

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'E' BENCH
MUMBAI**

**BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER
&
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No.1017/Mum/2018
(Assessment Year :2008-09)**

M/s. Essel Mining & Industries Limited Industry House 18 th Floor, 10, Camac Street Kolkata, West Bengal- 700 017	Vs.	Deputy Commissioner of Income Tax Central Circle (14) 9 th Floor, Old CGO Building M.K.Road, Mumbai- 400 020
PAN/GIR No.AACE6607L		
(Appellant)	..	(Respondent)

&

**ITA No.1552/Mum/2018
(Assessment Year :2008-09)**

Joint Commissioner of Income Tax Central Circle (14) Room No.902, 9 th Floor, Old CGO Building M.K.Road, Mumbai- 400 020	Vs.	M/s. Essel Mining & Industries Limited Industry House 18 th Floor, 10, Camac Street Kolkata, West Bengal- 700 017
PAN/GIR No.AACE6607L		
(Appellant)	..	(Respondent)

Assessee by	Shri Yogesh Thar
Revenue by	Shri Amol Kirtane
Date of Hearing	07/06/2022
Date of Pronouncement	05/09/2022

आदेश / ORDER**PER M. BALAGANESH (A.M.):**

These cross appeals in ITA Nos.1017/Mum/2018 & 1552/Mum/2018 for A.Y.2008-09 arises out of the order by the Id. Commissioner of Income Tax (Appeals)-47, Mumbai in appeal No.CIT(A)-47/10109/16-17 dated 26/12/2017 (Id. CIT(A) in short) against the order of assessment passed u/s.153C r.w.s. 143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 29/03/2016 by the Id. Dy. Commissioner of Income Tax, Central Circle-1(4), Mumbai (hereinafter referred to as Id. AO).

Common issues are involved in both these appeals, being cross appeals. Hence, they are taken up together and disposed of by this common order for the sake of convenience.

Let us take up the assessee appeal first in ITA No.1017/Mum/2018.

2. The assessee has raised the following grounds of appeal before us:-

“That on the facts and in the circumstances of the case and in law, the Commissioner of Income Tax (Appeals) (hereinafter referred to as the CTT(A)) erred in holding that the proceedings u/s 153C r.w.s. 153A of the Income Tax Act 1961 (hereinafter referred to as the Act) has been validly initiated by the Assessing Officer (hereinafter referred to as AO).

2. That on the facts and in the circumstances of the case and in law, the CIT(A) erred in dismissing appellant's claim that re-examination of issues/genuine claims, which had obtained finality as per Order u/s 143(3) of the Act, are beyond the scope of assessment u/s 153C of the Act.

3. That on the facts and in the circumstances of the case and in law, the CIT(A) erred in not considering and dismissing the appellant's main Ground of Appeal No. 2 (before the CIT(A)) which was a question of law as to whether AO can re-examine the claims which had obtained finality as per Order u/s 143(3) of the Act and did not abate as per the provisions of section 153C r.w.s. 153A of the Act.

3.1. That on the facts and in the circumstances of the case and in law, the CIT(A) erred in not considering and dismissing the appellant's main Ground of Appeal No. 2 (before the CIT(A)) without appreciating the fact that in the case of assessments which do abate, the addition / disallowances can solely be made on the basis of only incriminating materials which admittedly, in the case of appellant, is not available.

3.2. That the CIT(A) erred in deciding Alternate Grounds (Ground Nos. 5 to 7 before CIT(A)) without considering and hence dismissing the Main Ground (Ground No. 2. before CIT(A)).

4. That on the facts and in the circumstances of the case and in law, the CIT(A) erred in confirming the addition of Rs. 4,65,56,163/- on account of alleged illegal mining without appreciating the fact that the issue of mining production was fully verified in course of assessment proceeding u/s 143(3) of the Act.

5. That on the facts and in the circumstances of the case and in law, and without prejudice to Ground No. 4, the CIT(A) erred in not considering the appellant's Ground No. 6 (before the CIT(A)) which was against the action of the AO in valuing the closing stock of sub-grade Iron Ore after including Royalty. 5.1 That the CIT(A) failed to appreciate that Royalty cannot be included in the valuation of closing stock of sub-grade Iron Ore which was lying in the premises of the appellant. Royalty is applicable only on actual despatches from the mines.

