IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E" MUMBAI

BEFORE SHRI ABY T VARKEY (JUDICIAL MEMBER)
AND
SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)

ITA No. 1020/MUM/2018
Assessment Year: 2011-12
&
ITA No. 1019/MUM/2018
Assessment Year: 2012-13

Essel Mining & Industries Ltd., Industry House, 18th floor, 10, Camac Street, Kolkata-700017. **PAN No. AAACE 6607 L**	**Vs.**	Dy. CIT, Central Circle-1(4), 9th floor, Old CGO Building, MK Road, Mumbai-400020.
Appellant		**Respondent**

ITA No. 1550/MUM/2018
Assessment Year: 2011-12
&
ITA No. 1548/MUM/2018
Assessment Year: 2012-13

JCIT, Central Circle-1(4), Room No. 902, Pratishtha Bhavan, 9th Floor, Old CGO Building Annexe, Mumbai-400020.	**Vs.**	M/s Essel Mining & Industries Ltd., Industry House, 18th floor, 10, Camac Street, Kolkata-700017. **PAN No. AAACE 6607 L**
Appellant		**Respondent**

ITA No. 1970/MUM/2022
Assessment Year: 2011-12

M/s Essel Mining & Industries Ltd., Industry House, 18th floor, 10,	**Vs.**	Dy. CIT, Central Circle-1(4), 9th Floor, Old CGO Building, MK Road,

Camac Street, Mumbai-400020.
Kolkata-700017.

PAN No. AAACE 6607 L
Appellant **Respondent**

Revenue by	:	Smt. Nilu Jaggi, CIT-DR
Assessee by	:	Mr. Yogesh Thar/ Ms. Sukanya Jayaram
Date of Hearing	:	23/01/2023
Date of pronouncement	:	31/01/2023

ORDER

PER OM PRAKASH KANT, AM

All above appeals being connected with one assessee, same were heard together and disposed off by way of this consolidated order for convenience and avoid repetition of facts.

2. Firstly, we take up the cross-appeals of the Revenue and the assessee for assessment year 2011-12. The grounds raised by the Revenue for assessment year 2011-12 are reproduced as under:

> *1. "On the facts and the circumstances of the case and in law the Ld. CIT(A) erred in granting relief to the assessee stating that no disallowance u/s 153C of the Act is called for as there are no incriminating materials found during the search and the assessment has reached its finality and was not*

abated at the initiation proceedings u/s. 132(1) of the Income Tax Act, 1961".

2. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred, in holding that no addition can be made u/s 153C of the Act, once the assessment has reached to finality us 143(3) of the Act, and no incriminating documents have been found and seized in the case of the assessee during the course of search and seizure action relying upon the decision of the jurisdictional Bombay high Court decision in the case of Continental Warehousing Corp. and M/s Murli Agro Products without appreciating that the revenue has not accepted the decision and has filed SLP in the Hon'ble Apex Court".

3. On the facts and the circumstances of the case and in law the Ld. CIT(A) erred in allowing deduction u/s. 80IA of the Act, of Rs. 133,51,57,574/- in respect of rail system relying upon the decision of the Hon'ble ITAT in the case of M/s.

Ultratech Cement Ltd. For A.Y. 2010-11 without appreciating the decision of the Hon'ble ITAT has not been accepted by the department and further appeal has been filed."

4. On the facts and the circumstances of the case and in law the Ld. CIT(A) erred in directing to hold the sum of Rs. 5,56,45,576/- received on transfer of Carbon Credit as capital receipt and stating that no addition can be made in proceedings u/s 153C r.w.s 153A without any incriminating

material found during the course of search u/s. 132(1) of the Income Tax Act, 1961.

5. On the facts and the circumstances of the case and in law the Ld. CIT(A) erred in directing to hold the sum of Rs. 5,56,45,576/- received on transfer of Carbon Credit as capital receiptrelying on the decision of the Hon'ble ITAT in case of Ultratech Cement Ltd. for 2010-11 without appreciating that the said decision has not been accepted by the department and further appeal has been filed in the Hon'ble Bombay High Court"

2.1 The grounds raised by the assessee for assessment year 2011-12 are reproduced as under:

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

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

3. That on the facts and in the circumstances of the case and in law, the CIT(A) erred in not considering and dismissing the

appellant's main Ground of Appeal No. 3 (before the CIT(A)} which was a question of law as to whether AO can re-examine the claims which had obtained finality as per Order us 143(3) of the Act and did not abate as per the provisions of section 153C r.w.s. 153A of the Act.

3.1. That on the facts and in the circumstances of the case and in law, the CIT(A) erred in not considering and dismissing the appellant's main Ground of Appeal No. 3 {before the CIT(A)} without appreciating the fact that in the case of assessments which do abate, the addition / disallowances can solely be made on the basis of only incriminating materials which admittedly, in the case of appellant, is not available.

3.2. That the CIT(A) erred in deciding Alternate Grounds {Ground Nos. 7 to 9 beforeCIT(A)} without considering and hence dismissing the Main Ground {Ground No. 3 before CIT(A)).

4. That on the facts and in the circumstances of the case and in law, the CIT(A) erred in confirming the addition of Rs. 20,96,89,187/- on account of alleged illegal mining without appreciating the fact that the issue of mining production was fully verified in course of assessment proceeding us 143(3) of the Act.

5. That on the facts and in the circumstances of the case and in law, and without prejudice to Ground No. 4, the CIT(A) erred in not considering the appellant's Ground No. 8 {before

the CIT(A)} which was against the action of the AO in valuing the closing stock of sub-grade Iron Ore after including Royalty.

5.1 That the CIT(A) failed to appreciate that Royalty cannot be included in the valuation of closing stock of sub-grade Iron Ore which was lying in the premises of the appellant. Royalty is applicable only on actual despatches from the mines.

6. That on the facts and in the circumstances of the case and in law, and without prejudice to Ground No. 4, the CIT(A) erred in not considering the appellant's Ground No. 9 {before the CIT(A)) in which appellant had claimed that in case of addition on account of non-reporting of sub-grade production in particular assessment year, than impact of the same should be given in successive assessment years till the assessment in which such production was reported as saleable production due to available market.

2.2 The assessee has also raised addition ground, vide letter dated 23.08.2021 same are reproduced as under:

ADDITIONAL GROUND NO. 1: DEPUTY COMMISSIONER OF INCOME TAX, CENTRAL CIRCLE 1(4) DID NOT HAVE THE JURISDICTION TO PASS THE ORDER UNDER SECTION 143(3) READ WITH SECTION 153C

On the facts and circumstances of the case and in law, the Ld. AO erred in issuing notice under section 153C of the Act

and passing order under section 143(3) read with section 153C of the Act.

ADDITIONAL GROUND NO. 2: CLAIM OF DEDUCTION OF EDUCATION CESS

On the facts and the circumstances of the case and in law, the learned AO erred in not allowing deduction of education cess and secondary and higher education cess (collectively called as "Education Cess") while computing the total taxable income under the Act.

The Appellant prays that the learned AO be directed to allow deduction of EducationCess while computing the total taxable income of the Appellant.

3. Briefly stated, facts of the case are that the assessee-company is a public limited company engaged in the business of mining of ore, manufacturing and trading of Iron Ore & ferro alloys, generation of electricity (Wind Power Mill) & Railway siding for captive use.

3.1 For the year under consideration, the assessee e-filed its return of income on 30.09.2011 declaring total income of ₹739,69,17,320/-. The return of income filed by the assessee was selected for scrutiny and statutory notices under the Income-tax Act, 1961 (in short 'the Act') were issued and complied with. The assessment u/s 143(3) of the Act was completed on 24.01.2014 by the Dy. Commissioner of Income-tax, Circle 5, Kolkata, determining

total income of the assesseecompany at ₹760,32,32,330/-. While completing the assessment u/s 143(3) of the Act, the Assessing Officer *interalia* made following disallowance/ addition : (i) expenses related to exempt income u/s 10B of the Act (ii) disallowance u/s 14A r.w. Rules 8D of Income-tax Rules, 1962, (iii) penalty charges, (iv) club expenses, (v) excess depreciation on electrical equipment and (vi) expenses related to exempt income u/s 80IA of the Act.

