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

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA Nos.464 to 465/Bang/2020
Assessment year : 2013-14 & 2014-15

Mysore Minerals Ltd. [now Karnataka State Minerals Corporation Ltd.], BMTC Shantinagar TTMC Building, 'A' Block, 5th Floor, Shantinagar, Bengaluru – 560 027. **PAN: AACCM 2873L**	Vs.	The Deputy Commissioner of Income Tax, Circle 4[1][2], Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri Narendra Sharma, Advocate
Respondent by	:	Dr. Manjunath Karkihalli, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	03.03.2022
Date of Pronouncement	:	07.03.2022

O R D E R

Per Chandra Poojari, Accountant Member

This appeal by the assessee is directed against the common order dated 24.02.2020 of the CIT(Appeals)-13, Bengaluru for the assessment years 2012-13 & 2013-14. Common issues are involved in these appeals and therefore they are disposed of by this common order for the sake of convenience and brevity.

2. The first issue in **ITA No.464/Bang/2020 for AY 2013-14** is with regard to reopening of the assessment. The facts of the issue are that assessment for this year was completed u/s. 143(3) of the Act on

29.2.2016. Later assessment was reopened by issuing notice u/s. 148 dated 22.3.2017 and consequently assessment order u/s. 143(3) r.w.s. 147 of the Act was framed by the AO making addition on account of disallowance of CSR expenditure of RS.3,20,79,967.

3. Now the contention of the ld. AR is that this issue was already subject matter of original assessment and the AO had raised various queries in his letter dated 5.11.2015 for which the assessee replied vide his letter dated 4.1.2016 relating to CSR expenditure as follows:-

> "13. Corporate Social Responsibility expenses – Rs.3,20,79,967 – Ledger account copies along with a few bills are enclosed."

4. According to the ld. AR, considering the same issue in the reopened assessment is change of opinion, which cannot be done by the AO. During the course of original assessment, the assessee filed various documents along with account copies and bills with respect CSR expenditure`. Therefore what was disclosed was fully disclosed and nothing more was required to be done and accordingly the AO completed the assessment after considering all the issues raised in the reasons recorded in the original assessment. According to the ld. AR in the notice u/s. 148 dated 22.03.2017 issued there was no allegation that there was any failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. Later, the AO took up the same issue that was considered in the original assessment for reopening the assessment. Being so, the reopening of assessment is only on account of change of opinion on the basis of same facts and figures which were available during the original assessment proceedings. Especially the reasons recorded do not indicate any material which came on record after the original assessment proceedings prior to the issue of notice u/s. 148. Thus, he submitted that the AO on perusal of same record available with during

original assessment came to a different conclusion and reopened the assessment which is nothing but change of opinion which cannot be permitted. For this purpose, he relied on the following judgments:-

- CIT v. Bharatiya Reserve Bank Note Mudran Pvt. Ltd. in ITA No.433/2011 order dated 11.8.2021 (Kar.).
- Dell India (P) Ltd. v. JCIT, LTU, 123 taxmann.com 468 (Karnataka)
- Sri Jagannath Promoters & Builders v. DCIT [2021] 133 taxmann.com 270 (Ori.)
- Vishwanath Engineers v. ACIT [2014] 45 taxmann.com 15 (Guj)
- Jainam Investments v. ACIT, [2021] 131 taxmann.com 327 (Bom)

5. On the other hand, the ld. DR submitted that in the present case, income liable to tax has escaped assessment in the original assessment due to oversight and inadvertence or mistake, therefore the AO exercised jurisdiction u/s. 147 of the Act to reopen the assessment. For reopening the assessment, it is not necessary that the information must be derived from external source of any kind or there must be disclosure of income on important matter subsequent to the original assessment. According to him, reassessment is also possible if the information obtained from proper investigation from the material on record or from enquiry or reasons into facts or law. He submitted that the assessee cannot take advantage of any lapse on the part of the AO. In the instant case the AO did not form any opinion on the issues raised in reopening the assessment, as such he issued notice u/s. 148 of the Act so as to bring income escaping assessment into the tax net. He relied on the orders of lower authorities.

6. We have heard both the parties and perused the material on record. In the present case the AO raised the issue of CSR expenditure of Rs.3,20,79,967. The contention of the ld. AR is that this issue was already

considered by the AO in the original assessment and the AO cannot reopen the assessment on the same issues on change of opinion.

7. We have carefully gone through the assessment order u/s. 143(3) of the Act dated 29.2.2016. During the course of scrutiny assessment assessee provided all the details sought for in support of various claims of expenditure debited to P&L account vide letter dated 4.1.2016 and details of expenditure incurred on CSR of Rs.3,20,79,967 was also filed before conclusion of scrutiny assessment on 29.2.2016, hence the question of disallowance does not arise. The contention of the ld. AR is that the AO already applied his mind on the impugned issues raised in the reassessment, that cannot be considered for reopening the assessment. On the basis of the said reply of the assessee, the AO had not made any addition relating to CSR expenditure. Later the AO issued notice u/s. 148 by recording the reasons with regard to CSR expenditure of Rs.3,32,79,967.