6. That on the facts and in the circumstances of the case and in law, and without prejudice to Ground No. 4, the CIT(A) erred in not considering the appellant's Ground No. 7 (before the CIT(A)) in which appellant had claimed that in case of addition on account of non-reporting of sub-grade production in particular assessment year, than impact of the same should be given in successive assessment years till the assessment in which such production was reported as saleable production due to available market.

7. That the appellant craves leave to add, alter or withdraw any ground or grounds of Appeal at or before the hearing of the Appeal.”

3. We find that assessee had raised an additional ground vide letter dated 25/02/2020.

4. We deem it fit to address the original ground No. 3 and 3.1. raised by the assessee before us wherein the assessee had challenged the validity of assessment framed u/s.153C of the Act for A.Y.2008-09 by making certain disallowances and additions without the existence of incriminating material for the year under consideration received from the Assessing Officer of the searched person.

4.1. We find that assessee company is engaged in the business of raising Iron ore, manufacturing of Nitrogen Gas, Ferro Alloys, Trading of Iron Ore and Ferro Alloys, generation of electricity (Windmill) and Railway Siding for captive use. The original return of income was filed by the assessee company for the A.Y.2008-09 on 30/09/2008 declaring total income of Rs.1173,01,47,760/-. This return was revised by the assessee on 30/03/2010. The assessment was completed u/s.143(3) of the Act on 22/12/2010 determining total income at Rs.1170,56,33,879/-. Later the assessment was sought to be reopened by issue of notice u/s.148 of the Act on 28/03/2013. The re-assessment was completed u/s.143(3) r.w.s. 147 of the Act on 31/01/2014. All these assessments were framed on the assessee company by the Id. AO in Kolkata as the registered office of the assessee company was situated in 10, Camac Street, Kolkata – 700 017 at that point in time. Later the case of the assessee was transferred from Kolkata to Mumbai jurisdiction vide order u/s.127(2) of the Act dated 30/09/2014 by the Administrative Commissioner of Income Tax of Kolkata. Strangely yet another notice u/s.148 of the Act was issued by the Kolkata Officer on 13/10/2014 seeking to reopen the assessment of the assessee.

4.2. A limited search and seizure action was conducted by the Investigation Wing, New Delhi on the basis of information passed on by the CBI on 15/10/2013. The information received from the CBI on 15/10/2013 over phone was that during a search action being carried out by CBI at the premises of Aditya Birla group at 4th Floor, UCO Bank building, Parliament Street, New Delhi, the CBI team had found huge cash at the said premises of M/s. Aditya Birla Management Corporation Pvt. Ltd., (ABMCPL in short). On the basis of this, a survey u/s.133A of the Act was conducted in the said premises in the case of ABMCPL on 15/10/2013 which was converted into search and seizure operation by issuance of search warrant u/s.132 of the Act in the name of ABMCPL and in the case of its group Executive President Shri Shubhendu Amitabh at his residential premises on 16/10/2013. The search and seizure action resulted into seizure of unaccounted cash of Rs.25,13,41,000/-; jewellery and billion worth of Rs.44,82,394/- besides incriminating documents from the office of the ABMCPL and from the residence of Shri Shubhendu Amitabh. Several books of accounts, documents etc., were found seized and inventorised as Annexure-1 to Annexure-23. Also various computer hard discs and laptops were seized which were inventorised as Annexure-24 to Annexure-40.

4.3. The Annexure A-8 seized from the premises of ABMCPL which was subjected to search u/s.132 of the Act was a petty cash book of M/s. Essel Mining & Industries Ltd., i.e. the assessee before us. This petty cash book belonging to Essel Mining and Industries Ltd., was found and seized from the said premises of ABMCPL and since the said entries suggest that the ownership of unaccounted cash lies in the hands of M/s. Essel Mining & Industries Ltd., and therefore, it has direct bearing on the

determination of its total income. Accordingly, the Assessing Officer of the searched person i.e. ABMCPL recorded due satisfaction that the said document Annexure A-8 being the petty cash book belongs to assessee herein before us and handed over the said seized documents to the Assessing Officer of the assessee before us. Later notice u/s.153C of the Act was issued on the assessee company on 26/11/2014 to file the returns for A.Yrs. 2008-09 to 2013-14. In response to this notice, the assessee filed a fresh return of income on 31/12/2014 declaring total income of Rs.1134,14,41,426/- which was same as the returned income filed in response to notice u/s.148 of the Act. The assessment was completed u/s.153C r.w.s. 143(3) of the Act by the Id. AO on 29/03/2015 for the A.Y.2008-09 by determining the total income at Rs.1272,13,23,945/- under normal provisions of the Act and book profits of Rs.1238,23,41,899/- u/s.115JB of the Act. Under normal provisions of the Act, the following disallowances / additions were made:-