3.2 Subsequently, consequent to the search action by the Central Bureau of Investigation (CBI) at the premises of M/s Aditya Birla Management Corporation Private Limited, a search and seizure action u/s 132 of the Act was carried out on at the premises of said company on 16.10.2013. Simultaneously, search and seizure action u/s 132 of the Act was also carried out on the residential premises of Shri Subhendu Amitabh, an individual on 16.10.2013. Due to centralization of the cases of the Aditya Birla Group at Mumbai, the case of the assessee was also transferred from Kolkata to Mumbai. In view of Material belonging to the assessee seized during the course of search action at the premises of M/s Aditya Birla Management Corporation Private Limited, the assessment proceedings u/s 153C r.w.s. 153A of the Act were initiated in the case of the assessee by way of issue of notice dated 26.11.2014. After considering the submission/objection of the assessee, the Assessing Officer passed the assessment order u/s 153C r.w.s. 143(3) of the Act on 29.03.2016 determining total income at

₹918,85,81,780/-. In the assessment order, the Assessing Officer made various additions/disallowance which can be categorized in two categories, the ***first category*** of additions/disallowances which were already made in the assessment order passed u/s 143(3) of the Act and the Assessing Officer has only repeated all those additions in the present assessment order, which includes expenses related to exempt income u/s 10B of ₹24,871/- disallowance u/s 14A r.w.r. 8D (₹16,94,10,474/-) ; penalty charges (₹16,13,694/-) ; club expenses (₹58,374/-) ; excess depreciation on electrical equipment (₹92,831/-) and expenses related to exempt income u/s 80IA (₹60,63,759/-). The ***second category*** of additions, which have been made for the first time in search assessment proceedings, *interalia* include claim u/s 80IA in respect of rail siding system (₹133,51,57,574/-) ; illegal mining/ore production (₹20,96,89,187); Carbon credit treated as revenue receipt (₹5,56,45,576/-) and addition for unaccounted cash transactions (₹1,35,00,000/-).

4. On further appeal, the Ld. CIT(A) though upheld the validity of proceedings u/s 153C of the Act, however allowed relief to the assessee on all issues except on the issue of illegal mining.

5. Aggrieved, both the Revenue and the assessee are before us, by way of raising grounds as reproduced above.

6. In ground No. 1 and 2 of the appeal, the Revenue is aggrieved with the additions deleted by the ld CIT(A) on the ground that in absence of any incriminating material in case of completed assessments, no addition could have been made. These two grounds raised are in respect of additions which were made in original assessment proceedings as well as new additions made by the Assessing Officer. In respect of new additions, the assessee has also raised separate grounds No. 3 to 5 of the appeal.

7. As far as additions which have been repeated by the Assessing Officer in the present assessment order which were made in the original assessment order u/s 143(3) dated 24.01.2014, the Ld. CIT(A) has deleted the additions observing that the assessment for the assessment year under consideration was completed assessment as on the date of the search and therefore, it is in the nature of unabated assessment. The Ld. CIT(A) following the finding of the Hon'ble Jurisdictional High Court in the case of **Continental Warehousing Corporation (2015) 374 ITR 0645 (Bom)**and other decisions held that those additions could not have been made in the present search assessment proceedings. The relevant finding of the Ld. CIT(A) is reproduced as under:

> *"20.0 I have gone through the assessment order, the submissions of the appellant company and various other material on record, on this issue.*

20.1 The facts are that the original assessment in the case of appellant company had been completed w/s 143 of the Act on 24.01.2014. Against this order passed us 143(3) of the Act, the appellant has filed an appeal before the Ld. CIT(A), Kolkata. The appeal was decided by the Ld. CIT(A), in Appeal No. 223/13-14/CIT(A)-VI/ Cir-5/Kol, vide order dated 31/10/2014. The A.0. has, vide order dated 05/02/2015 given appeal effect to this order of Ld.CIT(A), granting part reliefs on certain issues which are stated as under:-

(a) Disallowance u/s 14A Rs. 3,25,01,249/-

(b) Club Expenses Rs. 58,347/-

(c) Penalty Expenses Rs. 16,13,694/

(d) Depreciation Rs. 92,381/-

(e) Common Expenses related to EOU unit Rs. 1,86,424/-(f)

Common Expenses related to 80IA units Rs 69,02,061/-.

20.2 Further, the Appellant has stated during the course of the appellate proceedings that both the appellant and the department had preferred second appeal before the Income Tax Appellate Tribunal.

20.3 It has been noted that the AO has withdrawn these reliefs in the Order passed us 143(3) r.w.s. 153C of the Act. Thus, the question for adjudication for ols whether the 10 was justified in making the impugned additions, which has

already been made in the original assessment passed w/s 143(3) of theAct, by invoking the provisions of section 153C of the Act. Further, it needs to be adjudicated as to whether in the absence of any incriminating material found during the course of search, the AO could made the impugned disallowances / additions.

20.2 From the assessment order, it is evident that AO has referred to Annexures A-1, A-2, A-8, A-9 & A-21, which have been seized during the course of search & seizure action on M/S ABMCPL on 16.10.2013. From the perusal and detailed discussion in assessment order, it is evident that these seized documents have no relation with the additions / disallowances stated above. Thus, the factual position is that there is no incriminating seized material in relation to the issues, mentioned above.

20.3 It is noticed that the original assessment in case of the appellant for the AY. under consideration had already been completed u/s.143(3) on 24.01.2014, passed by the then AO. In other words, the assessment for the current assessment year under consideration had already been concluded much before the initiation of search action us 132 of the Act. In the case of completed , where no incriminating material is found during the course of search, the assessment u/s.153C has to be made on originally assessed income only and no addition or disallowance can be made de hors the incriminating evidences recovered during the course of search.

20.4 In the case of All Cargo Global Logistics Ltd. Vs. DCIT, (2012) 147TTJ 0513 (SB): (2012) 74 DTR 0089 (SB): (2012) 137 ITD 0287 (SB): (2012)18 ITR 0106 (SB), the Hon'ble ITAT, Bombay has concluded as under:-

58. Thus, question No. 1 before us is answered as under:

a) In assessments that are abated, the AO retains the original jurisdiction as well as jurisdiction conferred on him us 153A for which assessments shall be made for each of the six assessment years separately;

b) In other cases, in addition to the income that has already been assessed, the assessment us 153A will be made on the basis of incriminating material, which in the context of relevant provisions means - (i) books of account, other documents, found in the course of search but not produced in the course of original assessment, and (ii) undisclosed income or property discovered in the course of search."

20.5 The Hon'ble Bombay High Court has examined this issue in great detail in a recent judgement in case of CIT Vs. Continental Warehousing Corporation 2015) 279 CTR 0389 (Bom): (2015) 120 DTR 0089 (Bom):(2015) 374 ITR 0645 (Bom): (2015) 232 TAXMAN 0270 (Bombay), wherein it has upheld the findings of Hon'ble ITAT, Bombay in the case of All Cargo Global Logistics Ltd., referred supra.

20.6 It has thus been held that in case of completed assessments, the assessment us.153C has to be made on the basis of incriminating material only, i.e. undisclosed

income/ property/ books of accounts/ documents. In other words, where nothing incriminating is found during the course of the search operation, relating to any of the assessment years covered us. 153C of the Act, the assessment for such AYs. can't be disturbed. It has also been held that in the absence of any incriminating material, the completed assessment has only to be reiterated.

20.7 A similar view has been taken by the Hon'ble Bombay High Court (Nagpur Bench) in case of Murli Agro Products Ltd Vs. CIT 49 Taxman.com172 in ITA No 36 of 2009, vide order dated 29/10/2010, the relevant excerpts of which are reproduced hereunder:-

> *"9. What Section 153A contemplates is that, notwithstanding the regular provisions for assessment/ reassessment contained in the IT Act, where search is conducted under Section 132 or requisition is made under Section 132A on or after 31/5/2003 in the case of any person, the Assessing Officer shall issue notice to such person requiring him to furnish return of income within the time stipulated therein, in respect of six assessment years immediately preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made and thereafter assess or reassess the total income for those assessment years. The second proviso to Section 153A provides for abatement of assessment/reassessment proceedings*

which are pending on the date of search requisition.Section 153A(2) provides that when the assessment made under Section 153A(1) is annulled, the assessment or reassessment that stood abated shall stand revived.

10. Thus on a plain reading of Section 153A of the Income Tax Act, it becomes clear that on initiation of proceedings under Section 153A, it is only the assessment/reassessment proceedings that are pending on the date of conducting search under Section 132 or making requisition under Section 132A of the Act stand abated and not the assessment/reassessments already finalized for those assessment years covered under Section 153A of the Act. By a circular No.8 of 2003 dated 18-9-2003 (See 263 ITR (St) 61 at 107) the CBDT has clarified that on initiation of proceedings under Section 153A, the proceedings pending in appeal, revision or rectification proceedings against finalized assessment/reassessment shall not abate. It is only because, the finalized assessments/reassessments do not abate, and the appeal, revision or rectification pending against finalized assessments/reassessments would not abate. Therefore, the argument of the revenue that on initiation of proceedings under Section 153A, the assessments / reassessments finalized for the assessment years covered under Section 153A of the

Income-tax Act stand abated cannot be accepted. Similarly on annulment of assessment made under Section 153A(1) what stands revived is the pending assessment/reassessment proceedings which stood abated as per section 153A(1).

11. In the present case, as contended by Shri Mani, learned counsel for the assessee, the assessment for the assessment year 1998-99 was finalized on 29-12-2000 and search was conducted thereafter on 3-12-2003. Therefore, in the facts of the present case, initiation of proceedings under Section 153A would not affect the assessment finalized on 29-12-2000.

