आयकर अपीलीय अधिकरण न्यायपीठ रायपुर में।
IN THE INCOME TAX APPELLATE TRIBUNAL,
RAIPUR BENCH, RAIPUR

BEFORE SHRI RAVISH SOOD, JUDICIAL MEMBER
AND
SHRI ARUN KHODPIA, ACCOUNTANT MEMBER

आयकर अपील सं. / ITA Nos. 223 & 224/RPR/2019
CO Nos.27 & 28/RPR/2019
निर्धारण वर्ष / Assessment Years : 2009-10 & 2010-11

The Deputy Commissioner of Income Tax-2(1),
Raipur (C.G.)

.......अपीलार्थी / Appellant

बनाम / V/s.

M/s. Bagadiya Brothers Pvt. Ltd.
Bagadiya Mansion, Jawahar Nagar,
Raipur (C.G.)
PAN : AABCB8934G

......प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No. 75/RPR/2020
CO No. 02/RPR/2020
निर्धारण वर्ष / Assessment Year : 2011-12

The Deputy Commissioner of Income Tax-2(1),
Raipur (C.G.)

.......अपीलार्थी / Appellant

बनाम / V/s.

M/s. Bagadiya Brothers Pvt. Ltd.
Bagadiya Mansion, Jawahar Nagar,
Raipur (C.G.)
PAN : AABCB8934G

......प्रत्यर्थी / Respondent

Assessee by : Dr. Rakesh Gupta, Advocate
S/Shri Saksham Agrawal,
G.S. Agrawal, CAs &
N.C. Gupta, Advocate.

Revenue by : Shri Debashish Lahiri, CIT-DR

सुनवाई की तारीख / Date of Hearing : 03.08.2022
घोषणा की तारीख / Date of Pronouncement : 31.10.2022

आदेश / ORDER

PER RAVISH SOOD, JM:

The captioned appeals filed by the revenue are directed against the respective orders passed by the CIT(Appeals)-1, Raipur, which in turn arises from the respective orders passed by the A.O u/ss. 147/143(3) of the Income Tax Act, 1961 (for short 'the Act') for the assessment year(s) 2009-10, 2010-11 and 2011-12. Also the assessee is before us as a cross-objector for all the aforementioned years. As the issues involved in the captioned appeals are inextricably interwoven or in fact interlinked, therefore, the same are being taken up together and disposed off by way of a consolidated order.

2. We shall first take up the appeal filed by the revenue in ITA No.223/RPR/2019 for the assessment year 2009-10 along with the cross-

objection filed by the assessee in CO No.27/RPR/2019 as the lead matter, and the order therein passed shall mutatis-mutandis apply for the purpose of disposing off the remaining appeals filed by the revenue a/w. the respective cross-objections filed by the assessee. The revenue has assailed the impugned order on the following solitary ground of appeal before us :

> "1. Whether in facts and in the law the ld. CIT(A) was justified in deleting the addition of Rs.1,85,95,677/-, being under invoicing amount ignoring the findings of M.B Shah Commission"

On the other hand the assessee had supported the order of the CIT(Appeals) by preferring a cross-objection on the following grounds:

> "1. That under the facts and the law, the hon'ble CIT(A) rightly held that proceedings u/s.147/148 were not as per law.
>
> 2. That under the facts and the law, the ld. CIT(A) rightly deleted the addition of Rs.1,85,95,677/-."

Also the assessee has supplemented his aforesaid cross-objection and objected to the order of the CIT(Appeals) by raising the following additional grounds of cross-objection before us:

> "1. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in framing the impugned reassessment order and that too without assuming jurisdiction as per law and without complying with mandatory conditions u/s 147 to 151 as envisaged under the Income Tax Act, 1961.
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> 2. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld.

> AO in reopening of the assessment of assessee and that too without recording valid reasons as envisaged under the law and erred in passing the impugned reassessment order without obtaining valid sanction approval given by the Ld. Pr. CIT u/s. 151.
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> 3.That having regard to facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in framing the impugned re-assessment order inter-alia on the ground that the objections raised by the assessee with respect to reason recorded u/s 147 have not been disposed off by Ld. AO which is bad in law.
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> 4. That having regard to facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in framing the impugned re-assessment order and that too without issuing the mandatory notice u/s.143(2) within the statutory time an in accordance with law."

3. We shall first deal with the application filed by the assessee company before us for admission of the additional grounds of cross-objection. On a perusal of the aforesaid additional grounds of cross-objection, it transpires that the assessee on the basis of its multi-facet grounds has assailed both the validity of the jurisdiction that was assumed by the A.O for initiating proceedings u/s.147 of the Act, as well as framing of the assessment vide his order passed u/ss. 147/143(3) of the Act. As the adjudication of the aforesaid issue involves purely a question of law which would not require looking any further beyond the facts available on record, therefore, we have no hesitation in admitting the same. Our aforesaid view that where an assessee had raised though for the first time an additional ground of appeal

which involves purely a question of law and requires no further verification of facts, then, the same merits admission finds support from the judgment of the Hon'ble Supreme Court in the case of National Thermal Power Company Ltd. Ltd. Vs. CIT (1998) 229 ITR 383 (SC).

4. Succinctly stated, the assessee company which is a merchant exporter of Iron Ore Fines (IOF), agro-products etc. had filed its return of income for the assessment year 2009-10 on 30.09.2009, declaring an income of Rs.5,88,75,840/-.

5. Information was shared by DGIT (Inv.), Kolkata with the A.O that as per the report of a Commission that was headed by Hon'ble Justice M.B Shah (Retd.) which was set up to probe into illegal mining activities of Iron Ore and Manganese Ore in the States of Orissa, Jharkhand and Goa, the name of the assessee company, viz. M/s. Bagadiya Brothers Pvt. Ltd. had figured in the list of the parties which had indulged in under invoicing of export of Iron Ore Fines (IOF). It was intimated that the assessee company during the accounting period 2008-09 had exported Iron Ore Fines of 41248 MT having FOB value of Rs.5,53,01,854/- on 27.01.2010 from Goa Port; and 202 MT Iron Ore Fines having FOB value of Rs.2,70,825/- on 19.12.2008 to China. Information revealed that the Hon'ble Justice M.B

Shah (Retd.) Commission had in the case of the assessee company reported under invoicing of 34% as in comparison to the price that was received by another company which has exported identical Iron Ore Fines of the same grade during the same period. It was further intimated that due to the aforesaid under invoicing there was a huge difference between quantity produced, royalty paid and quantity exported as per the records of exports. On the basis of the aforesaid information the A.O holding a bonafide belief that the income of the assessee company that was chargeable to tax had escaped assessment, thus, initiated proceedings u/s.147 of the Act. Notice u/s.148 of the Act dated 13.08.2014 was issued by the A.O. In compliance, the assessee vide its letter (filed under protest) dated 16.09.2014 requested that its return of income that was originally filed on 30.09.2009 may be treated as a return filed in response to the aforesaid notice. The A.O accepted the aforesaid request of the assessee and thereafter issued notices u/ss.143(2)/142(1) of the Act. The assessee vide his letter dated 21.10.2015 objected to the initiation of the proceedings u/s.147 of the Act on multiple grounds, as under :-

(i). that reopening of the case was, inter alia, on incorrect facts that the assessee had exported 202 MT Iron Ore Fines of a value Rs.2,70,825/- on

19.12.2008 to China as the said contract was cancelled and no such export was made;

(ii). that the observation of the A.O which had, inter alia, formed the basis for reopening of the assessee's case, i.e., the assessee had exported Iron Ore Fines of 41248 MT of FOB value of Rs.5,53,01,854/- was factually incorrect as the actual cargo that was loaded on 25.12.2008 was 40794 MT of a value of Rs.4,72,40,673/- (as was mentioned on the backside of the shipping bill);

(iii). That the observation of the Hon'ble Justice M.B. Shah (Retd.) Commission was merely a bundle of statistical figures on the basis of which the A.O could not have arrived at a bonafide belief that the income of the assessee chargeable to tax had escaped assessment;

(iv). that neither the Hon'ble Justice M.B. Shah (Retd.) Commission nor the A.O had given the basis for observing that the assessee had under invoiced its exports sales by 34%;

(v). that both the Hon'ble Justice M.B. Shah (Retd.) Commission and the A.O had while making the impugned comparison of prices at which exports had been carried out by various exporters wrongly adopted the price as on the

date of shipping bills and not those on the date when the contract was executed;

(vi). that for drawing adverse inferences on the basis of the impugned comparison of export prices the Hon'ble Justice M.B. Shah (Retd.) Commission had wrongly referred to the shipping bill dated 10.12.2008, loosing sight of the fact that the actual contract was entered into by the assessee on 17.11.2008 ;

(vii). that as the rates of Iron Ore Fines was extremely volatile and fluctuated even on the same day depending on the international and domestic market condition, therefore, the Hon'ble Justice M.B. Shah (Retd.) Commission had wrongly drawn adverse inferences on the basis of notings as per shipping bill;

(viii). that as the Hon'ble Justice M.B. Shah (Retd.) Commission in its report had not mentioned the terms and conditions of the contract, i.e., payment conditions, loading conditions, port of loading, port of discharge, vessel size and CQD condition all of which factors had a material bearing on the price at which Iron Ore Fines were exported, therefore, in absence of such details no feasible comparison could have been made;

(ix). that the Hon'ble Justice M.B. Shah (Retd.) Commission had wrongly adopted the average of the FOB sale price for same grade of IOF and period as a basis for determining the percentage of under invoicing without appreciating that as the price of Iron Ore Fines fluctuated even on the same day, therefore, the result obtained on the basis of average price of a period would be absolutely irrelevant for carrying out a feasible comparison of price;

(x). that adoption of under invoicing at the rate of 34% was nothing but a wild guess;

(xi). that the Hon'ble Justice M.B. Shah (Retd.) Commission by not appreciating the nature of the trade had wrongly adopted WMT rate (i.e. wet weight without deducting moisture of Iron Ore Fines) while for the rate is calculated on dry MT;