i) Disallowance u/s.147 of the Act	- Rs.17,15,98,000/-
ii) Disallowance of prior period expenses	-Rs. 3,86,365/-
iii) Disallowance of expenditure on provision	-Rs.5,84,29,722/-
iv) Addition made on account of illegal Unaccounted provision	-Rs.4,65,56,163/-
v) Denial of deduction u/s.80IA of the Act	-Rs.91,08,14,181/-

4.4. The Id. AR before us submitted that none of the aforesaid additions were made based on the incriminating material in the form of petty cash book vide Annexure-A-8 received from the Assessing Officer of ABMCPL (being the searched person u/s.132 of the Act). The Id. AR submitted that the A.Y.2008-09 was a concluded assessment as on the date of assumption of jurisdiction u/s 153C of the Act by the Id. AO and

hence, no addition or disallowance could be made in the search assessments framed either u/s.153C of the Act without existence of any incriminating material relatable to such assessment year. To address this aspect of the issue, it is pertinent to get into the fact as to whether the Id. AO had relied upon any incriminating material received from the Assessing Officer of the search person to make additions, disallowances in the assessment framed u/s.153C of the Act for A.Y.2008-09 in the hands of the assessee. Let us examine the same in respect of each disallowance / addition made in the assessment as under:-

A. Disallowance u/s.14A of the Act - Rs.17,15,98,000/-

We find that this disallowance was made already in the regular assessment framed u/s. 143(3) of the Act for the A.Y.2008-09 on 22/12/2010. Hence, there cannot be any reliance that could be placed on any search material.

B. Disallowance of Prior Period Expenses – Rs.3,86,365/-

We find that this disallowance was made already in the regular assessment framed u/s. 143(3) of the Act for the A.Y.2008-09 on 22/12/2010. Hence, there cannot be any reliance that could be placed on any search material.

C. Disallowance of Expenditure on Provision – Rs.5,84,29,722/-

We find that this disallowance was made already in the first re-assessment order u/s.143(3) r.w.s. 147 of the Act on 31/01/2014

for the A.Y.2008-09. Hence, there cannot be any reliance that could be placed on any search material.

**D. Addition made on account of illegal unaccounted provision
Rs.4,65,56,163/-**

We find that the Id. AO in page 27 para 15.1 had addressed this issue wherein he had made this addition by placing reliance on Justice M.B.Shah Commission report submitted before the Hon'ble Supreme Court pointing out discrepancy in production data of the assessee. It is pertinent to note that Justice M B Shah Commission was setup on illegal mining of Iron Ore and Manganese Ore in the states of Orissa, Jharkhand and Goa. The Id. AO had observed in para 15.3 of his order that as per the said report, the assessee was found to be involved in illegal mining activity of Iron ore. After calculating discrepancy in the production data, the Id. AO worked out the addition on account of suppressed production of Rs.4,65,56,162/- (1,26,501 MTS x Rs.368.03 per MT) and made an addition for the same in the search assessment concluded u/s.153C of the Act.

From the aforesaid narration of facts and the manner in which this addition has been made by the Id. AO, it could be safely concluded that the Id. AO had not relied upon any search material that has been handed over by the Assessing Officer of ABMCPL (being the searched person u/s.132 of the Act) and that this addition had been made by merely placing reliance on the Justice M B Shah commission report. The only incriminating material which was handed over to the Assessing Officer of the assessee herein was Annexure A-8 containing petty cash book. No additions have been

made for A.Y.2008-09 in the impugned search assessment u/s.153C of the Act by placing reliance on the said petty cash book. Hence, it could be safely concluded that the addition made on account of illegal unaccounted production does not come out of any seized material received from the Assessing Officer of the searched person relatable to A.Y.2008-09. In fact the Id. AR even took us to the said petty cash book Annexure A-8, wherein it is seen that the entries found thereon relate only to A.Y. 2011-12 for which a separate addition has been made in the sum of Rs.1.35 Crores by the Id. AO for A.Y.2011-12. This itself categorically goes to prove that no reliance has been placed by the Id. AO on the said petty cash book Annexure A-8 for making this addition for A.Y.2008-09.