12. Once it is held that the assessment finalized on 29.12.2000 has attained finality, then the deduction allowed under section 80HHC of the Income-tax Act as well as the loss computed under the assessment dated 29-12-2000 would attain finality. In such a case, the A.O. while passing the independent assessment order under Section 153A read with Section 143(3) of the IT. Act could not have disturbed the assessment/reassessment order which has attained finality, unless the materials gathered in the course of the proceedings under Section 153A of the Income-tax Act establish that the reliefs granted under the finalized assessment/reassessment were contrary to the facts unearthed during the course of 153Aproceedings.

13)In the present case, there is nothing on record to suggest that any material was unearthed during the search or during the 1534 proceedings which would show that the relief under Section 80 HHC was erroneous. In such a case, the A.O. while passing the assessment order under Section 153A read with Section 143(3) could not have disturbed the assessment order finalised on 29.12.2000 relating to Section 80 HHC deduction and consequently the C.I.T. could not have invoked jurisdiction under Section 263 of the Act."

20.8 The Hon'ble Bombay High Court in the above referred case has clearly held that no addition can be made in respect of assessments which have become final, if no incriminating material is found during the search. It has been held that once the original assessment has attained finality, then the Assessing Officer while passing the assessment order u/s. 153A r.w.s. 143(3) cannot disturb the assessment/reassessment order which has attained finality, unless the material gathered during the course of the search proceedings establishes something contrary to it. If there is nothing on record to suggest that any incriminating material was unearthed during the search, the AO, while passing order u/s.153A r.w.s. 143(3) cannot disturb the original assessment order passed us 143(3) of the Act.

20.9 The Hon'ble Bombay High Court again in the latest decision dated11.09.2017 in the case of CIT-20 Vs. Shri

Deepak Kumar Agarwal (2017-TOL-1902-HC-MUM-IT) had dismissed, the Revenue's following question of law:

> *"6.1 Whether on the facts and in the circumstance of the case and in law, the Hon'ble ITAT was justified in holding that assessment us.153A can be made only on the basis of incriminating material found in the search and no other issue can be taken following the Special Bench order in the case of "All Cargo Global Logistics Ltd.", when the SB decision of Hon'ble ITAT, Mumbai has been disapproved by Hon'ble Karnataka High Court in the case of Canara Housing Development Co.S. DCIT = 2014-TIOL-1396-HC-KAR-IT (unreported)?"*

20.10 On this issue, the Honb'le Bombay High Court had held as under:

> *"26. The argument before the Income Tax Appellate Tribunal in this case was that the order passed by the Commissioner of Income Tax, Mumbai, confirming the assessment order under Section 143(3) read with Section 153A of the IT Act is both, bad in law and on facts. No addition could have been made while completing assessment under Section 153A of the IT Act in the case of completed assessment if no undisclosed income was determinable from the material found as a result of search.*

27. As far as the addition under Section 68 on account of unexplained gifts received from the family members of Mr. B. R. Agarwal, the arguments have been noted.

28. The Special Bench order in the case of All Cargo Global Logistics Ltd. (supra) has been referred in the impugned order at the internal page 8 (running page 70 of the paper book).

29. The relevant paragraphs of the same have been reproduced.

30. The Tribunal concluded that the arguments relating to the validity of the notice under Section 153A and though that provision could have been invoked in the given facts and circumstances, but the additions made by the Assessing Officer were in the absence of any incriminating material. Therefore, they are not sustainable and they came to be deleted.

31. We do not think that any view other than the one taken by the Division Bench of this Court in the case of The Commissioner of Income Tax, Centrall vs. M/s. SKS Ispat & Power Limited [Income Tax Appeal Nos. 1874 of 2014 and 58 of 2015] dated 12th July, 2017 or the reported judgment in Continental Warehousing Corporation and All Cargo Global Logistics (supra) can be taken.

32. Once we are of the firm view that the question no.1 proposed by the Revenue is already answered by this

Court in a series of judgments, and particularly referred above, then we do not think that we should allow Mr. Ahuja to argue that these judgments are rendered in ignorance of the binding judgment of the Hon'ble Supreme Court in the case of Rajesh Jhaveri Stock Brokers Private Limited (supra). After having noted the context and the factual backdrop in which the decision the case of Rajesh haver was delivered and having distinguished it, we do not see how the question can be proposed by the Revenue as a substantial question of law. It is not a substantial question of law as the issue is already answered by this Court."

20.11 Accordingly, in the present case at hand, I am of the considered opinion that the disallowances which have been repeated by the A.O. in the order u/s 153C of the Act need not be adjudicated upon, again. I am of the view that the A.O. has erred in making two assessments on the same issues, viz. one in original assessment us 143(3) of the Act & another u/s 153C of the Act. Thus, where nothing incriminating has been found during the course of the search operation relating to a particular issue, the original assessment u/s 143(3) get revived and the same needs to be reiterated, subject to modification in light of subsequent appellate orders. In other words, the assessed income for the AY under consideration will be the same, as already determined in the original assessment order, subject to the order of the appellate authorities.

20.12 Hence, the AO is directed to restore the reliefs allowed by CIT(A)-VI, Kolkata vide Order dated 31.10.2014 on all the impugned additions / disallowances. To sum up, the AO is directed to compute the taxable income starting from latest assessed income as per Order us 143(3) r.w.s. 251 of the Act and also to give effect to the appellate orders passed by higher appellate authorities, subsequent there-to. In the present appellate proceedings, no decision on merits is being given on the regular assessment issues, which are not emanating from any search material.

20.13 In view of these facts and circumstances, the Ground of Appeal No. 4 is fully allowed & Ground Nos. 10 to 15 are partly allowed to the extent of relief already granted by my Ld. Predecessor CIT (A).”

8. We have heard rival submission of the parties on the issue-in-dispute and perused the relevant material on record. As far as finding of the Ld. CIT(A) is concerned, we do not agree with the same because under the proceedings u/s 153C r.w.s. 153A of the Act, the Assessing Officer was required to start the computation of the income from the last assessed income or last income upheld in appellate proceedings. Since, those additions under reference were already made in original assessment order u/s 143(3) dated 24.01.2014, therefore, the Assessing Officer was required to start the computation of the income for the purpose of section 153C r.w.s. 153A of the Act after including those additions/disallowance

to the returned income under original assessment. Since, in the return of income u/s 153C/153A of the Act, the assessee has simply repeated the income which was filed in the regular return of income, the Assessing Officer was having two options: ***first*** option was to start the computation of income under section 153C r.w.s. 153A with the last assessed income or last income upheld in appellate proceedings and then add the disallowance or addition made in order u/s 153C read with section 153A of the Act. The ***second*** option was that to repeat the additions which were made in the original assessment proceedings, in the body of the assessment order passed u/s 153C read with 153A and also make new addition if any and then, compute the total income beginning from the income returned by the assessee for the purpose of section 153C r.w.s. 153A of the Act. Though, the most preferred action should have been the option one. However, the Assessing Officer has followed the option two but both the actions reach at the same total income which finally should have been assessed for purpose of the computation income u/s 153C r.w.s. 153A of the Act. Therefore, the action of the Ld. CIT(A) in deleting those additions merely on the ground that same have been made without the aid of the incriminating material is not justified.

8.1 However, before us, the Ld. Counsel of the assessee has pointed out that all these additions/disallowance have already been deleted by the Income-tax Appellate Tribunal in appeals

corresponding to regular assessment proceedings [i.e. U/s 143(3) of the Act] for assessment year 2008-09, 2009-10 and 2010-11 and therefore, similar addition deserves to be deleted in consequent search proceedings [u/s 153C read with section 153A of the Act] for the year under consideration also.

8.1.1 Regarding the additions of expenses related to exempt income u/s 10B of the Act amounting to ₹2,04,871/-, the Ld. Counsel of the assessee has referred to the order of the Tribunal in ITA No. 1023 and 1554/M/2018 for assessment year 2009-10. The relevant part of the said decision is reproduced as under:

> ***"G. Apportionment of common expenses and its impact on claim of deduction u/s 80IA and u/s 10B of the Act – ₹ 2,62,53,000/-***
>
> *We find that this is only concerned with workings for allowability of deduction u/s 80IA and w/s 10B of the Act with regard to apportionment of common expenses. It is only a computational issue. There cannot be obviously any reference to incriminating material found during search regarding this issue. Hence there cannot be any reliance that could be placed on any search material for reworking the claim of deduction u/s 80IA and us 10B of the Act."*

8.1.2 Further, he has also referred to the order of the Tribunal in ITA No. 1021 & 1551/M/2018 for assessment year 2010-11. The relevant finding of the Tribunal is reproduced as under:

> ***"Apportionment of common expenses and its impact on claim of deduction u/s 80IA and u/s 10B of the Act - Rs 5,39,65,517/-***

We find that this is only concerned with workings for allowability of deduction u/s 80IA and u/s 10B of the Act with regard to apportionment of common expenses. It is only a computational issue. There cannot be obviously any reference to incriminating material found during search regarding this issue. Hence there cannot be any reliance that could be placed on any search material for reworking the claim of deduction u/s 80IA and us 10B of the Act.