(xii). that the Hon'ble Justice M.B. Shah (Retd.) Commission had failed to take cognizance of the effect of moisture content in its report;

(xiii). that the Hon'ble Justice M.B. Shah (Retd.) Commission in its report had only raised doubts about various transactions which were reported by them and was not certain about the final results;

(xiv). that the Hon'ble Justice M.B. Shah (Retd.) Commission was not in possession of any direct supporting material which would evidence under invoicing of the export transactions of the assessee company;

(xv). that the assessee could not be called upon to prove negative i.e. of not having under invoiced its export sales;

(xvi). that as export of 45000 MT had been made by the assessee to M/s. China National Building Materials and Equipment Import & Export Corporation, a state owned enterprise of "Peoples Republic of China", therefore, it was illogical to imagine that the assessee would have under invoiced its export sales to the aforesaid government agency;

(xvii). that the fact of alleged under invoicing of export sales in the case of the assessee was also ruled out considering the fact that neither the assessee nor its director was holding any bank account outside India;

(xviii). that the A.O could not be permitted to take recourse to proceedings u/ss.147/148 of the Act in order to make roving enquiries;

(xix). that though the assessee during the year had carried out export of Iron Ore through 51 vessels of Rs. 865 crores (approx.) but adverse inferences

were only drawn in respect of 1 vessel the export sales of which was only to the tune of Rs.5.53 crore which was hardly 0.67% of its total export turnover and was almost negligible;

(xx). that the fact that the Customs Authority had checked the value of the cargo as per shipping bill at the time of loading of the cargo and had levied custom duty on ad valorem basis and thus accepted the same evidenced the authenticity of the duly recorded export sales of the assessee;

(xxi). that the authenticity of the export sales of the assessee was also accepted as part of its international transactions u/s.92E of the Income Tax Act;

(xxii). that while for the assessee company was exporting Iron Ore Fines of 58% to 63% grade to China, however, the comparable instances quoted by the Commission was of low-grade quality of Iron Ore Fines i.e. 55% Grade, on the basis of which no feasible comparison could have been made; and

(xxiii). that the Hon'ble Justice M.B. Shah (Retd.) Commission was set up by Government of India for making enquiry on illegal mining of Iron Ore and Manganese Ore vide notification No. S.O. 2817(e), dated 22.11.2010 with an object to express its opinion about illegal mining, therefore, by no means,

the same could have formed a basis for reopening of the assessee's case under consideration.

6. The A.O declined to accept the aforesaid objections of the assessee company and after making an addition of Rs. 1,85,95,677/- i.e. 34% of the impugned export sales of 40794 MT of IOF of Rs.5,46,93,169, vide his order passed u/ss.147/143(3), dated 30.03.2016 assessed its income at Rs.7,74,71,520/-.

7. Aggrieved the assessee carried the matter in appeal before the CIT(Appeals). The assessee assailed the validity of the jurisdiction that was assumed by the A.O for taking recourse to proceedings u/s.147 of the Act, and also challenged on merits the impugned addition that was made by him on the basis of the Hon'ble Justice M.B. Shah (Retd.) Commission's report.

8. The CIT(Appeals) after exhaustively deliberating on the contentions advanced by the assessee found favor with the same. Concurring with the claim of the assessee, it was observed by the CIT(Appeals) that the main object of the Shah Commission was to express its opinion about illegal mining and its findings were not final and conclusive. In fact, it was observed by the CIT(Appeals) that the Commission itself had held that the irregularities that had surfaced were further required to be investigated by

the Central Investigation Agencies under the Foreign Exchange Management Act, Money Laundering Act etc. preferably by the Enforcement Directorate and the Income Tax Department. The CIT(Appeals) was of the view that the Commission on the basis of its aforesaid observation was clearly not in a position to finalize the illegality and irregularity with regard to export of Iron Ore by the lessee's or their representatives or traders comprehensively and had only recommended investigation by the Government Authorities. It was further noticed by him that though there was alleged under invoicing of 34% in the case of the assessee, however, on the other hand in the case of another exporter, viz. M/s. Prime Minerals Exports Pvt. Ltd., the assessee's data i.e. export price was adopted as a yardstick. On the basis of the aforesaid fact the CIT(Appeals) was in agreement with the claim of the assessee that now when its export price was being adopted as a standard rate, then, alleging under invoicing in its own case was clearly ruled out. Referring to the aforesaid instance, it was observed by the CIT(Appeals) that the shipping bill dated 19.03.2010 of Iron Ore Fines of grade 52% i.e. Fe 52 Iron Ore @ 1681.76 of the assessee company was adopted by the Commission as a standard rate for working out under invoicing of Rs. 147.15 per MT in the case of another exporter, viz. M/s. Prime Minerals Exports Pvt. Ltd. which had shown export price of Rs.1534.61 per MT. The CIT(Appeals) further

observed that Shah Commission report contained name of 404 entities in which the name of the assessee figured at Sr. No.175 and 176 i.e. at Page 204 of the report. It was observed by the CIT(Appeals) that while for in the report the transaction mentioned at Sr. No. 176 regarding export of 202 MT of Iron Ore Fines by the assessee to China having been cancelled had thus not materialized and no goods were loaded, however, strangely there was reference of FOB rate per WMT of Rs.1340.72 as regards the same. It was observed by the CIT(Appeals) that now when the aforesaid transaction did never see the light of the day and was cancelled, therefore, it was beyond understanding as to how the average of FOB sale rate in respect of such transaction was worked out. It was further observed by the CIT(Appeals) that as regards the transaction mentioned at Sr. No.175 of the aforesaid report the A.O had drawn adverse inferences and made the impugned addition without considering the assesse's reply for the reason that the same was not supported by any corroborative evidence. Rebutting the aforesaid observation of the A.O, it was observed by the CIT(Appeals) that the assessee in order to substantiate the authenticity of the export sales of Iron Ore Fines of 40794 MT for a value of Rs.4,72,40,673/- had placed on record supporting documentary evidences, viz. invoices, payment towards loading charges, shipping bills, documents evidencing sale @ Rs.1340.72 per MT,

(FOB Rate) etc., which were however rejected by the A.O without giving any cogent reason for so doing.

9. The CIT(Appeals) further observed that the cases of several companies whose names had figured in the Commission report were reopened u/s.148 of the Act. It was observed by him that the aforesaid companies had filed Writ Petition(s) with the Hon'ble High Court of Bombay which had disposed off the same vide its order passed in WP No.141/2015 in the case of Sesa Sterlite Limited (formerly known as Sesa Goa Limited) & Ors Vs. Assistant Commissioner of Income Tax & Ors. (2019) 417 ITR 334 (Bom.). It was observed by the CIT(Appeals) that the Hon'ble High Court of Bombay had after exhaustive deliberations concluded that there was no information available with the A.O to form a bonafide "reason to believe" that the income of the respective companies chargeable to tax had escaped assessment. It was further observed by the Hon'ble High Court that the report of the Commission was itself in the nature of a mere expression of an opinion on the basis of which it had recommended further enquiry by various government agencies. It was observed by the CIT(Appeals) that the A.O in the case of the assessee company had merely gone by the report of the Commission and had without any basis drawn adverse inferences towards alleged under invoicing of 34% (as per report) and made a consequential

addition of Rs.1,85,95,677/-. It was further observed by the CIT(Appeals) that as the report of the Commission was only a cursory observation that was arrived at without calling for and studying the relevant facts and figures of the various contracts, therefore, there was no justification on the part of the A.O in summarily making an addition by referring to the impugned 34% under invoicing as was stated by the Commission in its report. It was observed by the CIT(Appeals) that the A.O while drawing adverse inferences in the hands of the assessee was swayed by the observations of the Commission and had not only failed to carry out any independent enquiry, but had also not dislodged the substantial documentary evidences that were filed by the assessee company. Accordingly, the CIT(Appeals) was of the view that as the under invoicing of 34% lacked both finality and judicial authority, therefore, the same could not have been blindly adopted by the A.O for making the impugned addition in hands of the assessee company. The CIT(Appeals) further observed that there was substance in the assessee's claim that the Commission while alleging under invoicing had wrongly adopted price as on the shipping date and not on the date when the contract was entered into between the seller and buyer. Also, the CIT(Appeals) noticed that the price of two companies could be compared only if all the factors therein involved were found to be same. The CIT(Appeals)

was of the view that the date of contract was a material factor which could not be lost sight of for making a feasible comparison. The CIT(Appeals) on the basis of his aforesaid observation was of the view that two consignments though shipped by two exporters on the same date could not be compared if the respective contracts had been negotiated by them on different dates. Also, the CIT(Appeals) found favor with the claim of the assessee that though there were several factors such as grade of Iron Ore Fines, Payment conditions, loading conditions, port of loading, port of discharge and vessel size etc. which had a material bearing on the price negotiated inter se the parties, however, neither of the same were considered by the A.O while summarily alleging under invoicing by the assessee company. The CIT(Appeals) on the basis of the aforesaid facts was of the view that the impugned under invoicing of 34% that was adopted by the A.O on the basis of report of the Hon'ble Justice M.B. Shah (Retd.) Commission, i.e, without considering the material factors would result to nothing but a wild guess and a distorted result. The CIT(Appeals) thereafter by drawing support from the judgment of the Hon'ble High Court of Bombay concluded that the addition made on account of alleged under invoicing of 34% could not be sustained and was liable to be vacated.