8. However, in the final assessment order passed u/s. 143(3) r.w.s. 147 dated 24.11.2017, the made addition on disallowance of CSR expenditure. Now the contention of the ld. AR is that it is only a change of opinion and this issue was discussed in the original assessment proceedings and after considering the reply of the assessee on this issue, the AO has not made any addition there. Considering the same issue amounts to change of opinion as held by the Supreme Court in the case of *CIT v. Kelvinator of India Ltd., 320 ITR 561 (SC)* that section 147 would not give arbitrary power to the AO to reopen the assessment on the basis of mere change of opinion which cannot be *per se* reason to reopen. It was also held that there is a difference between power to review and power to reassess. The AO has no power to review, but he has power to reassess. But reassessment is to be made based on fulfilling certain pre-conditions and “if the concept of change of opinion” is removed in the garb of

reopening of assessment, review would take place. We must treat the "concept of change of opinion" as an in-built test to check the abuse of power by the AO. Hence after 1st April, 1989, AO has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment.

9. The judgment of Full Bench of Karnataka High Court in *Dell India Pvt. Ltd. v. Jt. CIT, LTU & Anr. [432 ITR 212 (Karn)(FB* held as under:-

> "12. We have given careful consideration to the submissions. We are dealing with a reference to a larger bench where we have been called upon to decide the questions formulated by a Division Bench of this Court. The first two questions revolve around the issue whether the Division Bench of this Court in the case of Rinku Chakraborthy (supra) has laid down the correct law. We must, therefore, refer to the decision in the case of Rinku Chakraborthy (supra). This was a case where the Tribunal had interfered with proceedings initiated in accordance with Section 147 of the said Act. The Tribunal held that reopening of an assessment on the basis of a mere change of opinion was not justified. The submission before the High Court was that it was not a case of change of opinion by the Assessing Officer, but it was a case of an income escaping the assessment. In paragraph 17 of the said decision, the Division Bench held thus:
>
> > '17. It is in this background, it is necessary to look into the judgment of the Apex Court, where the scope of reassessment has been explained. The leading case on the point is Kalyanji Mavji & Co. v. CIT 1976 CTR (SC) 85 : [1976] 102 ITR 287 (SC). The Supreme Court dealing with s. 34(1)(b) of 1922 Act, has held as under:
> >
> > "*On a combined review of the decisions of this Court the following tests and principles would apply to determine the applicability of s. 34(1)(b) to the following categories of cases*:
> >
> > (1) where the information is as to the true and correct state of the law derived from relevant judicial decisions;

(2) where in the original assessment the income liable to tax has escaped assessment due to oversight, inadvertence or a mistake committed by the ITO. This is obviously based on the principle that the taxpayer would not be allowed to take advantage of an oversight or mistake committed by the taxing authority;

(3) where the information is derived from an external source of any kind. Such external source would include discovery of new and important matters or knowledge of fresh facts which were not present at the time of the original assessment;

(4) where the information may be obtained even from the record of the original assessment from an investigation of the materials on the record, or the facts disclosed thereby or from other enquiry or research into facts or law.

If these conditions are satisfied then the ITO would have complete jurisdiction to reopen the original assessment. It is obvious that where the ITO gets no subsequent information, but merely proceeds to reopen the original assessment without any fresh facts or materials or without any enquiry into the materials which form part of the original assessment, s. 34(1)(b) would have no application."

(emphasis supplied)

Based on the said decision of the Apex Court, this Court held that:

(a) Where in the original assessment, the income liable to tax escapes assessment due to oversight or inadvertence or a mistake committed by Assessment Officer, the jurisdiction to reopen the original assessment vests in the Assessment Officer.

(b) A tax payer should not be allowed to take advantage of an oversight or mistake committed by Assessment Officer.'

13. Thus, what is held in the case of Rinku Chakraborthy (supra) is clearly based on the decision of the Apex Court in the case of Kalyanji Mavji & Co. (supra) and in particular what is held in clause (2) highlighted above.

In paragraph 13 of the decision of Kalyanji Mavji& Co. (supra) it was held thus:

> '13. On a combined review of the decisions of this Court the following tests and principles would apply to determine the applicability of section 34(1)(b) to the following categories of cases:
>
> "(1) Where the information is as to the true and correct state of the law derived from relevant judicial decisions;
>
> (2) *Where in the original assessment the income liable to tax has escaped assessment due to oversight, inadvertence or a mistake committed by the Income-tax Officer. This is obviously based on the principle that the taxpayer would not be allowed to take advantage of an oversight or mistake committed by the taxing authority*;
>
> (3) Where the information is derived from an external source of any kind. Such external source would include discovery of new and important matters or knowledge of fresh facts which were not present at the time of the original assessment;
>
> (4) Where the information may be obtained even from the record of the original assessment from an investigation of the materials on the record, or the facts disclosed thereby or from other enquiry or research into facts or law."
>
> If these conditions are satisfied then the Income-tax Officer would have complete jurisdiction to reopen the original assessment. It is obvious that where the Income Tax Officer gets no subsequent information, but merely proceeds to reopen the original assessment without any fresh facts or materials or without any enquiry into the materials which form part of the original assessment, section 34(1)(b) would have no application.'
>
> (emphasis supplied)

14. In the case of Indian and Eastern Newspaper Society (supra), one of the issues which arose for consideration was whether reassessment is justified on the basis of an error found by the Assessing Officer on the reconsideration of the same material, which was before him when he made the original assessment. Another issue before the Apex Court was whether a view expressed by an internal auditor of the Income-tax Department on a point of law can be regarded as an information within the meaning of clause (b) of section 147 of the said Act. The Apex Court considered its several earlier decisions and in paragraph 14 of the said decision, the Apex Court held thus:

> "14. Now, in the case before us, the Income-tax Officer had, when he made the original assessment, considered the provisions of sections 9 and 10. Any different view taken by him afterwards on the application of those provisions would amount to a change of opinion on material already considered by him. *The Revenue contends that it is open to him to do so, and on that basis to reopen the assessment under section 147(b). Reliance is placed on Kalyanji Mavji & Co. v. CIT, where a Bench of two learned Judges of this Court observed that a case where income had escaped assessment due to the "oversight, inadvertence or mistake" of the Income-tax Officer must fall within Section 34(1)(b) of the Indian Income-tax Act, 1922. It appears to us, with respect, that the proposition is stated too widely and travels farther than the statute warrants insofar as it can be said to lay down that if, on reappraising the material considered by him during the original assessment, the Income-tax Officer discovers that he has committed an error in consequence of which income has escaped assessment it is open to him to reopen the assessment. In our opinion, an error discovered on a reconsideration of the same material (and no more) does not give him that power. That was the view taken by this Court in Maharaj Kumar Kamal Singh v. CIT, CIT v. Raman & Co. and Bankipur Club Ltd. v. CIT and we do not believe that -the law has since taken a different course. Any observations in Kalyanji Mavji & Co. v. CIT suggesting the contrary*

> *do not, we say with respect, lay down the correct law."*
>
> (emphasis supplied)

15. Hence, Apex Court expressly held that the law laid down by a Bench of two Hon'ble Judges of the Apex Court in the case of Kalyanji Mavji & Co. (supra) was not correct. The Apex Court after noticing the view taken in its earlier decision in the case of Kalyanji Mavji & Co. (supra) expressly held that an error discovered on reconsideration of the same material does not give the Income-tax Officer the power to reopen a concluded assessment.

16. At this stage, we may make a useful reference to a subsequent decision of the Apex Court in the case of CIT v. Kelvinator of India Ltd. (supra). It is a decision of the Bench of three Hon'ble Judges. In paragraphs 3.1 and 3.2 of the said decision, the Apex Court has quoted Section 147 which existed prior to 1st April 1989 and after 1st April 1989. Paragraphs 3.1 and 3.2 of the said decision read thus:

'3.1 After enactment of Direct Tax Laws (Amendment) Act, 1987, i.e., prior to 1-4-1989, section 147 of the Act, reads as under:

> "147. Income escaping assessment.- If the Assessing Officer, for reasons to be recorded by him in writing, is of the opinion that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year)."

3.2 After the Amending Act, 1989, section 147 reads as under:

> "147. *Income escaping assessment.- If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year*, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recomputed the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year)."
>
> (emphasis supplied)

We are concerned with the provision of section 147 as amended with effect from 1st April 1989. In paragraph 4 of the said decision, the Apex Court held thus:

> '4. On going through the changes, quoted above, made to section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the above two conditions and fulfilment of the said conditions alone conferred jurisdiction on the assessing officer to make a back assessment, but in section 147 of the Act (with effect from 1-4-1989), they are given a goby and only one condition has remained viz. that where the assessing officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. *Therefore, post-1-4-1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the assessing officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The assessing officer has no power to review; he has the*

> *power to reassess. But reassessment has to be based on fulfilment of certain precondition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the assessing officer. Hence, after 1-4-1989, assessing officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment.* Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in section 147 of the Act. However, on receipt of representations from the companies against omission of the words "reason to believe", Parliament reintroduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the assessing officer.

"7.2 *Amendment made by the Amending Act, 1989, to reintroduce the expression 'reason to believe' in section 147.* - A number of representations were received against the omission of the words 'reason to believe' from section 147 and their substitution by the 'opinion' of assessing officer. It was pointed out that the meaning of the expression, 'reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989 has again amended section 147 to reintroduce the expression 'has reason to believe' in place of the words 'for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new section 147, however, remain the same."'

(emphasis supplied)

17. Thus, what is held by the Apex Court is that when a power under section 147 is to be exercised, concept of change of opinion must be treated as an inbuilt test to check abuse of power of the Assessing Officer. Further, it is held that after 1st April 1989, the Assessing Officer has power to reopen provided there is a tangible material to come to the conclusion that there is escapement of income from assessment. The Apex Court held that mere change of opinion on consideration of the same material is no ground to invoke section 147 of the said Act.

18. As noted earlier, the decision in the case of Rinku Chakraborthy (supra) is based only on what is held in clause (2) of paragraph 13 of the decision in the case of Kalyanji Mavji & Co. (supra). The decision rendered in the case of Kalyanji Mavji & Company (supra) was by a Bench of two Hon'ble Judges. Subsequently, a larger Bench of three Hon'ble Judges in the case of Indian & Eastern Newspaper Society (supra) has clearly held that oversight, inadvertence or mistake of the Assessing Officer or error discovered by him on the reconsideration of the same material does not give him power to reopen a concluded assessment. It was expressly held that the decision in the case of Kalyanji Mavji & Co. (supra), on this aspect does not lay down the correct law. The decision in the case of Rinku Chakraborthy (supra) is based solely on the decision of the Apex Court in the case of Kalyanji Mavji & Co. (supra) and in particular what is held in clause (2) of paragraph 13. The said part is held as not a good law by a subsequent decision of the Apex Court in the case of Indian and Eastern Newspaper Society (supra).