"8.5. The Id. DR argued that the term 'evidence' is to be used as per the Indian Evidence Act, 1872. He argued that the expressions 'incriminating material' and 'evidence' cannot be used interchangeably as the term 'evidence' has got a wider amplitude and meaning and confined only to seized material, whereas the expression 'incriminating material' has got a very narrow scope confined to search proceedings. He vehemently argued that the expression 'incriminating material' is not found in the provisions of the Act and it is only the Hon'ble Higher Courts which had given the said interpretation while deciding the appeals in respect of concluded assessments. Per Contra, the Id.AR in this regard argued that evidence should also emanate from the seized materials found during the course of search. In respect of Justice M B Shah Commission Report, the Hon ble Jurisdictional High Court in the case of Sesa Sterlite Ltd vs ACIT reported in 417 IT 334 (Bom) had categorically held that in the absence of any independent material on record, assessment could not be reopened merely on the basis of opinion formed by Commission appointed by Central Government that there was under invoicing of exports by assessee, as conclusion drawn by the Commission was only its opinion and cannot be treated as primary facts."

8.1.3 As regard to disallowance u/s 14A r.w.r. 8D is concerned the Ld. Counsel has referred to the decision of the Tribunal in ITA No. 1017 and 1552/M/2018 for assessment year 2008-09. The relevant part of the order of the Tribunal is reproduced as under:

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

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

8.1.4The Ld. Counsel has further referred to the decision of the Tribunal in ITA No. 1023 & 1554/M/2018 for assessment year 2009-10 and ITA No. 1021 and 1551/M/2018 for assessment year 2010-11.

8.1.5As regards to the penalty charges of ₹16,13,694/-, the Ld. Counsel has referred to the decision of the Tribunal in assessee's own case in ITA No. 1023 & 1554/M/2018 for assessment year 2009-10. The relevant part of the same is reproduced as under:

"C. Disallowance of Penalty Charges - Rs 9,36,000/-

We find that this disallowance was made already in the regular assessment order u/s.143(3) of the Act on 30/12/2011 for the AY 2009-10. Hence, there cannot be any reliance that could be placed on any search material."

8.1. 6 Further, the Tribunal has followed the same decision in assessment year 2010-11 in ITA No. 1021 and 1551/M/2018.

8.1.7. Regarding club expenses of ₹58,374/- the Ld. Counsel has referred to the decision of the Tribunal in assessee's own case for assessment year 2010-11 in ITA No. 1021 and 1551/M/2018. The relevant part of the said decision is reproduced as under:

"8.4. The Id. AR before us submitted that none of the aforesaid additions were made based on the incriminating material in the form of petty cash book vide Annexure-A-8 received from the Assessing Officer of ABMCPL(being the searched person /s.132 of the Act). The Id. AR submitted that the A..2010-11 was a concluded assessment as on the date of assumption of jurisdiction us 153C of the Act by the Id. AO and hence, no addition or disallowance could be made in the search assessments framed either u/s.153C of the Act without existence of any incriminating material relatable to such assessment year. To address this aspect of the issue, it is pertinent to get into the fact as to whether the Id.AO had relied upon any incriminating material received from the Assessing Officer of the search person to make additions, disallowances in the assessment framed u/s.153C of the Act for A.Y.2010-11 in the hands of the assessee. Let us examine the same in respect of each disallowance / addition made in the assessment as under:-

Disallowance u/s.14A of the Act - Rs.21,74,09,077 /-

……..

Disallowance of Club expenses - Rs 37,152/-

……..

Disallowance of Penalty Charges - Rs 4,59,000/-

……..

Addition made on account of illegal unaccounted provision Rs.22,54,01,541/-

……..

Denial of deduction us 80IA of the Act with respect to Rail System - Rs 78,43,89,265/-

…….

Apportionment of common expenses and its impact on claim of deduction u/s 80IA and u/s 10B of the Act - Rs 5,39,65,517/-

……..

8.2 Regarding excess depreciation on electrical equipment, the Ld. CIT(A) directed the Assessing Officer to restore the relief given by the Ld. CIT(A) in his order dated 31.10.2014. Regarding the expenses related to exempt income u/s 80IA, the Ld. Counsel relied on the assessment order of the Tribunal in assessee's own case for assessment year 2009-10 in ITA No. 1023 & 1554/M/2018. The relevant para of the said decision is reproduced as under:

"G. Apportionment of common expenses and its impact on claim of deduction u/s 80IA and u/s 10B of the Act – Rs 2,62,53,000/-

We find that this is only concerned with workings for allowability of deduction us 80IA and us 10B of the Act with regard to apportionment of common expenses. It is only a

computational issue. There cannot be obviously any reference to incriminating material found during search regarding this issue. Hence there cannot be any reliance that could be placed on any search material for reworking the claim of deduction us 80IA and u/s 10B of the Act."

8.3 In view of the finding of the Tribunal in assessee's own case as reproduced above, we are of the opinion that these additions made by the Assessing Officer in present proceedings also deserved to the deleted. Therefore, the ground No. 1 and 2 of the appeal of the Revenue to the extent of old additions are dismissed.

9. In ground No. 3, the Revenue is aggrieved with the deletion of disallowance of deduction u/s 80IA of the Act amounting to ₹133,51,574/- in respect of rail siding systems.

10. The brief facts qua the issue-in-dispute are that the assessee had developed and operated railway siding for carrying out their business requirement. The assessee entered into an agreement with Railway authorities for construction of private siding (rail track). The assessee claimed deduction u/s 80IA(4) of the Actfor said railway siding owned and operated as rail system. The said deduction u/s 80IA claimed by the assessee was disallowed by the Assessing Officer as according to him this was not an infrastructure facility of public utility and it was merely for the purpose of own transportation of mineral/ore. The Ld. CIT(A) deleted this addition not only on the ground that there was no incriminating material

found during the course of the search related to the issue-in-dispute but also deleted on the merit of the addition following the finding of the Tribunal in the case of M/s Ultatech System Ltd. in ITA No. 7631/M/2014.

11. We have heard rival submission of the parties on the issue-in-dispute and perused the relevant material on record. It is undisputed that no incriminating material has been found qua the issue-in-dispute in the search proceedings carried out at the premises of M/s Aditya Birla Management Corporation Private Limited i.e. on the basis of initiation of proceedings u/s 153C in the case of the assessee. The present assessment year, being year of unabated assessment, no addition could not have been the assessee without aid of the incriminating material, as held by the Hon'ble Bombay High Court in the case of Continental Warehousing Corporation and therefore, the addition made by the Assessing Officer, not justified legally. As far as merit is concerned the Ld. CIT(A) has followed the binding precedent of the Tribunal Mumbai in the case of the assessee in the case of M/s Ultatech System Ltd(supra). Further, the Ld. Counsel of the assessee has referred to the decision of the Tribunal in assessee's own case for assessment year 2009-10 in ITA No. 1023 & 1554/M/2018 wherein identical addition has been deleted on merit. The relevant finding of the Tribunal(supra) is reproduced as under:

"F. Denial of deduction u/ 80IA of the Act with respect to Rail System - Rs 112,12,25,027/-

We find that this disallowance was made based on the Mumbai Tribunal decision rendered in the case of Ultratech Cement Ltd,which cannot be construed as incriminating material found during the course of search.In any case, this decision of tribunal hasbeen reversed and in later decisions, the Mumbai Tribunal had granted deduction us 80IA of the Act for the rail system itself.Hence, there cannot be any reliance that could be placed on any search material for denying this deduction us 80IA of the Act."

11.1 Further, the Tribunal in assessment year 2010-11 in ITA No. 1021 & 1551/M/2018 has also deleted the identical disallowance made by the Assessing Officer. In view of the above discussion, the ground No. 3 of the appeal of the Revenue is dismissed.

12. In ground No. 4& 5, the Revenue has challenged deletion of the addition made in respect of Carbon credit of ₹556,45,576/- which were treated by the Assessing Officer as revenue receipt. The Brief facts qua, the issue-in-dispute are that in the process of generation of ore and distribution of wind power, the assessee claimed to have reduced the initiation of Carbon dioxide and therefore, certified emission reduction/carbon credit was given to the assessee by the United Nations framework convention on climate change. The entitlement or privilege which accrued to the

assessee in the course of generation of the power was treated by the assessee in the nature of the capital receipt, which the Assessing Officer rejected and according to him this was a revenue receipt. Accordingly, the receipt on account of sale carbon credit was held by the Assessing Officer as taxable income. The Ld. CIT(A) deleted the addition on legal ground that in case of completed assessment no addition could have been made without aid of the incriminating material. The relevant finding of the Ld. CIT(A) is reproduced as under:

> *"28.2 It is pertinent to note here that there is no incriminating material relating to this issue, which has been found during the course of the search operation conducted on the Group on 16.10.2013. In these circumstances, this issue can't be considered in the proceedings us 153C of the Act. get However, this issue is also being considered on merits in the foregoingparagraphs."*

12.1 On the issue of merit of the addition, the Ld. CIT(A) following the binding precedent on the issue-in-dispute deleted the addition observing as under:

> *"28.3 The AO has disallowed the claim of appellant relying on decision of Hon'ble ITAT, Cochin in the case of Apollo Tyres Ltd. vs. ACIT (2014) reported in 149 ITD 756.*
>
> *28.4 The appellant has relied on the decision of Hon'ble Andhra Pradesh High Court in the case of the Commissioner*

of Income Tax Vs. My Home Power Ltd. (ITA No. 60 of 2014) and the decision of Hon'ble ITAT Chennai in the case of India Dyeing Mills Pvt. Ltd. vs. ACIT in ITA No.498/MDS/2014 pronounced on 08.10.2014.