10. The department being aggrieved with the order of the CIT(Appeals) has carried the matter in appeal before us.

11. The Ld. Authorized Representative (for short 'AR') for the assessee at the very outset took us through the facts of the case. The Ld. AR on the basis of his multiple contentions assailed the validity of jurisdiction that was assumed by the A.O for framing the impugned assessment u/ss.147/143(3) of the Act, dated 30.03.2016. It was the claim of the Ld. AR that the impugned assessment u/ss.147/143(3) of the Act, dated 30.03.2016 was framed by the A.O without issuing a notice u/s.143(2) of the Act within the stipulated time period contemplated in law, i.e., six months from the end of the financial year in which the return was furnished. Advancing his aforesaid contention, it was submitted by the Ld. AR that the assessee in compliance to the notice u/s.148, dated 13.08.2014 had vide its letter dated 16.09.2014 requested the A.O that its return of income that was originally filed on 30.09.2009 may be treated as a return filed in response to the aforesaid notice, Page 3 of APB. It was averred by the Ld. AR that though the A.O had accepted the request of the assessee and framed the assessment vide order passed u/ss.147/143(3), dated 30.03.2016, but the same had been framed de hors issuance of any valid notice u/s.143(2) of the Act. Elaborating his aforesaid contention, it was submitted by the Ld. AR that

the A.O had issued notice u/s.143(2) of the Act, dated 22.03.2016 and framed the impugned assessment, Page 121 of APB. It was submitted by the Ld. AR that as the notice u/s.143(2) of the Act, dated 22.03.2016 was issued beyond the period of 6 months from the end of the financial year in which the return of income was filed by the assessee i.e. on 16.09.2014, therefore, the impugned assessment could not be sustained and was liable to be struck down on the said count itself. In support of its aforesaid contention the Ld. AR had relied on the judgments of the Hon'ble Supreme Court in the case of ACIT & Anr. Vs. Hotel Blue Moon [2010] 321 ITR 362 (SC) and CIT v. Laxman Das Khandelwal (2019) 417 ITR 325(SC).

11.1 It was further submitted by the Ld. AR that the A.O had thereafter issued a letter dated 23.03.2016 to the assessee company, wherein referring to the assessee's letter dated 16.09.2014 (supra) he had called upon it to e-file its return of income in compliance to the notice issued u/s.148 of the Act, so that the consequential assessment order that was to be passed u/ss.147/143(3) of the Act may be digitalized on ITD application, Page 222 of APB. The Ld. AR stated that in compliance to the aforesaid letter dated 23.03.2016 the assessee company had on 27.03.2016 e-filed its return of income. Referring to the aforesaid facts, it was submitted by the Ld. AR that a perusal of the letter dated 23.03.2016 issued by the A.O i.e. DCIT-2(1),

Raipur proved to the hilt that no notice u/s.143(2) of the Act was issued prior to 22.03.2016. In sum and substance, it was the claim of the Ld. AR that as no notice u/s.143(2) of the Act was issued to the assessee company within the stipulated time period i.e. 6 months from the end of the financial year in which the return was furnished, therefore, the impugned assessment so framed could not be sustained and was liable to be vacated.

11.2. The Ld. AR further assailed the validity of the proceedings initiated in the case of the assessee u/s.147 of the Act for the reason that observation of the Hon'ble Justice M.B Shah (Retd.) Commission could not form a basis for the A.O to arrive at a bonafide belief that the income of the assessee chargeable to tax had escaped assessment within the meaning of Section 147 of the Act. It was averred by the Ld. AR that as the Hon'ble Justice M.B Shah (Retd.) Commission due to time constraint could not come up with conclusive findings and had specifically recommended that the matter be further investigated by the Central Investigation Agencies under the Foreign Exchange Management Act, Money Laundering Act etc. preferably by the Enforcement Directorate and the Income Tax Department, therefore, the cursory observations of the Commission could not have been acted upon by the A.O for arriving at a bonafide belief that the income of the assessee company chargeable to tax had escaped assessment within the meaning of

Sec. 147 of the Act. The Ld. AR in support of his aforesaid contention had relied on the order of the Hon'ble High Court of Bombay in the case of Sesa Sterlite Limited (formerly known as Sesa Goa Limited) & Ors Vs. Assistant Commissioner of Income Tax & Ors. (2019) 417 ITR 334 (Bom). Alternatively, it was submitted by the Ld. AR that a bare perusal of the "reasons to believe" revealed beyond doubt that the same were based on observations which were not relevant to the case of the present assessee company which was a merchant exporter and was and not in the business of mining. Elaborating his aforesaid contention the Ld. AR took us through the copy of the "reasons to believe" on the basis of which proceedings u/s.147 of the Act were initiated in the case of the assessee, Page 1 of APB. Referring to the 'reason to believe' it was averred by the Ld. AR that as the assessee was involved in trading exports of Iron Ore Fines, thus, there could be no question about quantity produced or payment of royalty etc. by the assessee company as was stated in the reason to believe. The Ld. AR drawing support from the aforesaid facts submitted that as in the case of the assessee company action u/s.147 of the Act was initiated on the basis of incorrect facts and irrelevant observations, therefore, the proceedings were liable to be vacated on the said count itself.

11.3 Also, it was also submitted by the Ld. AR that a perusal of the "reasons to believe" revealed beyond doubt the non-application of mind by the A.O who had mechanically acted upon the observations of the Hon'ble Justice M.B. Shah(Retd.) Commission report and initiated proceedings u/s.147 of the Act in the case of the assessee company. The Ld. AR further stated that though as per the Justice M.B. Shah (Retd.) Commission report the assessee was allegedly reported to have indulged in under invoicing to the extent of 34% of its export price of its two shipments, viz. (i) export of Iron Ore Fines of 41248 MT : FOB value of Rs.5,53,01,854/- on 10.12.2008 ; and (ii) export of Iron Ore Fines of 202 MT : FOB value of Rs.2,70,825/- on 19.12.2008, however, the A.O on the basis of incorrect facts had sought to treat the entire export sales aggregating to an amount of Rs.5,55,72,679/- as the income of the assessee company that had escaped assessment. Apart from that, it was averred by the Ld. AR that even the Jt. CIT had given his approval u/s.151(2) of the Act on the basis of such incorrect facts. Also, it was though initially stated by the Ld. AR that the A.O had wrongly assumed jurisdiction and proceeded with the assessment without disposing off the objections of the assessee company qua the validity of the jurisdiction that was assumed by the A.O u/s.147 of the Act, but after arguing for some time on the said issue he stated that as per instructions he does not intend to press the said

contention. It was further submitted by the Ld. AR that the proceedings u/s.147 of the Act had been initiated in the case of the assessee company without obtaining a proper approval from the competent authority as contemplated u/s.151(2) of the Act. Elaborating on his aforesaid contention, it was submitted by the Ld. AR that as per the mandate of law as was at the relevant point of time available on the statute, notice u/s.148 of the Act in the case of the assessee could have been issued only after obtaining prior approval of the Jt. CIT, Raipur. The Ld. AR took us through the satisfaction note of the Jt. CIT, Raipur, Page 195-196 of APB. It was submitted by the Ld. AR that as the Jt. CIT had merely stated *"Yes, I am satisfied with the reasons recorded by the A.O. It is fit case for issue of notice u/s.148 of the IT Act, 1961"*, therefore, it revealed that it was a mere granting of approval in a mechanical manner without any application of mind. It was further submitted by the Ld. AR that a perusal of the "reasons to believe" revealed that the impugned proceedings had been initiated merely on the basis of a borrowed satisfaction i.e. report of the Hon'ble Justice M.B. Shah(Retd.) Commission and not on the basis of any independent application of mind by the A.O. It was, thus, submitted by the Ld. AR that as there was no application of mind on the part of the A.O which is a sine-qua-non for valid

assumption of jurisdiction u/s. 147 of the Act, therefore, the impugned proceedings were also liable to be vacated for the said reason.

11.4 Adverting to the merits of the case, it was submitted by the Ld. AR that the impugned addition of Rs.1.85 crore (approx.) made by the A.O towards alleged 34% under invoicing of the export price of the export bill in question was devoid and bereft of any basis, and thus, was liable to be vacated. Taking us through the observations of the Hon'ble Justice M.B Shah (Retd.) Commission's report (relevant extract), it was submitted by the Ld. AR that it was therein categorically observed that due to time constraint the commission was unable to finalize the illegalities and irregularities with regard to export of Iron Ore by the lessee or their representative or traders comprehensively. Referring to the aforesaid report, it was averred by the Ld. AR that it could safely be gathered that the Commission had recorded cursory observations which by no means could have been blindly adopted by the A.O for drawing adverse inferences in the hands of the assessee company. The Ld. AR once again took support from the fact that the Hon'ble Justice M.B Shah (Retd.) Commission had itself recommended for further investigation by the Central Investigation Agencies, i.e., preferably by Enforcement Directorate and the Income-Tax department under the Foreign Exchange Management Act, Money Laundering Act etc. In sum and

substance, it was the claim of the Ld. AR that as the Commission had not come up with any conclusive findings which would have irrefutably evidenced any under invoicing on the part of the assessee company, therefore, the A.O was statutorily bound to have carried out certain independent investigations and enquiries in the backdrop of the substantial documentary evidence that was filed by the assessee before him to substantiate the authenticity of its export transaction. Rebutting the adverse inferences that were drawn by the AO, it was submitted by the ld. A.R that he had with a pre-meditated state of mind for making the impugned addition summarily discarded the clinching documentary evidence that was filed by the assessee to substantiate the authenticity of its duly recorded export transaction under consideration. Referring to the observation of the Commission that there was 34% of under invoicing by the assessee company, it was submitted by the ld. A.R that the same de hors any supporting material could not have been summarily applied for making of the impugned addition in the hands of the assessee company. Adverting to the basis for quantifying the impugned under invoicing at 34% by the Hon'ble Justice M.B Shah (Retd.) Commission, it was submitted by the Ld. AR that the same was based on incorrect facts or in fact certain facts which were not relevant at all. Advancing his aforesaid contention, it was the claim

of the Ld. AR that the Commission had not pin pointed any specific material on the basis of which under invoicing of 34% in the case of the assessee would be proved to the hilt. Also, it was claim of the Ld. AR that the very basis adopted by the Commission for making the impugned comparison was found to be factually incorrect. Elaborating on his aforesaid contention, it was submitted by the Ld. AR that as the international markets were very volatile and the rate of Iron Ore Fines fluctuates even on the same day depending on multiple reasons, therefore, the adoption of average FOB sale price as a yardstick by the Commission for working out under invoicing was totally a fallacious method.

