आयकर अपीलीय अधिकरण, कटक न्यायपीठ,कटक

IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK

BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER
AND
SHRI MANISH AGARWAL, ACCOUNTANT MEMBER

आयकर अपील **सं/ITA No.460/CTK/2019**
(**निर्धारण वर्ष** / Assessment : 2008-2009)

ACIT, Balasore Circle, Balasore	Vs	Mr. Biirat Chandra Dagara, Rairangpur, Mayurbhanj
		PAN No. :AECPD 7343 D

AND

आयकर अपील **सं/ITA Nos.461, 386 & 387/CTK/2019**
(**निर्धारण वर्ष** / A.Yrs. : 2008-2009, 2009-2010 & 2010-2011)

ACIT, Balasore Circle, Balasore	Vs	M/s Nabbadurga Minerals, Rairangpur, Mayurbhanj
		PAN No. :AAABFN 8099 H

AND

आयकर अपील **सं/ITA Nos.111 & 112/CTK/2020**
(**निर्धारण वर्ष** / A.Yrs. : 2009-2010 & 2010-2011)

M/s Nabadurga Minerals, Rairangpur, Mayurbhanj	Vs	ACIT, Circle, Balasore
PAN No. :AABFN 8099 H		

(**अपीलार्थी /Appellant**)	..	(**प्रत्यर्थी / Respondent**)

राजस्व की ओर से /Revenue by	:	Shri Sanjay Kumar, CIT-DR
निर्धारिती की ओर से /Assessee by	:	Shri P.K.Mishra, Advocate
सुनवाई की तारीख / **Date of Hearing**	:	19/09/2024
घोषणा की तारीख/**Date of Pronouncement**	:	19/09/2024

आदेश / O R D E R

Per Bench :

These are the appeals filed by the revenue as well as assessee against the separate orders of the ld. CIT(A), Cuttack, dated 30.08.2019 & 30.09.2019, for the assessment years 2008-2009, 2009-2010 & 2010-2011, respectively.

2. First we shall take up the appeal of the revenue in ITA No.460/CTK/2019 in the case of Birat Chandra Dagara for the assessment year 2008-2009, wherein the revenue has initially has taken certain

grounds of appeal, which was revised later on vide letter dated 15.06.2022, which are as under :-

REVISED GROUNDS OF APPEAL
Shri Birat Chandra Dagra
PAN-AECPD7343D
A.YY.12008-09
Legal Grounds

(1) On the facts and circumstances of the case, the Ld. CIT(A), Cuttack was not justified in relying on the order of Hon'ble ITAT in assessee's own case for the A.Y.2009-10 as that order has been challenged before the Hon'ble High Court of Orissa on merits.

(2) On the facts and circumstances of the case, the Ld. CIT(A), Cuttack was not justified in holding that the income from mining was taxable in the hands of M/s. Nabadurga Minerals instead of being taxable in the hands of the assessee Sri Birat Chandra Dagra, who is the actual lessee, which is indirect contravention of the provisions of Rule 37(i)(b) of the Mineral Concession Rules, 1960.

(3) On the facts and circumstances of the case, the Ld. CIT(A), Cuttack was not justified in law in ignoring the fact that the assessee Sri Birat Chandra Dagra solely carried out mining activities as evidenced by Form No.H-1 & H-9 submitted before Deputy Director of Mines by the assessee himself,

(4) On the facts and circumstances of the case, the Ld. CIT(A), Cuttack was not justified in ignoring the judgement of Hon'ble Supreme Court in the case of ITO -v- Ch. Atchaiah (218 ITR 239) which does not preclude the Assessing Officer from taxing a right person even if the income has already been taxed in the hands of wrong person.

(5) On the facts and circumstances of the case, the Ld. CIT(A), Cuttack had also erred in applying the ratio of jurisdictional High Court in the case of CIT -v- Wine Chamber (195 ITR 195) in spite of the fact that it relates to Rule-18 of Board's Excise Rules, 1965 framed in exercise of powers conferred by section 90 of Bihar and Orissa Excise Act, 1915.

(6) On the facts and circumstances of the case, it is prayed that the order of the Ld. CIT(A) be set aside and that of the Assessing Officer may be restored.

General Ground.

(7) The appellant craves leave to add, alter, amend one or more grounds of appeal before the appeal[1] is heard.