28.5 The Appellant Company has also relied on the decision of jurisdictional Mumbai ITAT in the case of Ultra Tech Cement Ltd. Vs. Addl.CIT (2015-TIOL-989-ITAT-MUM), wherein it was held as under:-

> *"42. The first additional ground relates to the claim of Proceeds realized from sale of Certified Emission Reduction (CERs)amounting to Rs.7,64,56,908/- as capital receipts.*
>
> *43. We find that the assessee has shown the sale consideration out of sale proceeds of Carbon Credit under the head' other income' as revenue receipts which now it wants to claim as capital receipts in the light of the decision of the Tribunal. Since no new facts have to be verified so far as this claim is concerned realization of Carbon Credit are already shown under the head' other income' Respectfully following the decision of the Tribunal cited hereunder:*
>
> *(1) ITAT Hyderabad Bench in the case of My Home Power Ltd. VsDCIT in ITA No. 1114/Hyd/2009 = 2012-TIOL-637-ITAT-HYD*

2) ITAT Chennai Bench in the case of Sri Velayudaswamy Spinning Mills (P) Ltd. Vs DCIT in ITA No. 582/Mds/2013

3) ITAT Chennai Bench in the case of Ambika Cotton Mills Ltd. Vs DCIT in ITA No. 1836/Mds/2012;

we direct the AO to treat the Proceeds realized from sale of Certified Emission Reduction (CERs) generated out of Capital Projects registered with UNFCCC as capital receipts. Additional ground No. 1 is accordingly allowed.

28.6 It has also been noted that in a latest decision the jurisdictional Mumbai ITAT in the case of Aditya Birla Nuvo Ltd. Vs. DCIT in ITA No.3033/M/2012 (2016-TIOL-25-ITAT-MUM), the Hon'ble Mumbai ITAT has concluded as under:-

"9. Ground No. 10 is with regard to sale of certified emission reduction (CER) Rs.6,95,29, 718/- treated as revenue receipts and liable to tax and to treat the same as capital receipt not chargeable to tax.

9.1. During the assessment proceedings vide its letter dt.25.3.2009 the assessee submitted it had received Rs.6.95crores on sale of CER, that out of abundant caution it had offered the amount as taxable income, that the amount in question was in the nature of capital receipt and was not liable to tax. The AO rejecting the claim of the assessee held that CER was

generated in the process of business, that it was not a capital receipt, that same was liable to tax.

9.2. During the appellate proceedings before the FAA, the assessee contended that CER were a type of emission unit issued by the clean development mechanism executive board for emission reduction, that carbon credit was generated by using advanced technology that reduced the carbon emission in environment, that the income was generated by the co. by selling the points in the market, that it was capital receipt and was not chargeable to tax. The FAA held that the assessee had shown the income as revenue receipt in the books of account, that it did not file revised return, that the amount received by it was directly linked with running of the business. Upholding the order of the AO, he rejected the appeal filed by the assessee.

9.3.Before us, the AR contended that the issue of CER had been dealt and decided by the Tribunal/Courts in favour of the assessee Hereferred to the cases of My Home Power Ltd. (365[TR82) = 2014-TIOL-978-HC-AP-IT; My Home Power Ltd.(63 SOT 227) = 2012-TIOL-637-ITAT-HYD ;M/s. Shree Cements Limited(TA / 503/ JP/2012) =2014-TIOL-1233-ITAT-JAIPUR; BEST Corporation Pvt. Ltd. ITA1958/Mds/2014 dt.20.05.2015) = 2015-TIOL-829-ITAT-MAD andM/s. Subhash Kabini Power Corporation Ltd.(ITA

No.258/Bang/2014) dt.28/11/2014) = 2015-TIOL-44-ITAT-BANG. The DRsupported the order of FAA.We have heard the rival submissions and perused the material. In the case of My Home Power the Hon'ble Andhra Pradesh High Court has decided the issue as under

3. We have considered the aforesaid submission and we are unable to accept the same, as the learned Tribunal has factually found that"carbon credit is not an offshoot of business but an offshoot of environmental concerns. No asset is generated in the course of business but it is generated due to environmental concerns". We agree with this factual analysis as the assessee is carrying on the business of power generation. The carbon credit is not even directly linked with power generation. On the sale of excess carbon credits the income was received and hence as correctly held by the Tribunal it is capital receipt and it cannot be business receipt or income. In the circumstances, we do not find any element of law in this appeal."

Respectfully following the above judgment, Ground No. 10 is decide in favour of the assessee.

28.7 In view of these facts and circumstances and the various judicial pronouncements, the AO is directed to delete the addition made on account of Carbon Credit Income."

13. We have heard rival submission of the parties on the issue-in-dispute and perused the relevant material on record. As far as finding of the Ld. CIT(A) on the deletion in view of no incriminating material, we do not find any infirmity in the order of the Ld. CIT(A) in the issue-in-dispute. On the deletion on merit is concerned, we find that the Ld. CIT(A) has followed binding precedent on the issue-in-dispute and therefore, we do not find any error in the order of the Ld. CIT(A) on the issue-in-dispute. Accordingly, we uphold the finding of the Ld. CIT(A) on the issue-in-dispute and the grounds No. 4 & 5 of appeal of the Revenue are dismissed.

13.1 As far as appeal of the assessee is concerned, the ground No. 2 to 6 of the appeal relates to the issue of addition for illegal mining/ore production made on the basis of Justice M.B. Shah Commission Report. The relevant finding of the Ld. CIT(A) on the issue-in-dispute is reproduce as under:

> *"34. I have considered the observations of the AO in the assessment order, the submission of the appellant company and perused the materialsavailable on record. The appellant has taken this Ground, as an alternate to the Ground No. 3, discussed above.*
>
> *34.1 The facts of the case are that the CBI had conducted search operations on 15.10.2013 at the business premises of M/s Aditya Birla Management Corporation Pvt. Ltd. (M/s ABMCPL), a group concern at UCO Bank Building, 4" Floor,*

Parliament Street, New Delhi. During the said search operation, cash of approximately Rs. 25 Crores was found at the above mentioned premises of M/s. ABMCPL. Accordingly, the Income Tax Department was informed by CBI and the DDIT(In), New Delhi, conducted a survey action w/s. 133A of the Act at the premises of M/s ABMCPL, which was subsequently converted into a search operation w/s. 132 of the Act. It has been noted that these searches were conducted in relation to coal scam.

34.2 It is also noted that as a result of the search operation on the Group, one of the group concern, namely, M/s Sunbeam Trading & Inv. P Ltd. (M/s STIPL) has filed a settlement application before the Hon'ble ITSC, Mumbai wherein, cash unaccounted transactions have been accepted by M/s STIPL in relation to the sale of iron ore. It has also been noted that there are transactions of iron ore between the appellant company and M/s STIPL.

34.3 In these circumstances, I am of the considered opinion that this issue is emanating out of the search operation conducted on the Group and hence, the A.O. has rightly made additions us 153C of the Act on the issue of illegal mining.

34.4 It is also a fact on record that Justice M. B. Shah Commission was set up on illegal mining of Iron Ore and Manganese ore in the States of Orissa, Jharkhand & Goa and the Hon'ble Shah Commission has filed its report before the Hon'ble Supreme Court of India. The facts of the present

case at hand are that the report of Hon'ble Justice M. B. Shah Commission has been received py the A.O. from DDIT(v.), Bhubaneswar and also from DDITC(Inv.),Tech-II, Kolkata regarding illegal mining activities of the Appellant Company, in respect of three mines at Jilling, Kasia and Koira Mines, which revealed that the appellant has shown lower production in it's books of account for the various assessment years.