11.5 Apart from that, it was averred by the Ld. AR that the Hon'ble Justice M.B Shah (Retd.) Commission for the purpose of making comparison of price inter-se various exporters had wrongly taken price as on the date of shipping bills, for the reason that the price was fixed between the buyer and seller on the basis of a contract which was executed by them. Also, the Ld. AR pointed out that as the rate of Iron Ore Fines was calculated on dry MT, therefore, the adoption of WMT rate i.e. wet weight without deducting moisture of Iron Ore Fines by the Hon'ble Justice M.B Shah (Retd.) Commission clearly pointed out the fallacious method on its part in arriving at the alleged under invoicing. The Ld. AR further submitted that now when its export of Iron Ore

Fines had been subjected to custom duty on ad valorem basis, therefore, without placing on record any material which would irrefutably disprove the aforesaid value there was no justification for the A.O in alleging impugned under invoicing by the assessee company. On the basis of the aforesaid facts it was the claim of the Ld. AR that now when neither the basis adopted by the Hon'ble Justice M.B Shah (Retd.) Commission was found to be factually correct to justify the alleged under invoicing of export price of Iron Ore Fines i.e. @34% by the assessee company; nor any concrete material had been made available on record would conclusively prove any such under invoicing, therefore, there was no justification on the part of the A.O to have discarded its duly substantiated export of Iron Ore Fines and drawn adverse inferences by merely referring to the cursory observations recorded in the report of the Hon'ble Justice M.B Shah (Retd.) Commission. On the basis of his aforesaid contention it was submitted by the Ld. AR that the impugned addition of Rs.1.85 crore that was made by the A.O i.e 34% of under invoicing by the assessee company on the basis of an unsubstantiated allegation could not be sustained and was liable to be struck down.

12. Per contra, the Ld. Departmental Representative (for short 'DR') relied on the orders of the lower authorities. It was submitted by the Ld. DR that the A.O remaining well within his jurisdiction had validly framed the

assessment u/s.147 of the Act. Rebutting the claim of the assessee's counsel that the A.O had framed the impugned assessment u/ss.147/143(3), dated 30.03.2016 without issuing any valid notice u/s.143(2) of the Act, it was submitted by the Ld. DR that as the assessee had duly participated in the course the assessment proceedings, therefore, as per Section 292BB of the Act he could not now assail the validity of the assessment that was framed by the A.O u/ss.143(3)/147 of the Act, dated 30.03.2016. As regards the sanction granted by the Jt. CIT-2(1), Raipur u/s.151(2) of the Act, it was submitted by the Ld. DR that as he had in clear terms recorded his satisfaction, therefore, no infirmity did emerge therefrom.

12.1 Also, the Ld. DR rebutted the claim of the assessee's counsel that the proceedings u/s.147 of the Act had been taken recourse to on the basis of a borrowed satisfaction. It was submitted by the ld. D.R that a perusal of the "reasons to believe" revealed beyond doubt that the A.O had after due application of mind to the material available before him arrived at a bonafide belief that income of the assessee chargeable to tax had escaped assessment. It was further submitted by the Ld. DR that as what was required at the stage of initiation of proceedings u/s.147 of the Act was a nexus between the material available on record and formation of a bonafide belief on the part of the A.O that the income of the assessee chargeable to

tax had escaped assessment, and it was not required that the A.O should conclusively prove that the income of the assessee chargeable to tax had escaped assessment, therefore, no infirmity did emerge from the "reasons to believe" on the basis of which proceedings in the case of the assessee company were initiated u/s. 147 of the Act.

12.2 Also, the Ld. DR rebutted the claim of the assessee's counsel that the observation of the Hon'ble Justice M.B Shah (retd.) Commission could not be taken as a material for initiating proceedings u/s.147 of the Act. However, the Ld. DR failed to come forth with any contention as regards the observation of the Hon'ble High Court of Bombay in the case of Sesa Sterlite Limited (formerly known as Sesa Goa Limited) & Ors Vs. Assistant Commissioner of Income Tax & Ors. (2019) 417 ITR 334 (Bom.), wherein the Hon'ble High Court in context of similarly placed assessee's whose names had figured in the report of Hon'ble Justice M.B. Shah (Retd.) Commission had while allowing their Writ Petitions, observed, that there was no information available with the respective A.O's to form a bonafide belief that the income of the respective assessees chargeable to tax had escaped assessment. Also the Ld. DR could not rebut the contention of the assessee's counsel that a perusal of the "reasons to believe" revealed beyond doubt that its case was reopened on the basis of certain incorrect and misconceived

facts, viz. the assessee was not in the mining business but was merely a merchant exporter; and was also not paying any royalty to the lessee. On merits, it was the claim of the Ld. DR that as the addition of Rs.1.85 crore (supra) was made by the A.O on the basis of the report of the Hon'ble Justice M.B. Shah (Retd.) Commission which had after exhaustive deliberations worked out the under invoicing by the lessee or their representative or traders comprehensively who were involved in the business of Iron Ore Fines, therefore, it was incorrect on the part of the assessee's counsel to allege that the addition was made in absence of any supporting material.

13. We have heard the ld. authorized representatives of both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by them to drive home their respective contentions.

14. Before proceeding any further as regards the sustainability of addition of Rs.1.85 crore (supra) that was made by the A.O qua the 34% under invoicing of the export invoice, it would be relevant to cull out the bifurcated details of the impugned addition, as under:

Tianjin Material and Equipment (Group) Corporation	41,248	40,794	17.11.2008	10.12.2008	25.12.2008	5,53,01,854	34% (% of under invoicing as compare to average sale FOB price for	1,85,95,677	Majestic		204

							same grade & period)				
Tianjin Material and Equipment (Group) Corporation	202	No Loading	17.11.2008	19.12.2008	NA	2,70,825	34% (% of under invoicing as compare to average sale FOB price for same grade & period)	NIL	Majestic	Cargo cancelled and not exported but mentioned by Commission	204
	41,450					5,55,72,679	1,88,94,710	1,85,95,677			

On a perusal of the Hon'ble Justice M.B. Shah (Retd.) Commission report, it transpires that it had, inter alia, held that the assessee company had under invoiced to the extent of 34% of the value of its export of Iron Ore Fines as in comparison to the average FOB sale price for the same grade i.e. Fe containing 55%, as under:

Sr. No.	Shipping bill date	Name and address of Exporter	FE content %	Quantity exported (WMT)	FOB Value (Rs.)	FOB Rate per WMT(Rs.)	Country to which exported	% of under invoicing as compare to average sale FOB price for same grade & period (Rs.)
175	10.12.2008	Bagadiya Bro. Pvt. Ltd., Raipur	55	41248	55301854	1340.72	China	34
176	19.12.2008	Bagadiya Bros. Pvt. Ltd., Raipur (S/B Cancelled)	55	202	270825	1340.72	China	34

15. Although the Hon'ble Justice M.B Shah (Retd.) Commission in respect of the impugned sale transaction stated at Sr. No.176, had observed that the said transaction was cancelled, however, we find that the A.O while taking recourse to the proceedings u/s.147 of the Act had in the "reason to

believe" wrongly adopted the FOB value of Rs. 2,70,825/- i.e. the export value of the aforesaid cancelled transaction, and concluded that the assessee company had under invoiced its sales of Rs.5,55,72,679/- [Rs.5,53,01,854/-(+) Rs.2,70,825/-].

16. Be that as it may, we concur with the claim of the Ld. AR that the Hon'ble Justice M.B. Shah (Retd.) Commission had merely recorded their cursory observations about the impugned under invoicing, and had stated in clear terms that due to time constraint it was not in a position to finalize the illegalities and irregularities with regard to export of Iron Ore by the lessee or their representative or traders comprehensively. Apart from that, we find that the Commission had though observed, that it had on the basis of a comparison of export price of one company with the others arrived at a view that there was large scale under invoicing committed by some companies who were involved in export of Iron Ore Fines, but at the same time it had in clear terms stated that the said aspect was required to be investigated by the Central Investigation Agencies preferably by the Enforcement Directorate and Income-Tax department under the Foreign Exchange Management Act, Money Laundering Act etc. In sum and substance, it transpires that though the Hon'ble Justice M.B Shah (Retd.) Commission itself had stated that its observations were not to be taken as

final and were required to be further investigation by the Central Investigation Agencies, but as in the case before us the message appears to have not been clearly conveyed. We, say so, for the reason that the A.O in the case before us with a premeditated approach had summarily rejected the multi-facet contentions which were supported by the assessee on the basis of irrefutable documentary evidences to substantiate the genuineness of its export sales. In fact, we find that the A.O had without carrying out any independent enquiries made the impugned addition of Rs.1.85 Crore (supra) in the hands of the assessee company. We would not refrain from observing that we are pained to come across the manner in which the A.O had summarily discarded the substantial documentary evidences that were filed by the assessee to buttress the authenticity of its export transactions as were recorded in its books of account. Although the assessee had on the basis of his multiple contentions tried to impress upon the A.O that no adverse inferences were liable to be drawn as regards its exports in question, which though were referred to by the A.O in the body of the assessment order (Page 3 to 8 of assessment order), but strangely without dealing with the said objections he had hushed through the matter and made on addition of 34% of the impugned export sales in question.