E. Denial of Deduction u/s.80IA of the Act claimed by the assessee in return – Rs.91,08,14,181/-

This deduction u/s.80IA of the Act was originally allowed by the Id. AO both in the original assessment framed u/s.143(3) of the Act dated 22/12/2010 and in the first re-assessment order framed u/s.143(3) r.w.s. 147 of the Act dated 31/01/2014. Hence, there cannot be any reliance that could be placed on any search material.

4.5. We find that the Id. DR vehemently argued that there was yet another notice u/s.148 of the Act which was issued by the Kolkata Assessing Officer dated 13/10/2014. The date of issuance of notice u/s.153C of the Act was 26/11/2014. Hence, as on the date of the assumption of jurisdiction by the Id. AO u/s.153C of the Act, proceedings u/s.148 of the Act dated 13/10/2014 was pending which gets abated pursuant to search assessment to be framed in the hands of the assessee

u/s.153C of the Act. Hence, he argued that there is no need for the existence of any search material for making any disallowance or additions in the assessment framed u/s.153C of the Act in the hands of the assessee. We have already stated supra that the jurisdiction of the assessee has been changed from Kolkata to Mumbai vide order u/s.127(2) of the Act dated 30/09/2014 by the Administrative Commissioner of Income Tax. When the jurisdiction of the case has already been shifted from Kolkata to Mumbai on 30/09/2014, we are unable to understand as to how the Kolkata Assessing Officer could have issued notice u/s. 148 of the Act on 13/10/2014 for A.Y.2008-09. Hence, we hold that the said notice is without jurisdiction and accordingly null and void. When the primary notice u/s.148 of the Act dated 13/10/2014 becomes null and void, there cannot be any pending proceedings on the date of assumption of jurisdiction u/s.153C of the Act by the Id. AO i.e. 26/11/2014. Hence, the argument advanced by the Id. DR in this regard is dismissed as legally not tenable.

4.6. From the aforesaid narration of each of the disallowances / additions made, it could be safely concluded that none of the additions that were made by the Id. AO were based on reliance placed on search materials received from the Assessing Officer of the searched person. We hold that assessment for A.Y.2008-09 had originally been completed u/s.143(3) of the Act dated 22/12/2010. Later, the first re-assessment was framed in the hands of the assessee for A.Y.2008-09 u/s.143(3) r.w.s. 147 of the Act on 31/01/2014. Notice u/s.153C of the Act was issued to the assessee only on 26/11/2014. Hence, on the said date i.e. 26/11/2014, no proceedings of the assessee were pending. Hence, we hold that A.Y.2008-09 becomes an unabated / concluded assessment on the date of assumption of jurisdiction u/s.153C of the Act. The law is very

well settled that in respect of concluded assessments, the earlier assessment completed should not be disturbed in the search assessments without existence of any incriminating material relatable to such assessment year. Reliance in this regard is placed on the decision of the Hon'ble Jurisdictional High Court in the case of Continental Warehousing Corporation reported in 374 ITR 645. There is yet another decision which was rendered by the Hon'ble Calcutta High Court in the context of section 153C proceedings in the case of CIT vs. Veer Prabhu Marketing Ltd., reported in 73 taxmann.com 149 laying down the similar proposition.

4.7. In view of the aforesaid observations and respectfully following the judicial precedents relied upon hereinabove, we direct the Id. AO to re-compute the total income of the assessee by accepting the income declared in the return filed in response to notice u/s.153C of the Act without making any additions or disallowances thereon, both under normal provisions of the Act as well as in the computation of book profits u/s 115JB of the Act. We categorically hold that no additions / disallowance could be made in the search assessment u/s.153C of the Act for A.Y.2008-09 in view of the aforesaid detailed reasons. Accordingly, the ground Nos.3 & 3.1 raised by the assessee are allowed.

5. In view of the aforesaid direction, the adjudication of other grounds raised by the assessee in its original grounds; additional grounds raised by the assessee and grounds raised by the Revenue need not be gone into as they would become academic in nature. No opinion is given thereon by us and they are left open.

6. In the result, appeal of the assessee is allowed and appeal of the Revenue is dismissed.

Order pronounced on 05/09/2022 by way of proper mentioning in the notice board.

Sd/-
(RAHUL CHAUDHARY)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 05/09/2022
KARUNA, *sr.ps*

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Sr. Private Secretary / Asstt. Registrar)
ITAT, Mumbai