34.5 In view of these circumstances, the A.O. has called for information u/s133(6) of the Act from the Regional Controller of Mines, Bhubaneswar, thereby calling for the Annual Mining Returns filed by the appellant in requisite Form No. H-1. For the sake of clarity, the figures of production as per H-1 Form, M.B. Shah Commission Report and as per Audit Report, the differences and its valuation, for the various assessment years, is tabulated as under:

Financial Year	Production, as per H1 return (In M.T.)	Production, as per Report (In M.T.)	Production As per Tax Audit Report	Difference (In M.T.)	Rate (In Rs per M.T.)	Amount (In Rs.)
A	B	C	D			
2007-08	69,13,758	69,65,758	68,39,257	1,26,501	368.03	46556163
2008-09	85,14,422	84,73,142	80,23,900	4,90,522	408.56	200407521
2009-10	80,11,962		76,07,342	4,04,620	557.07	225401541
2010-11	37,18,910	35,06,248	34,27,554	2,91,356	719.70	209689187
2011-12	23,19,057	18,49,038	28,19,059	-5,00,002	519.46	-259732609.1
Total -A	2,94,78,108	2,07,94,186	2,87,17,112	8,12,997		42,23,21,803
2012-13	34,80,290	-	38,80,299	-4,00,009	519.46	-207790035
2013-14	32,54,463	-	36,14,978	-3,60,515	519.46	-187274339
Total -B	67,34,753	-	74,95,277	-7,60,524		-39,50,64,374
Grand Total -A+B	3,62,12,861	2,07,94,186	3,62,12,389	52,472		2,72,57,428

34.6 For the current year under consideration, the production of Iron Ore is37,18,910 M.T., as per the HI Report, whereas as per the Books of Accounts of the appellant company, the total production is shown at 34,27,554 M.T.Thus, there is a suppression of production to the tune of 2,91,356 M.T. for the year under consideration. The cost of production as evidenced by HI form is Rs. 719.70 per M.T. for the year under consideration. Accordingly, the value of suppressed production has been worked out by the A.O. at Rs.20,96,89,187/-.

34.7 On this issue it may be noted that for the F.Y. 2007-08 and F.Y. 2008-09 reporting of sub grade / Mineral Rejects (Below 55% Fe) was not required, for the purposes of Form H-1. However, the format of Form H-1 was changed in F.Y. 2009-10 to incorporate these details. It is clarified that the Sub-Grade Ore (SGO) is that part of the ore excavated from the mines, which contain metal content (Fe) less than required for marketable grades i.e. Below 55% Fe.

34.8 On this issue, the appellant has also submitted that the sales of the sub-grade material has been recorded in the books of account in the year in which it has been sold, so if there is any suppression in the year under consideration than that is of stock only and the stock has to be valued at cost or market price, whichever is less. It is further submitted that there will be no change in profit/real taxable income, even if the appellant company had started reporting SO production in Income Tax Return. As there was no sale of

SGO production in A.Y. 2011-12, question of taxable revenue does notarise.

34.9 On the above contention of the appellant company, it is stated that the income is to be taxed, in the year to which it actually belongs. Firstly, it is an undisputed fact that for the current year under consideration, the appellant company has not shown the Sub-Grade Iron Ore in the closing stock reflected in the books of account. Thus, the closing stock has been undervalued by the Appellant Company to that extent and hence, there will unpact on the taxable profit of the current assessment year under onsideration, contrary to what has been claimed by the Appellant Company.

34.10 Further, it is to be noted that in the year of sale, only the profit element i.e. (Sale Price, credited in the books - Cost Price, as appearing in books) needs to be taxed. Thus, the claim of the appellant that the suppression of production on account of Sub-Grade Iron Ore needs to be taxed in the year in which it is sold is against the accounting principles and is also an incorrect proposition both on law & facts.

34.11 The fact that the appellant company has subsequently sold the sub-Grade Iron Ore at a substantial price, clearly shows that the value of the closing stock of Sub-Grade Iron Ore can't be taken at 'Nil', as has been done by the Appellant company, in the books of account for the year under consideration.

34.12 From the assessment order, it is evident that the AO had made the addition, by following the instruction No. 14/2015 dated 14.10.2015 issued by Central Board of Direct Taxes (CBDT). The CBDT instruction, being important on this issue is reproduced, as under:-

Instruction No. 14/2015

Government of India

Ministry of Finance

Department of Revenue

Central Board of Direct Taxes

North-Block, New-Delhi, dated the 14th of October, 2015

To,

All Pr. Chief-Commissioners of Income-tax/Chief-Commissioners ofIncome-tax

All Pr. Directors-General of Income-tax/Directors-General of Income-tax

Sir/Madam

Subject:- Framing of scrutiny assessments in cases of assessees engaged in the business of Mining-regarding

The assessees engaged in the business of mining are required to file a Annual Return with Indian Bureau of Mines

(IBM'\Form H-1 in case of Iron Ore mining and Form H-2 to H-8 in case of mining in other Ores).

2. Follow-up enquiries, in regard to some of the companies which find mention in the report of the Justice M.B. Shah Commission of Enquiry, which was constituted by the Government to probe illegal Iron and Manganese Ore mining, shows that in some cases there were significant differences in figures regarding production and closing stock, as reported in the Annual Return filed with IBM vis-a-vis the details furnished in the Income-tax Return.

3. In this context, I am directed to convey that while scrutinizing the cases of entities engaged in the business of mining, the Annual Returns filed with IBM by the respective assessees should invariably be obtained and compared with the details submitted to the Income-tax Devartment so as to ascertain whether any suppression of productionand

discrepancy in stock exists and further necessary action as per provisions of law may be taken.

4. If significant discrepancies between the figures furnished to the mining authorities and the Income-tax Department for other vears also come to the notice, then, necessary remedial measures may be taken for all the years concerned.

5. This may be brought to the notice of all concerned for necessary compliance

(Ankita Pandey)

DCIT (OSD) IT(A-11)

E.No.225/259/2015-ITA.I

34.13 The above instruction clearly indicates that according to the JusticeM.B. Shah Commission of Enquiry, in some mining cases, there were significant differences in figures regarding production and closing stock, as reported in the Annual Return filed with Indian Bureau of Mines (IBM) vis-a-go vis the details furnished in the Income-tax Return. Accordingly, the concerned AOs were directed that assessment of such mining companiesshould invariably be made based on the basis of a comparison of the Annual Returns filed with IBM and Tax Audit Report.

34.14 In these circumstances, I am of the considered opinion that the AO has rightly followed the binding instruction of the CBDT on this issue and correctly made an addition on illegal mining based on difference in between the H-1 Return / M.B. Shah Commission Report and the Tax Audit Report. It needs to be emphasized here that the A.O. is duty bound to follow the CBDT instructions / circulars, while framing the assessment orders.

34.15 In the case of Commissioner of Central Excise Vs. Ratan Melting & Wire Industries, (2008) 220 CTR 0098 : (2008) 14 DTR 0324 (SC), the Hon'ble Supreme Court has held that instructions / circulars issued by the Board are binding in law on the authorities under the respective statutes.The Bombay High Court has taken a view in CWT.

v. Gammon India (P) Ltd.(1981) 130 ITR 471 (Bom) that if a circular is relied upon for the first time in the High Court in the course of the hearing of a reference under the Income Tax Act, it must be given effect to by the Court, because the circulars instructions issued by the CBDT are binding on the Income Tax Officer.

34.16 The Kerala High Court in CIT v. Malayala Manorama & Co Ltd.(1983) 143 ITR 29 (Ker) has observed that circulars of general directions issued by the CBDT are binding under section 119 of the Act on all officers and persons employed in the execution of the Act. The Delhi High Court in Addl. CIT v. Mrs. Avtar Mohan Singh (1982) 136 IT 645 (Del) has observed that though the circulars of the Central Board are not binding on the court, yet general circulars are binding on the Income Tax Authorities. It was held in the case of Tata Iron & Steel Co. Ltd. v. N.C. Upadhyaya (1974)96 ITR I (Bom), that circulars issued by the Central Board of Direct Taxes would be binding on the Income Tax Officers and must be given effect to by the Court [See Navnitlal Ambalal v. CIT (1976) 105 ITR 735 (Bom)].

34.17 An Catholic Syrian Bank Ltd. v/s. CIT 2012(3) SCC 784, the Supreme examined the effect of the circulars / instructions which are in forceand are issued by the Central Board of Direct Taxes in exercise of the power vested in it, under Section 119 of the Act. It was held that the circulars have the force of law and are binding on the income tax authorities. So long as the circular is in force, it aids the

uniform and proper administration and application of the provisions of the Act.

34.18 So long as instruction / circular issued under section 119 is in force, it would be binding on the departmental authorities to ensure a uniform and proper administration and application of the Income Tax Act (UCO Bank vs.CIT (1999) 11 SITC 415 (SC). The Hon'ble Supreme Court in CIT vs. AnjumM. H. Ghaswala & Ors. (2002) 166 Taxation 586 has held that circular issued by CBDT is legally binding on the Revenue.

34.19 The Supreme Court in K. P. Varghese v. ITO (1981) 131 IT 597 (SC) has observed that it is now well settled as a result of two decisions of this court, one in NavnitLal C. Javeri v. K.K. Sen, AAC (1965) AAC (1965) 56ITR 198 (SC) and the other in Ellerman Lines Ltd. v. CIT (1971) 82 ITR 913 (SC) that circulars / instructions issued by the CBDT under section 119 of the Act are binding on all officers and persons employed in the execution of the Act, even if they deviate from the provisions of the Act.

34.20 In view of the above facts and circumstances of the case and the various judicial pronouncements, the action of the A.O. in taxing the suppressed production of Sub-Grade Iron Ore us 153C of the Act is upheld.