17. Be that as it may, we concur with the claim of the Ld. AR that not only there was any irrefutable material before the Hon'ble Justice M.B. Shah (Retd.) Commission to arrive at a conclusion that the assessee company had under invoiced its export sales of Iron Ore Fines by 34%, but even otherwise the basis so adopted suffers from certain serious infirmities to which we cannot remain oblivion. As stated by the Ld. AR and, rightly so, the Hon'ble Justice M.B Shah (Retd.) Commission while making a comparison of prices of various exporters had erred in adopting the price as mentioned on the shipping bills, for the reason that it is the price on the date on which contract is executed between the buyer and seller which would be relevant for arriving at a feasible comparison. Admittedly, as the international markets are very volatile and the rate of Iron Ore Fines being no exception heavily fluctuates even on the same day depending on multiple market conditions, therefore, the aforesaid error in making a comparison would have a material bearing on the correct state of affairs which on the basis of the aforesaid fallacious method could not have been arrived at. Also, we find favor with the claim of the Ld. AR that as the Commission in its report was silent about the terms and conditions of the contracts, viz. payment condition, loading condition, port of loading, port of discharge, vessel size, CQD condition etc., which all factors would undeniably have a material bearing on the prices;

therefore, a fair comparison could not have been carried out. As regards the adoption of average FOB sale price for same grade and same period by the Hon'ble Justice M.B Shah (Retd.) Commission for computing the percentage of under invoicing, we are of the considered view that the same would by no means give a correct result. We, say so, for the reason that as observed by us hereinabove the price of Iron Ore Fines heavily fluctuates on the same day, thus, adoption of average FOB sale price though for the same grade and period would only give a distorted result. Further the claim of the assessee that the value of cargo i.e. export of Iron Ore Fines had been verified by the Customs Authority at the time of loading does lends credence to the authenticity of the export invoices of the assessee company.

18. Also, we find substance in the claim of the Ld. AR that as Iron Ore Fines of 58% to 63% grade were commonly exported to China, therefore, for the purpose of making a comparable analysis the reference by the Commission to Iron Ore Fines of 55% i.e. very low grade quality would materially distort the correct result. The claim of the assessee that during the year under consideration it had loaded as many as 51 vessels and carried out exports of Rs.865 Crore (approx.) of 27.10 lac MT, while for adverse inferences drawn by the Hon'ble Justice M.B Shah (Retd.) Commission are only as regards its export of Iron Ore Fines that were

shipped on 10.12.2008 of a value of Rs.5.53 crore (approx.) of 41248 MT which was miniscule 0.67% of its total export turnover further adduces the claim of the assessee that there was no under invoicing of its export of Iron Ore Fines. In fact the DDIT (Inv.) had carried out investigation as regards the export of the Iron Ore Fines by the assessee company and no adverse inferences as regards the same were drawn by him. We also find substance in the claim of the Ld. AR that no documentary evidences supporting the alleged under invoicing of export of Iron Ore Fines by the assessee company had either been referred to by the Hon'ble Justice M.B. Shah (Retd.) Commission or brought on record by the A.O. In fact, as observed by us hereinabove the Commission had only expressed certain doubts which it had suggested were required to be supplemented on the basis of enquiries by the Central Investigation Agencies. In our considered view though the Hon'ble M.B. Shah (Retd.) Commission in all fairness had observed that due to time constraint it was not in a position to finalize the illegalities and irregularities with regard to export of Iron Ore by the lessee or their representative or traders, and thus, as a word of caution had stated that its observations were required to be supplemented by Investigations to be carried out by the Central Investigation Agencies, but the A.O in the present case loosing sight of the aforesaid material observation of the Commission,

which in fact did cast a very heavy onus upon him to carry out requisite verifications and enquiries, had however summarily drawn adverse inferences in the hand of the assessee company.

19. As in the case before us as the Department had without placing on record any material alleged under invoicing by the assessee company, while for the latter had supported its duly recorded sales on the basis of substantial documentary evidences, therefore, we are in agreement with the contention of the Ld. AR that nothing more could have been done by the assessee company. We, thus, in terms of our aforesaid observation are of a strong conviction that the addition of Rs.1.85 crore (supra) could not have been made by the A.O towards alleged 34% of under invoicing of export invoice in question for three-fold reasons, viz. (i). that though the Hon'ble Justice M.B. Shah (Retd.) Commission had clearly stated that due to time constraint it was unable to finalize the illegalities and irregularities with regard to export of Iron Ore by the lessee or their representative or traders comprehensively, and as a word of caution had categorically stated that its observations were required to be supplemented by Investigation of the Central Investigation Agencies, however, the A.O in the present case had in a most callous manner not only failed to carry out the requisite verification and inquiry, but also most strangely had summarily discarded the

substantial clinching documentary evidences that were filed by the assessee to substantiate the authenticity of its duly recorded export sales in question in the course of the proceedings before him; (ii). that as the very basis for arriving at the impugned under invoicing of 34% by the Hon'ble Justice M.B. Shah(Retd.) Commission, as observed by us herein above does not conclusively prove under invoicing of export of Iron Ore Fines by the assessee company, therefore, the same could not have been summarily acted upon by the A.O for making the impugned addition; and (iii). that pursuant to infirmities in the basis/methodology adopted for arriving at the impugned under invoicing a distorted comparative analysis could not be ruled out. We, thus, finding favor with the aforesaid claim of the assessee, vacate the unsubstantiated addition of Rs.1.85 crore (approx.) that was made by the A.O by alleging under invoicing of 34% of impugned export of Iron Ore Fines by the assessee company.

20. Although the addition made by the A.O had been vacated by us on merits, however, we are of the considered view that even otherwise the A.O had wrongly assumed jurisdiction for initiating proceedings under Sec. 147 of the Act in the case of the assessee company. Our aforesaid view is fortified by the judgment of the Hon'ble High Court of Bombay in the case of Sesa Sterlite Limited (formerly known as Sesa Goa Limited) & Ors Vs. Assistant

Commissioner of Income Tax & Ors. (2019) 417 ITR 334 (Bom.). In its aforesaid judgment the Hon'ble High Court after deliberating at length in the cases of similarly placed exporters, had observed that the export prices of other exporters considered in Hon'ble Justice M.B. Shah(Retd.) Commission report did not suggest even a trend to indicate any particular market price. It was observed by the Hon'ble High Court that as for the purpose of validly reopening a case there must be information available with the A.O about the escapement of income arising in the case, which, however, was not available in the cases before them, and what was available was that certain export prices recovered by the assessee's before them were less in some cases as in comparison to the market price that was said to be prevailing on those days. Considering the aforesaid information, it was observed by the Hon'ble High Court that since there was nothing to indicate that there was any particular market price on the relevant date which ruled or which alone was the correct price, nor there was even a trend to indicate any particular market price, and the price in an individual export contract was a function of various parameters, therefore, the A.O could not have formed a "reason to believe" that income of the assessee chargeable to tax had escapement simply on the basis of differences in the export prices of the assessee's before them when compared to others. It was further observed by the Hon'ble High Court that

even if it was to be assumed that the assessee's export prices were in fact comparatively on the lower side, then, still there was nothing to indicate that any particular income has accrued to anyone as a result of such difference in price. Accordingly, the Hon'ble High Court on the basis of its aforesaid observations had quashed the notice(s) issued u/s.148 of the Act and allowed the writ petition(s). For the sake of clarity, the relevant observations of the Hon'ble High Court is culled out, as under:

> "2. The Assessees are all traders and exporters of iron ore, though some of them are also miners and processors of the ore. Having regard to allegations of large-scale mining, trading and exports of iron and manganese ore illegally or without authority of law across various States, the Government of India appointed a commission of inquiry under Section 3 of the Commission of Inquiry Act, 1952. Based on the findings of this commission, which inter alia reported under-pricing of ore exported by individual exporters, the Assessing Officers issued reopening notices under Section 148 of the Act. These notices are challenged by individual Assessees in these petitions. The petitions can be broadly classified into four groups. There are some petitions where notices under Section 148 have been issued after the expiry of four years from the end of the relevant assessment year, whilst there are others where the reopening has been within four years. In these latter petitions, the Assessees' case is that the Assessing Officers had no reason to believe that any income chargeable to tax had escaped assessment, whereas in the former cases the Assessees allege both want of such reason to believe and also want of any case of their failure to disclose fully or truly all material facts necessary for the assessments. Then there are petitions where the allegations of the Revenue for reopening assessments are that there was a case of under-pricing of export goods and also that the businesses conducted by the Assessees were illegal and hence, their income ought to be brought to tax not as business income but as income from other sources. On the other hand, there are some petitions where the allegation of illegality does not find place in the reasons recorded for reopening notices issued under Section 148.

3. Since Writ Petition No.329 of 2015 involves all four aspects referred to above, and since the basis of reassessment proposed in that case is the same as in the case of the other petitions, wherever applicable, though individual facts and figures may be different, this Writ Petition is taken as a lead case and the controversy is discussed in the light of the facts and circumstances stated in it. Separate references are made to individual petitions of the other groups, wherever there are individual elements to be distinguished as noted in the following order.

4. The petitioner is a mining concessionaire or lessee carrying on business of mining and production as well as export/trading of iron ore. For the assessment year 2008-09, the petitioner filed its return of income declaring a total income of Rs.463,09,28,770.00. The petitioner's case was selected for 6crutiny by the Revenue by issuing of a notice under Section 143(2) of the Act. The particulars called for by the Assessing Officer from the petitioner were supplied by it with details of export of iron ore with quantity, quality, names and countries of the respective purchasers. Based on the information supplied by the Assessee, respondent no.2 passed an assessment order under Section 143(3) of the Act, determining the total income of the Assessee at Rs.478,49,83,060.00. Being aggrieved by the adjustments made in the assessment order, the petitioner filed an appeal before CIT (Appeals), who, disposed it of by his order dated 12/11/2013. Being aggrieved, the petitioner filed an appeal before the Income Tax Appellate Tribunal (ITAT), who, by an order dated 31/10/2014, partially allowed it.