19. Therefore, in the light of law laid down in the case of Indian and Eastern Newspaper Society (supra), the first question will have to be answered in the negative by holding that the decision in the case of Rinku Chakraborthy (supra) does not lay down correct position law to the extent to which it follows what is held in clause (2) of paragraph 13 of the decision of the Apex Court in the case of Kalyanji Mavji & Company (supra). The second question will have to be answered in the affirmative. In view of the consistent decisions of the Apex Court holding that "reason to believe" in the context of section 147 of the Income-tax cannot be based on mere change of opinion of the Assessing Officer, the third question will have to be answered in the negative. In fact, in

> view of settled law, framing of question No. 3 was not warranted at all.
>
> 20. We make it clear that we have not made any adjudication on the controversy on the merits of Writ Appeal and now the Appeal will have to be placed before concerned Division Bench for deciding the same on merits in the light of what we have held above. The questions whether a case for reopening of the assessment in accordance with section 147 of the said Act is made out and whether a Writ Court ought to interfere with the impugned notice, are left to be decided by a Division Bench."

10. In view of the above discussion, we are of the opinion that in the present case, the AO wanted to review his own earlier order in the garb of reopening the assessment u/s. 147, which is nothing but change of opinion on the issue which was concluded by him by taking a decision in favour of the assessee in the original assessment. Accordingly, we are of the opinion that reopening of assessment in this case is bad in law. Accordingly, we quash the reassessment.

ITA No.465/Bang/2020 for AY 2014-15

11. In this case, the facts are that assessment was passed u/s. 143(3) of the Act on 13.12.2016 making the following disallowances.

> (i) Penalty expenses in illegal mining areas amounting to Rs.6,92,00,000.
>
> (ii) Expenses relating to Corporate Social Responsibility (CSR) amounting to Rs.8,40,23,625.

12. On appeal, the CIT(Appeals) observed as under:-

> "9.2. The appellant's argument with regard to the disallowance of Penalty expenses in illegal mining areas amounting to Rs.6,92,00,000/- for the A.Y. 2014-15 have been examined. In this connection the extract of the Hon'ble Supreme Court Order dated 28.09.2012 (page 6 and page 7) is reproduced below:

"The amicus has submitted a Note, dated September 27, 2012, which actually gives a gist of the main features of the earlier CEC Reports on the subject. In this Note, the amicus suggests certain steps which are essential before the Court may consider granting permission for resumption of mining operations in the 63 'Category B' mining leases. The suggestions of the amicus are contained in paragraphs 6 to 9 and paragraph 10 (which has a number of sub-paragraphs) of the Note. The suggestions include, compensatory payments by the leaseholders for repairing the environmental depredation wrought by the leaseholders by unplanned and to an extent, illegal mining done in their respective areas and the implementation of the Reclamation and Rehabilitation (R&R) plan by each of the 'lease holders. Another important suggestion is in regard to the constitution of a Special Purpose Vehicle (SPV) by the State of Karnataka to carry out the ambitious, but highly essential Comprehensive Environment Plans for the Mining Impact Zone (CEPMIZ) in order to restore the environmental language caused in the area by illegal and reckless mining on a very large scale and to ensure that the environment in the area may not suffer from any such abuse and destruction in future .....

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. l 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."
>
> A plain reading of the above extract of the order of Hon'ble Supreme Court unequivocally clarify the matter that the penalty levied by the CEC is nothing but penalty for **"illegal and reckless mining on a very large scale and to ensure that the environment in the area may not suffer from any such abuse and destruction in future**." Explanation 1 to Section 37 of the IT Act further support the order of the AO which states **"For removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose 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"**. Therefore, the disallowance of Rs.6,92,00,000/- made by the AO in his order us/. 143(3) dated 13/12/2016 is in order and hence sustained. The grounds of appeal raised are accordingly dismissed."

13. Thus, the CIT(Appeals) confirmed the order of the AO. Against this, the assessee is in appeal before us.

14. We have heard both the parties and perused the material on record. In our opinion, the issue is squarely covered by the order of the Tribunal in the case of *M/s. Veerabhadrappa Sangappa & Co. v.* ACIT *in ITA No.1054/Bang/2014 dated 08,12.2020* wherein it was held as follows:-

> "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 86 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:

i) 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

ii) 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-O@' leaseholders" would also be required to be specifically noticed at this stage.

"8. 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):

"888.. 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)1 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 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 86 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 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 of expenditure" should be an offence or prohibited by law. In the instant cases, the purpose of payments is for "R 86 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."

15. Following the above order of the Tribunal, we are inclined to allow this ground of the assessee.

16. The next common issue raised in both the appeals for AYs 2013-14 & 2014-15 is with regard to disallowance of CSR expenditure of Rs.3,20,79,967 and Rs.8,40,23,625 respectively. Though the reassessment is quashed on jurisdiction of the AO in framing the assessment u/s. 143(3) r.w.s. 147 of the Act in AY 2013-14, this issue is taken up for adjudication on merits in both the years.

17. From the verification of records, the AO noted that assessee has incurred above expenses towards corporate social responsibility as per Companies CSR Rules 2014. He was of the view that under the existing provisions of the Income-tax Act, expenditure incurred wholly and exclusively for the purposes of the business is only allowed as a deduction for computing taxable business income. CSR expenditure, being an application of income, is not incurred wholly and exclusively for the purposes of carrying on business. As the application of income is not allowed as deduction for the purposes of computing taxable income of a company, amount spent on CSR cannot be allowed as deduction for computing the taxable income of the company. Moreover, the objective of CSR is to share burden of the Government in providing social services by companies having net worth/turnover/profit above a threshold. If such expenses are allowed as tax deduction, this would result in subsidizing of around one-third of such expenses by the Government by way of tax expenditure.