34.21 Accordingly, the Ground of Appeal Nos. 7, 8 and 9 of the appellant company are dismissed."

13.2 Before us, the Ld. Counsel of the assessee submitted that this addition was made purely on the basis of M.B. Shah Commission Report and it was not based on any incriminating material and therefore, following the finding of the Hon'ble Bombay High Court in the case of Continental Warehousing Corporation (supra), the addition deserved to be deleted. He further submitted that identical addition has been deleted by the Tribunal in assessee's own case for assessment year 2008-09, 2009-10 and 2010-11. The relevant finding of the Tribunal in ITA No. 1017 and 1552/M/2018 for assessment year 2008-09 is reproduced as under:

> ***"D. Addition made on account of illegal unaccounted provision Rs.4,65,56,163/-***
>
> *We find that the Id. AO in page 27 para 15.1 had addressed this issue wherein he had made this addition by placing reliance on Justice M.B.Shah Commission report submitted before the Hon'ble Supreme Court pointing out discrepancy in production data of the assessee. It is pertinent to note that Justice M B Shah Commission was setup on illegal mining of Iron Ore and Manganese Ore in the states of Orissa, Jharkhand and Goa. The Id. AO had observed in para 15.3 of his order that as per the said report, the assessee was found to be involved in illegal mining activity of Iron ore. After calculating discrepancy in the production data, the Id. AO worked out the addition on account of suppressed production of Rs.4,65,56,162/- (1,26,501 MTS x Rs.368.03 per MT) and*

made an addition for the same in the search assessment concluded u/s. 153C of the Act.

From the aforesaid narration of facts and the manner in which this addition has been made by the Id. AO, it could be safely concluded that the Id. AO had not relied upon any search material that has been handed over by the Assessing Officer of ABMCPL (being the searched person us.132 of the Act) and that this addition had been made by merely placing reliance on the Justice M B Shah commission report. The only incriminating material which was handed over to the Assessing Officer of the assessee herein was Annexure A-8 containing petty cash book. No additions have beenmade for A.Y.2008-09 in the impugned search assessment u/s. 153C of the Act by placing reliance on the said petty cash book. Hence, it could be safely concluded that the addition made on account of illegal unaccounted production does not come out of any seized material received from the Assessing Officer of the searched person relatable to A.Y.2008-09. In fact the Id. AR even took us to the said petty cash book Annexure A-8, wherein it is seen that the entries found thereon relate only to A.Y. 2011-12 for which a separate addition has been made in the sum of Rs. 1.35 Crores by the Id. AO for A.Y.2011-12. This itself categorically goes to prove that no reliance has been placed by the Id. AO on the said petty cash book Annexure A-8 for making this addition for A. Y.2008-09."

13.3 Further, the Tribunal in assessment year 2010-11 in ITA No. 1021 and 1531/M/2018 has deleted the addition observing as under:

> *"8.4. The Id. AR before us submitted that none of the aforesaid additions were made based on the incriminating material in the form of petty cash book vide Annexure-A-8 received from the Assessing Officer of ABMCPL(being the searched person /s.132 of the Act). The Id. AR submitted that the A..2010-11 was a concluded assessment as on the date of assumption of jurisdiction us 153C of the Act by the Id. AO and hence, no addition or disallowance could be made in the search assessments framed either u/s.153C of the Act without existence of any incriminating material relatable to such assessment year. To address this aspect of the issue, it is pertinent to get into the fact as to whether the Id.AO had relied upon any incriminating material received from the Assessing Officer of the search person to make additions, disallowances in the assessment framed u/s.153C of the Act for A.Y.2010-11 in the hands of the assessee. Let us examine the same in respect of each disallowance / addition made in the assessment as under:-*
>
> ***Disallowance u/s.14A of the Act - Rs.21,74,09,077 /-***
>
> *……*
>
> ***Disallowance of Club expenses - Rs 37,152/-***
>
> *……*

Disallowance of Penalty Charges - Rs 4,59,000/-

……

Addition made on account of illegal unaccounted provision Rs.22,54,01,541/-

We find that the Id. AO in page 19 para 13.1 had addressed this issue wherein he had made this addition by placing reliance on Justice M.B.Shah Commission report submitted before the Hon'ble Supreme Court pointing out discrepancy in production data of the assessee. It is pertinent to note that Justice M B Shah Commission was setup on illegal mining of Iron Ore and Manganese Ore in the states of Orissa, Jharkhand and Goa. The Id. AO had observed in para 13.4 of his order that as per the said report, the assessee was found to be involved in illegal mining activity of Iron ore. After calculating discrepancy in the production data, the Id. AO worked out the addition on account of suppressed production of Rs.22,54,01,541/- (404620 MTS × Rs.557.07 per MT) and made an addition for the same in the search assessment concluded us. 153C of the Act.

From the aforesaid narration of facts and the manner in which this addition has been made by the Id. AO, it could be safely concluded that the Id. AO had not relied upon any search material that has been handed over by the Assessing Officer of ABMCPL (being the searched personU/S.132 of the Act) and that this addition had been made by merely placing reliance on the Justice M B Shah commission report. The only

incriminating material which was handed over to the Assessing Officer of the assessee herein was Annexure A-8 containing petty cash book. No additions have been made for A..2010-11 in the impugned search assessment u/s. 153C of the Act by placing reliance on the said petty cash book. Hence, it could be safely concluded that the addition made on account of illegal unaccounted production does not come out of any seized material received from the Assessing Officer of the searched person relatable to A.Y.2010-11. In fact the Id. AR even took us to the said petty cash book Annexure A-8, wherein it is seen that the entries found thereon relate only to A.Y. 2011-12 for which a separate addition has been made in the sum of Rs.1.35 Crores by the Id. AO for A.Y.2011-12. This itself categorically goes to prove that no reliance has been placed by the Id. AO on the said petty cash book Annexure A-8 for making this addition for A.Y.2010-11."

13.4 Though the Ld DR submitted that addition in dispute has been made in consequent to the search action , which led to formation of MB shah Commission and thus the addition was based on incriminating material found during the course of search, but in view of contrary finding of the Tribunal (supra) , respectfully following the same, the finding of the Ld. CIT(A) on the issue-in-dispute is set aside and the addition issue-in-dispute is deleted. The grounds of appeal of the assessee are accordingly allowed.

14. The ground No. 1 of the appeal of the assessee challenging the validity of proceedings u/s 153C r.w.s. 153A of the Act, is concerned, the Ld Counsel submitted that notice u/s 153C has been issued by one officer and order has been passed by another officer. He submitted that no order u/s 127 of the Act was passed for transfer of jurisdiction from one officer [i.e. DCIT Central Circle-I(2), Mumbai] to another officer [i.e. DCIT Central Circle I(4), Mumbai], thus the order passed finally by the DCIT Central Circle I(4) is invalid. The Ld. DR on the hand filed a copy of the order 127(1) of the Act dated 5/08/2014 issued by The Commissioner of Income-tax (Central)-I, Mumbai, where in cases of M/s Aditya Birla Group of cases including the case of the assessee have been transferred from DCIT Central Circle -2 (i.e. later on renamed as DCIT Central Circle -I(2) , Mumbai] to DCIT Central Circle- 5 (i.e. later on renamed as DCIT Central Circle I(4), Mumbai] .

14.1 We have heard submission of the parties on the issue in dispute. The Ld. Counsel in rejoinder admitted that he was not aware of the said order u/s 127(1) of the Act and subsequent change in name of the circles. In view of the order of concerned Commissioner of Income-tax u/s 127(1) of the Act, the order u/s 153C has been passed by the officer having valid jurisdiction. Accordingly, the ground no. of the appeal of the assessee is dismissed. The additional ground No. 2 of the appeal was not pressed, hence same is dismissed as infructuous. The additional

ground No. 1, raised is similar to ground no. 1 of the appeal. Further, additions in the case of the assessee have already been deleted by us, the additional ground No. 1 raised isrendered merely academic, hence same is dismissed as infructuous.

15. Now, we take up cross-appeals of the Revenue and assessee for assessment year 2012-13. The grounds raised by the Revenue are reproduced as under:

> *1. "On the facts and the circumstances of the case and in law the Ld. CIT(A) erred in granting relief to the assessee stating that no disallowance u/s 153C of the Act is called for as there are no incriminating materials found during the search and the assessment has reached its finality and was not abated at the initiation proceedings u/s. 132(1) of the Income Tax Act, 1961".*
>
> *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred, in holding that no addition can be made us 153C of the Act, once the assessment has reached to finality us 143(3) of the Act, and no incriminating documents have been found and seized in the case of the assessee during the course of search and seizure action relying upon the decision of the jurisdictional Bombay high Court decision in the case of Continental Warehousing Corpn. and M/s Murli Agro Products without appreciating that the revenue has not accepted the decision and has filed SLP in the Hon'ble Apex Court".*

3. On the facts and the circumstances of the case and in law the Ld. CIT(A) erred in allowing deduction u/s. 80IA of the Act, of Rs. 11,95,87,312/- in respect of rail system relying upon the decision of the Hon'ble ITAT in the case of M/s. Ultratech Cement Ltd. For A. Y. 2010-11 without appreciating the decision of the Hon'ble ITAT has not been accepted by the department and further appeal has been filed."