5. In the meantime, the Union of India through Ministry of Mines appointed a commission of inquiry under the Chairmanship of Mr. Justice M.B. Shah (Retired), inter alia, to inquire into allegations of illegal mining and trading of ore in various States including the State of Goa. The commission was appointed purportedly on the basis of reports received by the Union Government from various State Governments of wide spread mining of iron ore and manganese ore in contravention of various provisions of law including the provisions of Mines and Minerals (Development and Regulation) Act, 1957, The Forest (Conservation) Act, 1980, The Environment (Protection) Act, 1986 and rules and guidelines issued thereunder. The terms of reference of the commission, inter alia, included inquiry into, and determination of, the nature and extent of mining, transportation and trading of iron ore and manganese ore done illegally or without lawful authority and the losses arising therefrom as also identification of, as

far as possible, persons responsible for the same and of the extent to which regulatory and monitoring systems had failed to deter, prevent, detect and punish offences relating to mining, storage, transportation, trade and export of ore done illegally or without lawful authority and persons responsible for the same.

6. Shah Commission visited Goa, and issued notices and, in particular, called for information from various State authorities. Based on the information made available to the Commission, it made three reports finding inter alia violation of various statutes and other infirmities.

7. The first two reports were considered by the Supreme Court, when it heard a public interest litigation filed by Goa Foundation under Article 32 of the Constitution of India purportedly on the basis of those two reports and praying inter alia for directions to Union of India as well as State of Goa to take steps for termination of mining leases issued in the State in violation of various laws and for incidental and consequential reliefs. In answer, it was pointed out by the mining lessees that there was a serious violation of principles of natural justice vis-a-vis the mining lessees. It was submitted that neither did the commission issue any notice under Section 8-B of the Commission of Inquiry Act giving a reasonable opportunity of hearing to the lessees or to produce evidence in their defence nor did the commission permit them to cross- examine witnesses or address the commission and be represented by legal practitioners. It was submitted that the inquiry and the findings arrived at by the commission in its reports were thus contrary to the provisions of Section 8-B and 8-C of Commission of Inquiry Act. Both Union of India and State of Goa, however, took a stand before the Supreme Court that no action would be taken against the mining lessees only on the basis of the findings of Shah Commission and that both would make their own assessments and give opportunity to show cause to the lessees before taking such action. The Supreme Court was, in the premises, not inclined to consider quashing of the commission's report on the ground of violation of Sections 8-B or 8-C or infraction of principles of natural justice. The Court chose instead to examine the legal and environmental issues raised in the report of Shah Commission on its own and on the basis of its findings on those issues, consider granting of reliefs prayed for in the petition. After considering the issues thus in the light of the answers of the respondents, the Supreme Court declared that the deemed mining leases of all lessees in Goa had expired on 27/11/1987, whereas

maximum renewal period of 20 years in case of such mining leases had expired on 27/11/2007 and consequently, mining by the lessees after 22/11/2007 was illegal. The Supreme Court passed various other directions with which we are not concerned in the present matter. These were basically consequential upon its main finding on determination of mining leases. We are also not directly concerned with the first two reports of Shah Commission which, as we have noted above, were before the Supreme Court and considered by it in the manner outlined above.

8. After presenting its first two reports, Shah Commission made a third report, by which it inter alia observed that there were illegal exports particularly by means of under-invoicing on the part of the mining lessees and exporters. After this report was submitted by Shah Commission, the Income Tax Officer proceeded to issue a notice to the petitioner under Section 148 of the Act, proposing reopening of its assessment under Section 147 for the assessment year 2008-09. Reasons for reopening communicated in the order sheet to the Assessee were as follows: (i) there was under-invoicing of exports by the Assessee, (ii) alternatively, mining activity being held to be illegal, income arising from it ought to be assessed as income from other sources, and (iii) escapement of income from assessment was on account of failure on the part of the Assessee to disclose wholly and truly all material facts necessary for the assessment.

In support of reason (i), it was stated that the third report of Shah Commission on illegal mining and exports of iron and manganese ore in the State of Goa had disclosed that for the same period and for the same corresponding grade, the Assessee's prices were less than the market prices and that prima facie the Assessee had under-invoiced its exports. A chart of such instances of under-invoicing of exports forming part of the report of Shah Commission (third report), was set out in the reasons. It was submitted that these instances were not noticed till the report of Shah Commission was made available to the Assessing Officer. Reason (ii) pertained to the Supreme Court order in the Goa Foundation petition, which had held all deemed mining leases to have finally expired on 22/11/2007 and mining by lessees after 22/11/2007 to be illegal. It was submitted that based on this order of the Supreme Court, income accruing during financial year 2007-08 relevant to assessment year 2008- 09 could not be said to be legitimate business income and was required to be treated as income from other sources. In support of reason (iii) it was alleged that having regard to the information given by Shah Commission

report of under-invoicing of exports of iron ore by the Assessee, prima facie, it was found that for the same period and for the same FE content, the actual prices were higher than what was disclosed by the Assessee. It was submitted that the Assessee had under invoiced its exports and was carrying on an illegal activity on an expired deemed mining lease and these facts were not disclosed to the Assessing Officer when the original assessment was made. The Assessing Officer, accordingly, claimed that the Assessee's case needed to be reopened since income to the tune of Rs.116,75,46,110.00 had escaped assessment. The amount was arrived at as a total of all amounts by which exports in the relevant financial year were allegedly under-invoiced by the Assessee and which were referred to in the reasons for re-opening.

9. The petitioner outlined its objections to the reasons indicated by the revenue by pointing out inter alia brief facts of its case and submitting that no income had in fact escaped assessment. It was submitted that the Assessee had a well laid out process for exports, which was closely monitored by a separate export division. Depending upon the business policies/customer requirements, long term or spot contracts were entered into by the Assessee and export prices for such contracts were determined on the basis of various factors, such as nature of contract (long term or spot), quality of the ore, impurities in the ore, size of the vessel (freight rate), loading rate of vessel, dispatch, demurrage, market factors as well as overall negotiations. It was pointed out that all parties with whom the Assessee was dealing for its exports were unrelated parties and payments were received directly through banking channels and export duty was duly paid on the basis of prices agreed in the contracts. It was submitted that there was no question of any under-invoicing of exports as alleged by the department. So far as the information for his formation of belief indicated by the Assessment Officer is concerned, it was submitted that reopening was solely proposed on the basis of Shah Commission report; the department itself did not have any material. It was submitted that no new information was brought out in the reasons recorded for reopening of the assessment.

It was submitted that from the reasons recorded, it was clear that the department was indulging in a fishing inquiry and did not have any reason to believe escapement of income which could form the basis of a valid reassessment notice. It was submitted that there was no direct nexus between the material available to the Assessing Officer and the formation of his belief concerning escapement of income on the basis

thereof. The Assessee also objected to the basis suggested by the Assessing Officer for treating its income as income from other sources. The Assessee requested the Assessing Officer to pass a speaking order in this behalf.

10. The objections raised by the Assessee were considered and dealt with by respondent no.2 in his order dated 20/02/2015. Respondent no.2, inter alia, observed that the commission report was not prepared merely on the basis of hearsay or conjectures but on the basis of facts collected from the concerned authorities or the lessees. It was observed that as per the third report of the commission, there was under-invoicing of exports of iron ore, which was quantified and calculated year-wise. Respondent no.2 observed that under-invoicing was apparent from the evidence obtained from the concerned authorities and the Assessee had failed to disclose its true income earned on account of sale of iron ore; it had suppressed the sale value by resorting to under-invoicing as a modus operandi. Respondent no.2 explained that the statement made by the Union of India before the Supreme Court in the case of Goa Foundation and the observations of the Supreme Court on the basis of such statement required that no prosecution could be initiated against mining lessees on the basis of the report alone, without the lessees being given due opportunity. What was meant by this was 'prosecution' of the lessees and not any 'action' against the lessees. So far as the reason of taxability of the Assessee's income as income from other sources is concerned, respondent no.2 referred to Section 37(1) of the Act and its applicability. It was observed that the expenditure incurred by the Assessee was for a purpose which was prohibited by law and was not allowable for deduction.

11. The reopening of the assessment, in the premises, is challenged by the petitioner Assessee in the present petition.

12. Mr. Pardiwala, learned Senior Counsel appearing for the petitioner, submits that the reasons to believe escapement of income disclosed by the Assessing Officer do not indicate any information available to the department for formation of any such belief. Learned Counsel submits that the assessment is sought to be reopened solely on the basis of Shah Commission report. Learned Counsel submits that the commission report itself was vitiated on account of serious violation of principles of natural justice and, at any rate, by reason of breach of Sections 8-B and 8-C of the Commission of Inquiry Act. Learned Counsel submits that the lessees including the petitioner

herein were not given any opportunity to explain the material used by Shah Commission in its report. It is submitted that, at any rate, the report of the commission is in the nature of expression of an opinion by the Commissioner and has no efficacy either as a legal finding or admissible evidence. Learned Counsel submits that so far as reasons to believe within the meaning of Section 147 of the Act are concerned, one must go by the reasons disclosed by the Assessing Officer himself; these reasons cannot be supplemented or improved upon in any subsequent order dealing with the petitioner's objections or otherwise. Learned Counsel submits that at any rate, there is no direct nexus or live link between the information said to be available to the Assessing Officer and the formation of his belief that income has escaped assessment. So far as the alleged ground of illegality of the business is concerned, learned Counsel submits that, in the first place, at the relevant time, that is to say, either during the relevant previous year or at the time of assessment, all concerned proceeded on the basis that the business of mining and export/trade of ore was perfectly legitimate. It is submitted that only when the Supreme Court decided the Goa Foundation petition on 21/04/2014 that the question of illegality of mining activities on account of expiry of deemed leases arose for the first time. Learned Counsel submits that at any rate, the Mines and Minerals (Development and Regulation) Act, 1957 was amended after the Supreme Court judgment in Goa Foundation ease extending the periods of mining leases and even the State of Goa subsequently renewed the period of lease in case of mining lessees in Goa including the petitioner herein and that at the date of the reopening notice there was a valid lease in place so far as the mining lessees including the petitioner are concerned. Learned Counsel submits that, in any event, the legality or otherwise of mining operations would not have any bearing on the character of the activity carried out by the Assessee.

It is submitted that the activity was anyway in the nature of business and the income deemed from it was business income chargeable to tax after making allowance for deductible business expenditure.