18. According to the AO, the provisions of section 37(1) of the Income-tax Act provide that deduction for any expenditure, which is not mentioned specifically in section 30 to section 36 of the Income-tax Act shall be allowed if the same is incurred wholly and exclusively for the purposes of carrying on business or profession. As the CSR expenditure being an

application of income is not incurred for the purposes of carrying on business, such expenditure cannot be allowed under the provisions of section 37 of the Income-tax Act. Therefore in order to provide certainty on this issue, said section 37 has been amended to clarify that for the purposes of sub-section(1) of section 37 any expenditure incurred by an assessee on the activities relating to corporate social responsibility referred to in section 135 of the Companies Act, 2013 shall not be deemed to have been incurred for the purpose of business and hence shall not be allowed as deduction under said section 37. However, the CSR expenditure which is of the nature described in section 30 to section 36 of the Income-tax Act shall be allowed as deduction under those sections subject to fulfilment of conditions, if any, specified therein. Hence the AO held that CSR expenditure is not an allowable expense.

19. The CIT(Appeals) confirmed the order of the AO. Against this, the assessee is in appeal before us.

20. The ld. AR submitted that CSR expenditure is incurred wholly and exclusively for the purpose of business and is to be allowed as an expenditure u/s. 37(1) of the Act on principle of commercial expediency. Explanation 2 to section 37(1) is effective from 1.4.2015 and from AY 2015-16 onwards. Being so, the present appeals under consideration being prior to that, accordingly it cannot be applied. He relied on the following decisions:-

i) National Small Industries Corporation Ltd. v. DCIT, [2019] 175 ITD 601 (Del Trib.)

ii) DCIT v. M/s. Great Eastern Energy Corporation Ltd. v. DCIT [2019] 112 taxmann.com 412 (Del Trib.)

iii) Garden Reach Ship Builders & Engineers Ltd. v. Pr.CIT [2021] 121 taxmann.com 386 (Kol Trib.).

iv) NTPC-SAIL Power Co. (P) Ltd. v. DCIT [2019] 112 taxmann.com 409 (Del Trib.)

v) Kanhaiyalal Dudheria v. JCIT [2020] 418 ITR 410 (Kar)

vi) PCIT v. Karnataka State Industrial Infrastructure Development Corporation in ITA No.460/2017 & 458 to 461/2017 dated 17.3.2021.

vii) Ashwathnarayana Singh & Co. v. ACIT, ITA No.522/Bang/2019 dated 1.2.2021.

21. The ld. DR supported the orders of lower authorities and relied on the decision in the case of *CIT v. Wipro Ltd., 360 ITR 658 (Kar)* wherein it was held as under:-

> "I. Section 37(1) of the Income-tax Act, 1961 - Business expenditure - Allowability of [community development] - Assessment years 1986-87, 1987-88 and 1992-93 - Assessee claimed expenditure incurred for community development in a backward area where their factory was situated - Assessing Officer disallowed expenditure on ground that those were in nature of charity and was not connected with business - Whether expenditure towards religious funds, charitable institutions, social clubs or for charity did not stand to test of commercial expediency - Held, yes - Whether since assessee had not placed any other materials on record in support of their claim of expenditure over community development, so as to apply test of commercial expediency, expenses incurred by assessee for community development was not allowable under section 37(1) - Held, yes [Para 18] [In favour of revenue]"

22. We have heard both the parties and perused the material on record. In our opinion, the issue is squarely covered by the order of the Tribunal in the case of *Shri B. Rudragouda v.* ACIT *in ITA Nos.314 & 315/Bang/2020 dated 15.04.2021* wherein it was held as follows:-

> "9. We have heard both the parties. For this assessment year, the assessee incurred the above expenditure for the purpose of upkeep of roads as per the directions of Deputy Commissioner,

Bellary. The lower authorities invoked the provisions of Explanation 2 to section 37 of the Act which Explanation 2 to section 37 of the Act was introduced by the Finance (No.2) Act, 2014 w.e.f. 1.4.2015 as follows:-

"Explanation 2. — For the removal of doubts, it is hereby declared that for the purposes of sub-section (1), any expenditure incurred by an assessee on the activities relating to corporate social responsibility referred to in section 135 of the Companies Act, 2013 (18 of 2013) shall not be deemed to be an expenditure incurred by the assessee for the purposes of the business or profession."

10. The Memorandum to Finance (No. 2) Bill, 2014 explaining provisions relating to direct taxes on Corporate Social Responsibility is extracted below:-

"CORPORATE SOCIAL RESPONSIBILITY (CSR)

Under the Companies Act, 2013 certain companies (which have net worth of Rs.500 crore or more, or turnover of Rs.1000 crore or more, or a net profit of Rs.5 crore or more during any financial year) are required to spend certain percentage of their profit on activities relating to Corporate Social Responsibility (CSR). Under the existing provisions of the Act expenditure incurred wholly and exclusively for the purposes of the business is only allowed as a deduction for computing taxable business income. CSR expenditure, being an application of income, is not incurred wholly and exclusively for the purposes of carrying on business. As the application of income is not allowed as deduction for the purposes of computing taxable income of a company, amount spent on CSR cannot be allowed as deduction for computing the taxable income of the company. Moreover, the objective of CSR is to share burden of the Government in providing social services by companies having net worth/turnover/profit above a threshold. If such expenses are allowed as tax deduction, this would result in subsidizing of around one-third of such expenses by the Government by way of tax expenditure.