4. On the facts and the circumstances of the case and in law the Id. CIT(A) erred in directing to hold the sum of Rs11,23,61,487/- received on transfer of Carbon Credit as capital receipt and stating that no addition can be made in proceedings u/s 153C r.w.s 153A without any incriminating material found during the course of search u/s. 132(1) of the Income Tax Act, 1961.

5. On the facts and the circumstances of the case and in law the Id. CIT(A) erred in directing to hold the sum of Rs. 11,23,61,487/- received on transfer of Carbon Credit as capital receiptrelying on the decision of the Hon'ble ITAT in case of Ultratech Cement Ltd. for 2010-11 without appreciating that the said decision has not been accepted by the department and further appeal has been filed in the Hon'ble Bombay High Court"

15.1 The grounds raised by the assessee are reproduced as under:

"1. That on the facts and in the circumstances of the case and in law, the Commissioner of Income Tax (Appeals) (hereinafter referred to as the CIT(A)) erred in holding that the

proceedings us 153C r.w.s. 153A of the Income Tax Act 1961 (hereinafter referred to as the Act) has been validly initiated by the Assessing Officer (hereinafter referred to as AO).

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

4. That on the facts and in the circumstances of the case and in law, the CIT(A) erred in not allowing a deduction of Rs. 25,97,32,609/- against the additions made in AYs2008-09 to 2011-12 on account of alleged illegal mining.

4.1 That the CIT(A) erred in confirming the action of AO of double taxation on the same production quantity once in the year in which production was shown in mining returns and secondly when the same production was shown in the Tax Audit Report.

4.2 That the CIT(A) erred in not appreciating the fact that appellant is not seeking any benefit of Revenue in the proceeding us 153A / 153C of the Act. He failed to appreciate that the appellant's alternate claim of deduction of Rs. 25.97.32,609/- in AY 2012-13 is consequential to additions made in proceeding u/s 153A / 153C in AYs 2008-09 to 2011-12.

5. That without prejudice to the contention raised in Ground No. 4 above, the CIT(A) failed to appreciate that the Supreme

Court decision in the case of Goetz (India) Ltd. was relevant only in relation to the Assessing Officer's power and not in respect of the power of an Appellate authority and thus he erred in applying the said decision in relation to the claim made by the appellant at the Appeal stage."

15.2 The assessee has also filed an additional ground which is reproduced as under:

ADDITIONAL GROUND NO. 1: DEPUTY COMMISSIONER OF INCOME TAX CENTRAL CIRCLE 1(4) DID NOT HAVE THE JURISDICTION TO PASS THE CRDER UNDER SECTION 143(3) READ WITH SECTION 153C

On the facts and circumstances of the case and in law, the learned AO erred in issuing notice under section 153C of the Act and passing order under section 143(3) read with section 153C of the Act.

ADDITIONAL GROUND NO. 2: CLAIM OF DEDUCTION OF EDUCATION CESS

On the facts and the circumstances of the case and in law, the learned AO erred in not allowing deduction of education cess and secondary and higher education cess (collectively called as "Education Cess") while computing the total taxable income under the Act.

The Appellant prays that the learned AO be directed to allow deduction of Education Cess while computing the total taxable income of the Appellant.

16. As far as ground No. 1 & 2 of the appeal is concerned same are identical to ground No. 1 & 2 of the appeal of Revenue for assessment year 2011-12. In the year under consideration, only three additions interalia disallowance u/s 14A r.w.r. 8D amounting to ₹18,03,86,542/- ; club expenses of ₹1,03,960/- and expenses related to exempt income u/s 80IA of the Act amounting to ₹35,27,814/- were made. All these additions were also made in assessment year 2011-12 based on the addition made in the assessment proceedings u/s 143(3) of the Act. Therefore, following our finding on the issue-in-dispute in assessment year 2011-12, the ground No. 1 and 2 of the appeal of the Revenue are dismissed.

17. As far as ground Nos. 3, 4 & 5 of the appeal of the Revenue are concerned same are identical to the ground No. 3 to 5 raised by the Revenue in assessment year 2011-12 except change of amount and therefore, following our finding in assessment year 2011-12 these grounds of appeal of the Revenue are accordingly dismissed.

18. As far as ground of appeal of the assessee are concerned the issue relates to allowing deduction of ₹25,97,32,609/- against additions which were made in earlier assessment year 2008-09 to 2011-12 on account of alleged illegal mining. The facts qua the issue-in-dispute are that in the case of the assessee certain sub standard ore was produced in the process of ore manufacturing which was claimed by the assessee of no use and having no value

however, due to change in the standard of reporting by the Bureau of mining, the assessee was also required to report the said production of substandard ore (having low percentage of Iron) . There was a difference in the ore production as reported to Bureau of mining and reported under the tax audit report for the purpose of income-tax and therefore, in earlier years additions were made by the Assessing Officer for assessment year 2008-09 to 2011-12.

19. Before us, the Ld. Counsel of the assessee has submitted that those additions have already been deleted by the Tribunal in assessment year 2008-09 to 2010-11. We also note that in assessment year 2011-12, we have also deleted the addition for illegal mining in ore production following finding of the Tribunal in earlier years and therefore, addition made in all the earlier assessment year 2008-09 to 2011-12 stands deleted and therefore this claim of deduction cannot survive. The ground of appeal of the assessee is accordingly dismissed.

20. The additional ground as well as ground No. 1 challenging the validity of the proceeding u/s 153C of the Act are identical to relevant grounds raised in AY 2011-12 , and thus following our finding in AY 2011-12, these grounds are dismissed..

21. Now we take up the appeal of the assessee in ITA No. 1970/M/2022 for assessment year 2011-12. In the grounds raised, the assessee is aggrieved with the levy of penalty u/s 271(1)(c) of

the Act. The relevant finding of the Ld. CIT(A) on the issue-in-dispute is reproduced as under:

> *"17. The appellant has made identical submissions as that made in Appeal No.CIT(A)-47/10087/2019-20 for A.Y. 2008-09, as reproduced above. Other facts and backgrounds of the case remain the same. Since all the six grounds involved in Appeal No. CIT(A) 47/10090/2019-20 for A.Y. 2011-12 are identical to the one that is discussed above in Appeal No. CIT(A)-47/10087/2019-20 for A.Y. 2008-09, the undersigned findings for A.Y. 2008-09 with respect to these six grounds would mutatis mutandis apply to this appeal for AY 2011-12 as well. Hence, the appeal for AY 2011-12 is dismissed."*

22. We find that the Ld. CIT(A) has followed his finding in assessment year 2008-09. Before us, the Ld. Counsel of the assessee has relied on the order of the Tribunal for assessment year 2008-09 where the Tribunal has deleted penalty observing as under:

> *"2. Shri Yogesh Thar appearing on behalf of the assessee submitted that the addition on account of suppressed production was made in assessment order passed u/s153C of the Act for the respective Assessment Years. In respect of said addition penalty proceedings u/s. 271(1)(c) of the Act were also initiated. The Assessing Officer vide separate orders of even date i.e. 28/03/2019 levied penalty of Rs.6,81,18,520/- for the Assessment Year 2009-10 and penalty of Rs.7,66,13,980/- in the Assessment Year 2010-*

11. The Id. Authorized Representative for the assessee pointed that the additions made in assessment proceedings were deleted by the Tribunal in IT No.1021/Mum/2018 for Assessment Year 2010-11 and ITA No.1023/Mum/2018 for Assessment Year 2009-10 vide common order dated 15/11/2022.

3. Shri Ashish Heliwal representing the Department fairly admitted that the additions made in the assessment order on which penalty u/s 271(1)(c) of the Actwas levied has been deleted by the Tribunal.

4. Both sides heard. Both sides are unanimous in stating that the addition on which penalty us. 271(1)(c) of the Act was levied has been deleted by the Tribunal vide order dated 15/11/2022(supra) . Once substratum for levy of penalty has eroded, the penalty proceedings does not survive. In the light of undisputed facts, the impugned order confirming penalty us. 271(1)(c) of the Act for Assessment Year2009-10 and 2010-11 is quashed and the appeals of the assessee are allowed."

22.1 As the penalty in the year under consideration has been upheld by the Ld. CIT(A) following his finding in assessment year 2008-09 which the Tribunal has already deleted. Therefore, respectfully following the finding of the Tribunal (supra) the penalty levied u/s 271(1)(c) of the Act for the year under consideration is also deleted. The order of the Ld. CIT(A) on the issue-in-dispute is

set aside and the ground of appeal of the assessee are accordingly allowed.

23. In the result, the appeal of the Revenue for assessment year 2011-12 and 2012-13 are dismissed whereas the appeal of the assessee for assessment year 2011-12 and 2012-13 are partly allowed. The appeal of assessee in relation to penalty u/s 271(1)(c) of the Act for AY 2011-12 is allowed.

Order pronounced under Rule 34(4) of the ITAT Rules, 1963 on 31/01/2023.

Sd/-	**Sd/-**
(ABY T VARKEY)	**(OM PRAKASH KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai;
Dated: 31/01/2023
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

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

BY ORDER,

//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai