on the order passed by Ld. CIT(A).

6.3. We heard the parties on this issue and perused the record. We notice that an identical issue has been examined by the coordinate benches in the cases relied upon by the assessee. For the sake of convenience, we extract below relevant observations made by the coordinate bench in the case of M/s. Veerabhadrappa Sangappa& Company (supra).

> ***"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. <u>The first is a case in which the income never reaches the assessee,</u>*

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.*

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7.10.8. *We note that co-ordinate Hyderabad 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.

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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.

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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 Sitaldas Tirathdas reported in(1961) 41 ITR 367.Hon'ble Supreme Court laying down following principal referred to various rulings that illustrated aspects of diversion of income by overriding title.

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

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."*

6.4 We have earlier noticed that the CEC, vide its report dated 3-2-2012 and 13-3-2012 had made certain recommendations to the Hon'ble Supreme Court. The Hon'ble Supreme Court has incorporated those recommendations in Paragraph 7 (Page 164 to 171 of its order reported in (2013)(8 SCC 154). The CEC had made following recommendation with regard to setting up of Special Purpose Vehicle, transfer of funds collected from all lease holders under various heads, the purpose of utilisation of said funds etc.

"(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;"*

The Hon'ble Supreme Court @ 176 of its order has 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"

6.5 The Hon'ble Supreme Court has observed as under in respect of Reclamation and Rehabilitation Plans (R & R Plans) 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.

The Hon'ble Supreme Court has also recorded lease wise R & R Plans in continuation of the above said observations.

6.6 The Hon'ble Supreme Court has accepted the recommendations of CEC with the following observations at page 194:-

"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.***

53. 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. This will bring us to the most vital issue of the case, i.e., the future of the Category 'C' mines."

6.7 It can be noticed that all the amounts collected from the lessees under different categories 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) came to the same conclusion by following the decision rendered by Hon'ble Kolkata High Court in the case of Shyam Sel 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. Hence, as held by Hyderabad bench of Tribunal in the case of NMDC Ltd (supra), these expenses are allowable as deduction u/s 37(1) of the Act.

6.8 Another important point we notice is that the recommendations made by CEC for making these payments have been made for the purpose of resuming the mining operations. The Hon'ble Supreme Court discusses these points at page 171 from paragraph 10 onwards. Hence there is merit in the submission of the ld A.R that, without making these payments, the 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.

6.9 The above said discussions as well as the decision rendered by the co-ordinate benches in the above cited case would show that the amount deducted @ 10%/15% as the case may be from the sale proceeds constitute trading receipts in the hands of the assessee, but at the same time it is allowable as deduction u/s 37(1) of the Act.

6.10 We notice that the AO has mentioned in the assessment order relating to AY 2013-14 that the claim of Rs.3,22,02,370/- made in that year represents 20% of the sales value of Rs.16,10,11,861/-. We have earlier noticed that the Hon'ble Supreme Court has ordered for deduction of 10% of sale proceeds from Category A mines and 15% of sale proceeds from Category B mines. Hence it is not clear as to how 20% of the sales value was deducted as expenditure. Accordingly, in order to clarify this point, we restore this issue in AY 2013-14 to the file of the AO with the direction to examine the workings and allow deduction to the extent of 10%/15% of sales value in respect of Category A/Category B mines.

6.11 In respect of claim of contribution to SPV in AY 2014-15 and 2015-16, it is stated that the same represent 10%/15% of sales realization. Accordingly, following the decision rendered by the Tribunal in the case of Veerabhadrappa Sangappa & Co (supra), we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete the disallowance.

7.0 The remaining issue urged in AY 2013-14 relates to the disallowance of claim of Rs.8,54,00,000/- claimed as DMG Penalty

and charges. We have noticed earlier that the Hon'ble Supreme Court had approved the recommendation of CEC for collecting compensation/penalty @ Rs.5.00 crore per Ha in respect of illegal mining pits and @ Rs.1.00 crore per Ha in respect of illegal overburden dumps. During the year under consideration, the assessee claimed deduction of Rs.8,54,00,000/- as payment of compensation towards illegal mining pits and illegal overburden dumps as detailed below:-

Illegal Mining Pit in 0.39 Hectares in ML 2561	Rs.19500000
Illegal dumping of waste in 0.92 Hectares in ML 2561	Rs. 9200000
Illegal Mining Pit in 1.09 Hectares in ML 2545	Rs.54500000
Illegal dumping of waste in 0.22 Hectares In ML 2545	Rs. 2200000
	Rs.85400000

The assessee claimed the same as deduction in its Profit and Loss account. The AO considered the same as payment of penalty and accordingly opined that the same is not allowable u/s 37(1) of the Act. The AO took support of the decision rendered by Hon'ble Supreme Court in the case of Maddi Venkataramana & Co (P) Ltd vs. CIT (1998)(229 ITR 534)(SC), wherein it was held that the penalties paid for violation of law is opposed to public policy and not allowable as deduction. The AO also took support of some other decisions also, wherein identical view has been expressed.

7.1 The Ld A.R submitted that identical payment made in the case of Veerabhadhrappa Sangappa & Co. (supra) has been examined by the co-ordinate bench of Tribunal and it has been held that the claim of the assessee is allowable.

7.2 We heard Ld D.R on this issue and perused the record. We notice that the co-ordinate bench has examined an identical payment made in the case of Veerabhadrappa Sangappa & Co. (supra) and it has been held to be allowable. The relevant discussions made by the Tribunal are extracted below:-

*"**8.4.** Before us, Ld.Counsel referred to breakup of*

At page 201 of paper book	*Rs.9,69,00,000/-*
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, 3233 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 readwith 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 theletter 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 StateGovernment. 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 Article32 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 beresorted 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 illegalmining outside the leased area and that the assessee has paid theproportionate compensation for mining in the areas outside the sanctioned area allotted to it*** *and that 10% of sum is to be transferredto 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' forextra mining, without which the assessee could not have resumed itsactivities. 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 ofcompensation. 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 forming 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 assesseewas 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 to be 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 under:-*

"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 ofexpenditure" 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."

7.3 Following the decision rendered by the co-ordinate bench in the above cited case, we hold that the compensation amount paid by the assessee is allowable as deduction. Accordingly, we set aside the order passed by Ld CIT(A) on this issue in AY 2013-14 and direct the AO to delete the disallowance.

8. In the result, the appeal of the assessee for AY 2013-14 is treated as partly allowed. The appeal of the assessee for AY 2014-15 is partly allowed and the appeal of the assessee for AY 2015-16 is allowed.

Order pronounced in the open court on 3rd Dec, 2021

Sd/-	**Sd/-**
(Beena Pillai)	**(B.R. Baskaran)**
Judicial Member	**Accountant Member**

Bangalore,
Dated 3rd Dec, 2021.
VG/SPS

Copy to:

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

By order

Asst. Registrar,
ITAT, Bangalore.