The existing provisions of section 37(1) of the Act provide that deduction for any expenditure, which is not mentioned specifically in section 30 to section 36 of the Act, shall be

allowed if the same is incurred wholly and exclusively for the purposes of carrying on business or profession. As the CSR expenditure (being an application of income) is not incurred for the purposes of carrying on business, such expenditures cannot be allowed under the existing provisions of section 37 of the Income-tax Act. Therefore, in order to provide certainty on this issue, it is proposed to clarify that for the purposes of section 37(1) any expenditure incurred by an assessee on the activities relating to corporate social responsibility referred to in section 135 of the Companies Act, 2013 shall not be deemed to have been incurred for the purpose of business and hence shall not be allowed as deduction under section 37. However, the CSR expenditure which is of the nature described in section 30 to section 36 of the Act shall be allowed deduction under those sections subject to fulfilment of conditions, if any, specified therein.

This amendment will take effect from 1st April, 2015 and will, accordingly, apply in relation to the assessment year 2015-16 and subsequent years."

11. The amendment introduced w.e.f. 1.4.2015 cannot be construed as disadvantageous to the assessee and it cannot cover the impugned expenditure incurred by the assessee in these two assessment years. We have gone through the amended provisions including Note on Clauses and explanatory notes and note that as per the Companies Act, 2013, certain companies (which have net worth of Rs.500 crores or more, or turnover of 1000 crore or more or net profit of 5 crores or more during any financial year) are required to spend certain percentage of their profit on activities relating to Corporate Social Responsibility (CSR). Under the existing provisions of the Act, expenditure incurred wholly and exclusively for the purpose of business is only allowed as deduction for computing taxable business income. CSR expenditure being an application of income is not incurred wholly and exclusively for the purpose of carrying on business. As application of income is not allowed as deduction for the purpose of taxable income of a company, the amount spent on CSR cannot be allowed as a deduction for computing taxable income of the company. The object of the CSR expenditure is to share the burden of the Govt. in providing social service by

companies having import/turnover/profit above a threshold. If such expenses are allowed as deduction, it will result in subsidizing the amount of one-third of such expenses by Govt. by way of tax expenditure. The provisions of section 37(1) provide that deduction for any expenditure which is not mentioned specifically in section 30 to 36 of the Act, shall be allowed if the same is incurred wholly and exclusively for the purpose of carrying on business or profession. As CSR expenditure being application of income is not incurred for the purpose of carrying on of business, such expenditure cannot be allowed under the provisions of section 37 of the Act. Therefore, in order to provide certainty on this issue, the said section 37 has been amended to clarify that for the purpose of sub-section (1) of section 37 any expenditure by an assessee on the activities relating to CSR referred to in section 135 of the Companies At, 2013 should not be allowed as deduction under sub-section 37. However, CSR expenditure which is of nature described sections 30 to 36 of the Act, shall be allowed as deduction under this section, subject to fulfillment of conditions, if any, specified therein. But this amendment takes effect from 1.4.2015 and will be applicable in relation to AY 2015-16 and subsequent years.

12. Now the issue before us is whether the department is justified in invoking this Explanation 2 to section 37 to disallow above expenditure incurred by the assessee. Explanation (2) to section 37 reads as follows:-

"Explanation 2. — For the removal of doubts, it is hereby declared that for the purposes of sub-section (1), any expenditure incurred by an assessee on the activities relating to corporate social responsibility referred to in section 135 of the Companies Act, 2013 (18 of 2013) shall not be deemed to be an expenditure incurred by the assessee for the purposes of the business or profession."

13. A reading of the above Explanation makes it clear that it only refers to corporate social responsibility as referred in Section 135 of the Companies Act, 2013. Corporate social responsibility which is mentioned in Section 135 of the Companies Act, 2013 is applicable to company only, which is as follows:-

"[135. (1) Every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during 3[the immediately preceding financial year] shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director.

[Provided that where a company is not required to appoint an independent director under sub-section (4) of section 149, it shall have in its Corporate Social Responsibility Committee two or more directors.]

(2) The Board's report under sub-section (3) of section 134 shall disclose the composition of the Corporate Social Responsibility Committee.

(3) The Corporate Social Responsibility Committee shall,—

(a) formulate and recommend to the Board, a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company [in areas or subject, specified in Schedule VII];

(b) recommend the amount of expenditure to be incurred on the activities referred to in clause (a); and

(c) monitor the Corporate Social Responsibility Policy of the company from time to time.

(4) The Board of every company referred to in sub-section (1) shall,—

(a) after taking into account the recommendations made by the Corporate Social Responsibility Committee, approve the Corporate Social Responsibility Policy for the company and disclose contents of such Policy in its report and also place it on the company's website, if any, in such manner as may be prescribed; and

(b) ensure that the activities as are included in Corporate Social Responsibility Policy of the company are undertaken by the company.

(5) The Board of every company referred to in sub-section (1), shall ensure that the company spends, in every financial year, at least two per cent. of the average net profits of the company made during the three immediately preceding financial years [or where the company has not completed the period of three financial years since its incorporation, during such immediately preceding financial years], in pursuance of its Corporate Social Responsibility Policy:

Provided that the company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities:

Provided further that if the company fails to spend such amount, the Board shall, in its report made under clause (o) of sub-section (3) of section 134, specify the reasons for not spending the amount [and, unless the unspent amount relates to any ongoing project referred to in sub-section (6), transfer such unspent amount to a Fund specified in Schedule VII, within a period of six months of the expiry of the financial year].

[Provided also that if the company spends an amount in excess of the requirements provided under this sub-section, such company may set off such excess amount against the requirement to spend under this sub-section for such number of succeeding financial years and in such manner, as may be prescribed.]

[Explanation.—For the purposes of this section "net profit" shall not include such sums as may be prescribed, and shall be calculated in accordance with the provisions of section 198.]

[6) Any amount remaining unspent under sub-section (5), pursuant to any ongoing project, fulfilling such conditions as may be prescribed, undertaken by a company in pursuance of its Corporate Social Responsibility Policy, shall be transferred by the company within a period of thirty days from the end of the financial year to a special account to be opened by the company in that behalf for that financial year in any scheduled bank to be called the Unspent Corporate Social Responsibility Account, and such amount shall be spent by the company in pursuance of its obligation towards the Corporate Social Responsibility Policy within a period of three financial years from the date of such

transfer, failing which, the company shall transfer the same to a Fund specified in Schedule VII, within a period of thirty days from the date of completion of the third financial year.

[(7) If a company is in default in complying with the provisions of sub-section (5) or sub-section (6), the company shall be liable to a penalty of twice the amount required to be transferred by the company to the Fund specified in Schedule VII or the Unspent Corporate Social Responsibility Account, as the case may be, or one crore rupees, whichever is less, and every officer of the company who is in default shall be liable to a penalty of one-tenth of the amount required to be transferred by the company to such Fund specified in Schedule VII, or the Unspent Corporate Social Responsibility Account, as the case may be, or two lakh rupees, whichever is less.]

(8) The Central Government may give such general or special directions to a company or class of companies as it considers necessary to ensure compliance of provisions of this section and such company or class of companies shall comply with such directions.]

[(9) Where the amount to be spent by a company under sub-section (5) does not exceed fifty lakh rupees, the requirement under sub-section (1) for constitution of the Corporate Social Responsibility Committee shall not be applicable and the functions of such Committee provided under this section shall, in such cases, be discharged by the Board of Directors of such company.]

14. Schedule VII to the Companies Act, 2013 is extracted hereunder:-

“SCHEDULE VII

(See Section 135)

Activities which may be included by companies in their Corporate Social Responsibility Policies Activities relating to:—

[(i) Eradicating hunger, poverty and malnutrition, [‘‘promoting health care including preventive health care’’] and sanitation

[including contribution to the Swach Bharat Kosh set-up by the Central Government for the promotion of sanitation] and making available safe drinking water.

(ii) promoting education, including special education and employment enhancing vocation skills especially among children, women, elderly and the differently abled and livelihood enhancement projects.

(iii) promoting gender equality, empowering women, setting up homes and hostels for women and orphans; setting up old age homes, day care centres and such other facilities for senior citizens and measures for reducing inequalities faced by socially and economically backward groups.

(iv) ensuring environmental sustainability, ecological balance, protection of flora and fauna, animal welfare, agroforestry, conservation of natural resources and maintaining quality of soil, air and water 4[including contribution to the Clean Ganga Fund set-up by the Central Government for rejuvenation of river Ganga].

(v) protection of national heritage, art and culture including restoration of buildings and sites of historical importance and works of art; setting up public libraries; promotion and development of traditional art and handicrafts;

(vi) measures for the benefit of armed forces veterans, war widows and their dependents, 9[Central Armed Police Forces (CAPF) and Central Para Military Forces (CPMF) veterans, and their dependents including widows];

(vii) training to promote rural sports, nationally recognised sports, paralympic sports and olympic sports

(viii) contribution to the prime minister's national relief fund 8[or Prime Minister’s Citizen Assistance and Relief in Emergency Situations Fund (PM CARES Fund)] or any other fund set up by the central govt. for socio economic development and relief and welfare of the schedule caste, tribes, other backward classes, minorities and women;

[(ix) (a) Contribution to incubators or research and development projects in the field of science, technology, engineering and medicine, funded by the Central Government or State Government or Public Sector Undertaking or any agency of the Central Government or State Government; and

(b) Contributions to public funded Universities; Indian Institute of Technology (IITs); National Laboratories and autonomous bodies established under Department of Atomic Energy (DAE); Department of Biotechnology (DBT); Department of Science and Technology (DST); Department of Pharmaceuticals; Ministry of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homoeopathy (AYUSH); Ministry of Electronics and Information Technology and other bodies, namely Defense Research and Development Organisation (DRDO); Indian Council of Agricultural Research (ICAR); Indian Council of Medical Research (ICMR) and Council of Scientific and Industrial Research (CSIR), engaged in conducting research in science, technology, engineering and medicine aimed at promoting Sustainable Development Goals (SDGs).]

(x) rural development projects]

[(xi) slum area development.

Explanation.- For the purposes of this item, the term `slum area' shall mean any area declared as such by the Central Government or any State Government or any other competent authority under any law for the time being in force.]

[(xii) disaster management, including relief, rehabilitation and reconstruction activities.]"

15. By going through the provisions of Explanation 2 to section 37, it is evident that the said Explanation refers to CSR expenditure as referred in section 135 of the Companies Act, 2013. Thus said restriction is applicable only to the companies, not others.