13. It is submitted on behalf of the revenue by Mr. Aravind, learned Counsel for the respondents, that Shah Commission was an official commission appointed by the Government of India under the Commission of Inquiry Act and its findings could well form the information available to the Assessing Officer for formation of a belief that income had escaped assessment. Learned Counsel submits that it is not relevant at the stage of a notice of reopening of assessment

under Section 148 that under-invoicing reported by the commission should have demonstrably led to any escapement of income. In other words, learned Counsel submits that the link between the information, namely, under-invoicing of exports arid escapement of income need not be complete. Learned Counsel submits that at the stage of a reopening notice, what is relevant is whether there is material at all for formation of a belief that income has escaped assessment; adequacy of that material from the point of view of formation of such belief is not a matter which the Court can scrutinize when a notice is challenged before it under Article 226 or 227. Learned Counsel submits that under Section 37(1) of the Act, particularly having regard to the explanation provided thereunder, no business expenditure is allowable as deduction if the business was conducted illegally, and that the entire gross income of the Assessee was, in the premises, taxable in the hands of the Assessee. Secondly, and at any rate, it is submitted that income referred to in the reassessment notice, not having been earned in a disclosed transaction, would have to be treated as income from other sources.

14. For any reassessment, the Assessing Officer must have reason to believe that income chargeable to tax has escaped assessment for any assessment year. Such reason to believe, which is the foundation of Section 147, is formed on the basis of information extraneous to the original assessment proceedings. As observed by the Supreme Court in the case of Commissioner of Income Tax, Gujarat V/s. A. Raman and Co., [1968 (67) ITR 11], the condition which invests the Income Tax Officer with jurisdiction of reassessment has two branches: (i) that the Income Tax Officer has reason to believe that income chargeable to tax has escaped assessment; and (ii) that it is in consequence of information which he has in his possession that he has reason so to believe. The expression "information", in the context in which it occurs, must, as explained by the Supreme Court, mean instruction or knowledge derived from an external source concerning facts or particulars, or as to law relating to a matter bearing on the assessment. If, as a result of such information, the Income Tax Officer has a reason to believe that income chargeable to tax had escaped assessment, he has jurisdiction to assess or reassess the income under Section 147 of the Act. The information, thus, is the starting point and the formation of belief the end point, so far as re-opening of assessment is concerned. The High Court, exercising jurisdiction under Article 226 of the Constitution of India, has power to set aside a re-opening notice, if these conditions precedent for the exercise of jurisdiction do not exist. The Court, thus, has to first see whether the

officer had in his possession any information as explained in Raman and Co. (supra) and whether from that information he could have formed the belief that income chargeable to tax had escaped assessment. As explained by the Supreme Court in the case of Income Tax Officer V/s. Lakhmani Mew & Das, [(1976) 103 ITR 437 (SC)], the reasons for formation of such belief must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income Tax Officer and the formation of his belief that there has been escapement of income of the assessee from assessment in the particular year. In case such reassessment is to be made in respect. of an assessment made under Sub-section (3) of Section 143 or 147 after the expiry of four years from the end of the relevant assessment year, the Assessing Officer must additionally believe that the escapement of income had occurred as a result of the Assessee's failure to disclose fully and truly all material facts necessary for the assessment. No doubt, the Court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the Income Tax Officer on whether action should be initiated for reopening assessment. At the same time, it is to be borne in mind, as explained in Lakhmani Mewal Das (supra), that it is not any and every material, howsoever vague and indefinite or distant, remote and far-fetched, which would warrant the formation of belief relating to escapement of income from the assessment. These then are the parameters for the Court to assess the legality of any reopening notice.

15. Let us now see what was the information or material available to the Assessing Officer and which is disclosed in the reasons to believe stated in the original order sheet. The information is said to be the Shah Commission report, which inter alia reported under-invoicing of exports by the exporters of iron ore mentioned in it including the Assessee herein. **If one has regard to the Shah Commission report and its use made in the reopening notice, it is at once apparent that under-invoicing in the concerned exports is nothing but a matter of expression of opinion by the commissioner. As this Court has explained in the case of Fomento Resources Private Ltd. & Anr. V/s. Union of India & Ors., Writ Petition NO.606 of 2014 decided on 2nd July, 2019, where this very report of Shah Commission was a matter of direct challenge by the mining lessees and exporters, including the Assessee herein, facts found, as also conclusions drawn, by a Commission of Inquiry are not judicial pronouncements. The report of the Commission neither**

constitutes a binding judgment nor a definitive pronouncement. The Commission, as held by the Supreme Court in the State of Karnataka V/s. Union of India, (1977) 4 SCC 608, is required to submit its report, which may or may not be accepted by the appointing authority. If it is not accepted, it has no legal consequences. The Commission, in other words, has no power to adjudicate in the sense of passing an order which can be enforced. **What the Commission says is merely an expression of its opinion; it lacks both finality and authoritativeness. The differences in export prices of various exporters, so far as iron ore is concerned, may be matters of fact, which are said to have been derived by Shah Commission from the material available in public domain, but the Commission's conclusion on the basis of these differences in prices that there was under-invoicing, is a matter of conclusion drawn by the commission. This conclusion is purportedly drawn on the basis of the primary facts of differences in export prices; and it is a deduction by the Commissioner by way of an expression of his opinion, as we have explained above. That per se cannot be treated as a primary fact, on the basis of which any belief can be formed by the assessing authorities.** Besides, it must be noted that when the **Shah Commission matters were argued before this Court, the Union of India made an express statement on the same lines as was made before the Supreme Court in the Goa Foundation petition. Learned Counsel appearing for the Union stated before this Court, and which. statement has been noted in our order dated 02/07/2019, that the Union would not take any action against mining lessees or traders for exports of ore only on the basis of the Commission's report without making its own assessment of facts and without first giving opportunity of producing evidence to the affected parties. For the reasons stated above, which bear generally on the status of the Commission's report and its findings, as well as the statement made by the Union of India as noted above, it is impermissible to the department to act exclusively on the basis of the Commission's report. It must make its own assessment of facts before any action is initiated**. In the present case, since it is a reopening notice under Section 148, it may not be necessary to give any pre-notice opportunity of hearing or producing of evidence to the affected parties. The notice itself admits of a cause being shown by the affected parties, namely, in the present case, the Assessee. It is, however, imperative that the Assessing Officer must apply his own mind and make his own assessment of facts before he issues any notice under Section 148.

16. **In the present case, as we have noted above, the only primary fact which was available in public domain and which is made part of the Shah Commission report is the differences in export prices charged by the Assessee to its counter parties abroad as compared to other exporters, in the cases referred to in Shah Commission report, and noted in the reopening notice; the Assessee's prices were lower than other exporters. Even if it is assumed that so far as this fact is concerned, the information contained in the report of Shah Commission by itself can be treated as information available to the Assessing Officer within the meaning of Section 147, the further information, however, that there was therefore under-invoicing of exports by the Assessee does not simply follow from this primary information.** There is nothing whatsoever in the impugned notice issued by the Assessing Officer to indicate that he has applied his mind to this aspect of the matter. Learned counsel for the Revenue relies on the case of Calcutta Discount Company Ltd., Vs Income Tax Officer, (1961) 41ITR 191 (SC), to support his contention that it is not only the primary facts but inference to be drawn from such facts which also can form part of the material on which the Assessing Officer may form his belief. Learned counsel is right there. As the Supreme Court has explained in this case, from the primary facts in his possession, whether on disclosure by the assessee, or discovered by him on the basis of the facts disclosed, or otherwise, the Assessing Authority has to draw inferences as regards certain other facts; and ultimately, from the primary facts and the further facts inferred from them, the authority has to draw a proper legal inference on whether any income has escaped assessment. But then, any inference to be drawn from the primary facts in possession of the Assessing Officer must be such as might follow from those primary facts; it cannot be a matter of conjecture or surmise and in any event, the officer has to apply his mind to arrive at such inference.

17. As the Supreme Court has explained in the case of A. Raman and Co. (supra), the law does not oblige a trader to make' maximum profit out of his trading transactions. It is the income which accrues to a trader which is taxable in his hands; not the income which he could have, but has not earned. No doubt, by adopting a device, if it is made to appear that income which really belonged to the assessee had been earned by some other person or by the Assessee in some other form or means, that income may be brought to tax in the hands of the Assessee and if such income has escaped tax in a previous

assessment, a case for reassessment under Section 147(b) may be made out. There is nothing, however, in the reasons indicated by the Assessing Officer in the present case to suggest that any such income has accrued to any person or the Assessee. The reasons do not indicate that the Assessing Officer has formed any belief that under-pricing was adopted by the Assessee as a device by which income had accrued to any other person or the Assessee himself in any other form and such income had escaped assessment.

18. **In any event, as we have explained above, there must be a direct nexus or live link between the information found by the Assessing Officer and the escapement of income arising in the case. In the present case, all that was available to the Assessing Officer was the information that the export prices recovered by the Assessee were less in some cases than the market prices said to be prevailing on those days. This information itself is highly doubtful, since there is nothing to indicate that there was any particular market price as at the relevant date which ruled or which alone was the correct price. The export prices of other exporters, considered in Shah Commission report, do not suggest even a trend to indicate any particular market price. Besides, the price in an individual export contract is a function of various parameters as claimed by the Assessee, and as indicated whilst noting the Assessee's objections to the re-opening notice. But, these are matters of merit and need not engage us today, except the fact that the Commission's conclusion that any particular price was the market price was itself a matter of conjecture and hardly a primary fact. For our purposes, even if we assume that the Assessee's export prices were in fact so less, there is nothing to indicate that any particular income has accrued to anyone as a result of such difference in prices. There is, thus, no direct nexus or live link between the difference in prices and escapement of income. There is, in other words, no way the Assessing Officer could have formed a belief that any income has escaped assessment simply on the basis of the differences in the export prices of the Assessee when compared to others**.