16. The ld. DR submitted that Explanation to s. 37 is applicable to assesses including individual assesses like the present assessee. We are not in agreement with the above

contention of the ld. DR. While interpreting the word in the section, particularly in the Explanation 2 to s. 37, which are enacted under beneficial legislation, the basic principle that has to be kept in mind is the object and intention of the Legislature for enactment of the Act. If that is kept in mind, then strict technical interpretation of the terms used in the section, detrimental to the main object, can easily be avoided. Further if a harmonious interpretation is given to all the provisions, keeping in view the object, then the intention of the Legislature for enacting this legislation, will be fulfilled and the economic and social justice aimed by the Legislature will be reached to one and all. When in a statute there are general words following particular and "specified words", the general words are some times construed as limited to things of the same kind as those specified. This rule of interpretation generally known as ejusdem generis rule has been pressed into service on behalf of the assessee. This rule reflects an attempt to reconcile incompatibility between the specified and general words, in view of the other rules of interpretation, that all words in a statute are given effect if possible, that a statute is to be construed as a whole and that no words in a statute are presumed to be superfluous. Ejusdem Generis rule being one of the rules of interpretation, only serves, like all such rules, as an aid to discover the legislative intent; it is neither final nor conclusive and is attracted only when the specific words enumerated, constitute a class, which is not exhausted and are followed by general words and when there is no manifestation of intent to give broader meaning to the general words. Being so, the word “assessee” used in this Explanation 2 to s. 37 (1) is with regard to the companies for which section 135 of the Companies Act is applicable, not to other assesses which is not covered by the Companies Act.

17. In the present case, the assessee being an individual, the restriction imposed under Explanation (2) to section 37 is not applicable to assessee’s case. At this stage, it is appropriate to draw support from the judgment of Hon’ble Gujarat High Court in the case of Pr. CIT v. Gujarat Narmada Valley Fertilizers & Chemicals Ltd., 422 ITR 164 (Guj). In that case, the following question was before the Hon’ble High Court :-

"Whether in the facts and in circumstances of the case, the learned ITAT has erred in law and on facts in deleting disallowance u/s 37(1) of the Act in respect of expenses being contribution/donation to educational institutions, trust, local bodies?"

18. The Hon'ble Gujarat High Court held as under:-

"8.10 We have also noted that the amendment in the scheme of section 37(1) is not specifically stated to be retrospective and the said Explanation is inserted only with effect from 1st April 2015. In this view of the matter also, there is no reason to hold this provision to be retrospective in application. As a matter of fact, the amendment in law, which was accompanied by the statutory requirement with regard to discharging the corporate social responsibility, is a disabling provision which puts an additional tax burden on the assessee in the sense that the expenses that the assessee is required to incur, under a statutory obligation, in the course of his business are not allowed deduction in the computation of income. This disallowance is restricted to the expenses incurred by the assessee under a statutory obligation under section 135 of Companies Act 2013, and there is thus now a line of demarcation between the expenses incurred by the assessee on discharging corporate social responsibility under such a statutory obligation and under a voluntary assumption of responsibility. As for the former, the disallowance under Explanation 2 to section 37(1) comes into play, but, as for latter, there is no such disabling provision as long as the expenses, even in discharge of corporate social responsibility on voluntary basis, can be said to be "wholly and exclusively for the purposes of business". There is no dispute that the expenses in question are not incurred under the aforesaid statutory obligation. For this reason also, as also for the basic reason that the Explanation 2 to section 37(1) comes into play with effect from 1st April 2015, we hold that the disabling provision of Explanation 2 to section 37(1) does not apply on the facts of this case."

19. Thus, it is evident that the disallowance is restricted to the expenses incurred by the assessee under a statutory obligation u/s. 135 of the Companies Act, 2013 and there is thus now a line of demarcation between the expenses incurred by the assessee on

> discharging corporate social responsibility under such a statutory obligation and under a voluntary assumption of responsibility. As for the former, the disallowance under Explanation 2 to section 37(1) comes into play, but as for latter, there is no such disabling provision as long as the expenses, even in discharge of corporate social responsibility on voluntary basis, can be said to be "wholly and exclusively for the purposes of business". There is no dispute that the expenses in question are not incurred under the aforesaid statutory obligation. In the present case, the said expenditure is incurred by the assessee on discharging social responsibility so as to earn the goodwill of the society and it is wholly and exclusively for the purpose of business.
>
> 20. Therefore, the provisions of Explanation to section 37 of the Act cannot be applied. Further, in the present case, the assessee being an individual, and not a corporation under the Companies Act, 2013, Explanation 2 to section 37 cannot be applied so as to deny the voluntary expenditure incurred by assessee towards community welfare. Accordingly, we are of the opinion that the expenditure incurred is wholly and exclusively for the purpose of business of assessee and has to be allowed as business expenditure. Accordingly, this ground of appeal is allowed."

23. Moreso, the Hon'ble High Court of Karnataka in the case of *CIT v. Infosys Technologies Ltd., 43 taxmann.com 251* held that, where assessee incurred expenditure on installation of traffic signals at various parts of city in order to secure free movement of its employees so that they reached office in time, amount so spent being a part of its corporate responsibility, was to be allowed as business expenditure as under section 37(1).

24. Being so, following the above judicial precedents, we allow the grounds taken by the assessee with regard to CSR expenditure for both the assessment years under appeal.

25. In the result, both the appeals are allowed.

Pronounced in the open court on this 7th day of March, 2022.

Sd/-	Sd/-
(BEENA PILLAI)	(CHANDRA POOJARI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Bangalore,
Dated, the 7th March, 2022.

/*Desai S Murthy /*

Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.