19. Learned Counsel for the revenue places strong reliance on the case of Central Provinces Manganese Ore Co. Ltd. V/s. Income Tax Officer, (1991) 191 ITR 0662. Relying on this case, it is submitted that based on export prices showing a systematic lesser value as compared with the prevailing market prices for the same quality of goods, a reopening notice could indeed be issued under Section 148. In

Central Provinces Manganese Ore Co. Ltd. (supra), the facts were quite peculiar. The appellant before the Court was a non-resident company having its office in London. It also had an office in India at Nagpur and was assessed to income tax in Nagpur. It had been the practice of the appellant to produce before the Income Tax Officer relevant books kept at its local office at Nagpur and balance sheets, trading accounts and profit and loss accounts at its head office in London. The customs authorities came to know that the appellant had declared very low prices in respect of all its consignments of manganese ore exported out of India. It was also found that most of its export was only to 2 to 3 buyers, who in turn did not purchase ore from any other company except the appellant. After due inquiry/ investigation, customs authorities had found that the appellant was systematically showing lesser value for the manganese ore exported as compared with the prevailing market prices for the same grade of manganese ore. The customs authorities accordingly came to a definite conclusion that the prices mentioned in the relevant contracts between the Assessee and its buyers were lesser than contemporaneous market prices and it was found as a fact that the appellant company was indulging in under-invoicing. Final orders were accordingly passed under the Customs Act. It is in the context of these facts that the Supreme Court countenanced a reopening notice under Section 148 in that case. It is to be noted, firstly, that what the customs authorities found was by way of an order passed under law; it was a final order of Collector of Customs, and it found under-invoicing as a matter of fact. Secondly, the facts disclosed peculiar circumstances such as all consignments of exports being systematically priced at lesser value. Thirdly, it must be noticed that these exports were made to related parties who did not buy from any other source. In the light of these circumstances, which were found as matters of fact, and that in a quasi judicial order, which had attained finality, the Supreme Court found formation of belief by the Assessing Officer as having a reasonable connection with the information available to him and did not find fault with the reopening notice. These facts are entirely distinguishable. In our case, there is no systematic undervaluation of export prices. In fact, as pointed out by Mr. Pardiwala, there have been cases where the export prices of the petitioner are taken to be market prices and on the basis of those prices, under-invoicing has been claimed vis-a-vis other exporters. So much for systematic under-valuation. **There is no finding by a court of law or a statutory authority as a matter of fact that there was any under-invoicing. The so called finding is by a commission of inquiry; that commission has itself made it clear in its very**

opening statement that it was not in a position to finalize illegalities or irregularities with regard to the export of iron ore by individual lessees or their representatives or traders comprehensively due to time constraints. It is at best a tentative opinion expressed by a Commission of inquiry without affording any opportunity to the concerned exporters to explain the material used against them. Besides, there is no case of related parties to whom such exports were made. At least, the reopening notice and the reasons indicated by the Assessing Officer do not indicate any of these things. **In the absence of these and such other materials, the simple and bare primary fact of the Assessee having charged lesser export prices from its counter-parties as compared to some other exporters, is no basis for formation of any belief that any income has escaped assessment to tax.**

20. The judgments in cases of Phool Chand Bajranglal v/s. ITO, 203 ITR 456 (SC), Patel & Co. v/s. Dy. Commissioner of Income tax, 346 ITR 0207 (Guj), Income Tax Officer v/s. Selected Dalurb and Coal Co. (P). Ltd., 217 ITR 0597 (SC), Rattan Gupta v/s. Union of India, 234 ITR 220 (Del), AGR Investment Ltd. vs. Addl. Commissioner of Income Tax, 333 ITR 97 (Del), Raymond Wollen Mills Ltd. v/s. Income Tax Officer, (1999) 236 ITR 34 (SC), and ACIT v/s. Rajesh Jhaveri Stock Brokers (P) Ltd., (2007) 291 ITR 500 (SC), cited by learned Counsel for the revenue, bear on me aspect of sufficiency or otherwise of the material used for formation of belief. These judgments make it clear that what can be submitted to judicial scrutiny is whether or not there was material on the basis of which belief could have been formed about escapement of income from assessment, and not whether the material was actually adequate or sufficient for formation of such belief. There is no quarrel with this proposition here. Here, we are precisely concerned with whether or not such belief could have been formed on the basis of such material as was available with the Assessing Officer. In every State action or order submitted to judicial scrutiny, the matter is assessed from the point of view of Wednesbury unreasonableness. The focus of the scrutiny is, firstly, on whether the authority has kept itself within the four corners of law and, secondly, and even if it has so kept itself, whether it has nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. A reopening notice issued under Section 148 of the Income Tax Act is no exception to this rule. The Courts have made it clear time and again that belief under Section 147 of the Act is not a matter of a mere opinion of the Assessing Officer. It must be demonstrably shown that the material used by Assessing Officer is

reasonably capable of formation of his belief that income has escaped assessment. As the Supreme Court observed in Lakhmani Mewal Das (supra), belief does not mean a purely subjective satisfaction on the part of the income Tax Officer. It must be held in good faith; it cannot be merely a pretense. It is open to the Court to examine whether the reason has a rational connection with or relevant bearing on the formation of the belief; it must not be extraneous or irrelevant for the purpose. In the present case, as we have noted above, the reason has no such bearing or rational connection with the formation of the belief. It is purely speculative on the part of the Assessing Officer to form a belief of escapement of income from taxation simply on the basis of lesser export prices charged by the Assessee. There is no material or even suggestion that any income corresponding to the so-called under-invoicing of exports was in fact received by any party or by the Assessee through any backdoor method. In the premises, there is no legitimate reason to believe which can sustain the impugned notice issued by the Assessing Officer.

21 to 28 ....

29. Rule is accordingly made absolute and **Writ Petition Nos. 102 of 2016, 325, 327, 328, 329, 955, 956, 958, 959, 1015, 1016, 1019, 1020, 1022 of 2015, and Petition Nos. 3, 4, 5, 6, 8, 9, 10, 11, 12,15,16,17,22,23,24,25, 75, 80, 99, 100, 101, 102, 105, 106, 110, 113, 114, 115, 116, 117, 118, 120, 123, 124,125, 133, 141, 142, 143, 144,145,148, 149, 150, 165, 166,167, 173, 174, 190, 191,192,207, 224, 225, 226, 227,261,263,270, 604,605, 606, 651, 674, 777, 791,866 of 2016 and 1104 of 2017 are allowed by quashing and setting aside notices of reopening under section 148 which have been challenged therein**. No order as to costs."

(emphasis supplied by us)

Considering the fact that the issue involved in the present appeal on the basis of which proceedings u/s.147 of the Act were initiated remains the same as were there in the aforesaid case, therefore, we have no hesitation to hold that for the same reasons the impugned proceedings initiated u/s.147

of the Act in the case of the assessee company not being as per the mandate of law is liable to be quashed.

21. As we have vacated the impugned addition on merits, and also considering the fact that the issue as regards the validity of the jurisdiction that was assumed by the A.O for taking recourse to proceedings u/s.147 of the Act in the case of the assessee is squarely covered by the judgment of the Hon'ble High Court of Bombay in the case of Sesa Sterlite Limited (formerly known as Sesa Goa Limited) & Ors Vs. Assistant Commissioner of Income Tax & Ors. (2019) 417 ITR 334 (Bom.) respectfully followed the same parity of reasoning and had held the reopening of its case to be invalid, therefore, we refrain from adverting to and therein adjudicating the other contentions advanced by the Ld. AR on the basis of which he had assailed the validity of the jurisdiction assumed by the A.O for taking recourse to the proceedings u/s.147 and also those on the basis of which he had challenged the validity of the order passed by the A.O u/ss.147/143(3) of the Act, dated 30.03.2016, which, thus, are left open.

22. In the result, appeal filed by the revenue in ITA No.223/RPR/2019 for A.Y.2009-10 is dismissed while for the cross-objection/Additional cross-

objection (CO No.27/RPR/2019) for A.Y.2009-10 is allowed in terms of our aforesaid observations.

ITA No.224/RPR/2019 & ITA No. 75/RPR/2020
CO No.28/RPR/2019 & CO NO.02/RPR/2020
A.Ys. 2010-11 & 2011-12

23. As the facts and issues involved in the captioned appeals filed by the revenue and cross-objections/Additional cross-objections filed by the assessee remains the same as were there before us in the aforementioned ITA No.223/RPR/2019 & CO NO.27/RPR/2019 for assessment year 2009-10, therefore, our order therein passed while disposing off the said appeal a/w cross-objection/Additional cross-objection shall apply mutatis-mutandis for disposing off the present appeals and cross-objection/Additional cross-objections in ITA No.224/RPR/2019 & ITA No. 75/RPR/2020 and CO No.28/RPR/2019 & CO N0.02/RPR/2020 for the A.Y 2010-11 & 2011-12, and accordingly the appeals filed by the revenue for A.Y.2010-11 & 2011-12 are dismissed and the cross-objection/Additional cross-objections filed by the assessee for A.Y.2010-11 & 2011-12 are allowed on similar terms.

24. Resultantly, the appeals filed by the revenue are dismissed while for cross-objections/Additional cross-objections filed by the assessee are allowed in terms of our aforesaid observations.

Order pronounced under rule 34(4) of the Appellate Tribunal Rules, 1963, by placing the details on the notice board.

Sd/- **ARUN KHODPIA** **(ACCOUNTANT MEMBER)**	Sd/- **RAVISH SOOD** **(JUDICIAL MEMBER)**

रायपुर/ RAIPUR ; दिनांक / Dated : 31st October, 2022
***SB

<u>आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :</u>

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals)-1, Raipur (C.G)
4. The Pr. CIT-1, Raipur (C.G)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, रायपुर बेंच, रायपुर / DR, ITAT, Raipur Bench, Raipur.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

निजी सचिव / Private Secretary
आयकर अपीलीय अधिकरण, रायपुर / ITAT, Raipur.