3. In Ground No.1 the revenue has challenged the order of the ld. CIT(A), where the ld. CIT(A) relied on the order of the coordinate bench of the Tribunal in assessee's own case for A.Y.2009-2010 and based on the findings given by the Tribunal, the ld. CIT(A) has deleted the addition so made by the AO. Other grounds of appeal are in relation to merits of the case.

4. Brief facts of the case are that the assessee is an individual engaged in the business of mining contractor. The assessment was reopened u/s.147 of the Act based on the findings of Justice M.B.Shah Commission Report on illegal mining in Odisha and thereafter based on the information so received has made the additions by estimating the income after invoking the provisions of Section 145(3) of the Act.

5. Before us, ld. CIT-DR submitted that in this case primarily no notice of hearing was issued by the ld. CIT(A) and, therefore, no proper opportunity of being heard was provided to the department. It was further submitted by the ld. CIT-DR that the assessee was having mining lease, however, no income was shown from mining activities in its individual capacity but the income was shown in the hands of the separate business entity M/s Nabadurga Minerals. According to ld. CIT-DR when lease was granted in the name of the assessee without any order in writing from the Government, the same cannot be transferred in terms of the provisions of Section 37 of the Mining Concession Rules, 1960. Therefore, the case of the assessee was reopened by issue of notice u/s.148 of the Act and AO has made the addition in the hands of the assessee on substantive basis.

Simultaneously, additions were made in the hands of the firm M/s Nabadurga Minerals on protective basis of the same amount. The ld. CIT-DR submitted that in subsequent assessment year i.e. 2009-2010 & 2010-2011 proceedings were initiated u/s.263 of the Act by the then PCIT, wherein the directions were given for making additions of mining activities in the hands of the assessee as he is the lease-holder of these mines. The ld. CIT(A) while allowing the appeal of the assessee has deleted the same by holding that in those years the order u/s.263 of the Act were quashed by the Tribunal. Since the revenue has filed appeal before the Hon'ble High Court of Odisha against such order, therefore, the action of the ld. CIT(A) in deleting the additions in the impugned year in the hands of the assessee is contrary to the facts. Thus, he prayed for the restoration of the additions made by the AO in the hands of the assessee.

6. On the other hand, ld. AR supported the order of the ld. CIT(A) and submitted that in the subsequent assessment years, the orders passed u/s.263 of the Act were quashed by this Tribunal in ITA No.307 & 308/CTK/2016, vide order dated 29.05.2017 and also the consequential order passed in compliance to the order passed u/s.263 of the Act were also quashed by the Tribunal vide order dated 06.01.2021 in ITA No.345&346/CTK/2019. The ld. AR placed the copies of such orders before us. Ld. AR further submitted that on enquiry from the Portal of Hon'ble High Court of Orissa no appeal is appearing as being claimed by the revenue against the order passed by the ITAT wherein the order u/s.263 of the Act were quashed by the Tribunal nor any notice was ever

received from the Hon'ble High Court. He further submitted that in the present case of the assessee, proceedings u/s.147 of the Act were initiated solely based on the report of Justice M.B.Shah Commission Report and this Tribunal as well as the Hon'ble High Court of Bombay in various cases has consistently held that observations of the Justice M.B.Shah Commission Report cannot be made sole basis for reopening the assessment. Therefore, he prayed for the confirmation of the order of the ld. CIT(A) deleting the additions made in the case of the assessee.

7. We have heard the rival submissions and perused the material available on record. Admittedly, the issues involved in this appeal is similar to the issue decided by the Tribunal in the case of the assessee in ITA Nos.307&308/CTK/2016, dated 29.05.2017, where the order passed u/s.263 of the Act was quashed. In that order u/s.263 of the Act, the ld. CIT(A) also alleged that assessee has violated the provisions of Section 37 of the Minerals Concession Rules, 1960 and directed the AO to assess the income from mining lease in the hands of the assessee instead of the income declared by the partnership firm M/s Nabadurga Minerals. The relevant observations of the Tribunal in the aforesaid appeals are as under:-

> *5. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.*
>
> *6. From the facts and circumstances of the case, grounds of appeal raised by the assessee and order passed by the Revenue authorities below, the sole question arises for determination in both the aforesaid appeals is :-*

"as to whether the impugned order passed by the CIT u/s 263 of the Act is without jurisdiction as the assessment order passed in these cases u/s 143(3) was not erroneous and prejudicial to the interest of the Revenue as contended by the assessee?"

7. Undisputedly, assessment was completed in both the cases qua AYs 2009-10 and 2010-11 u/s 143 (3) and u/s 144(1)/147 respectively of the Act. However, CIT invoked the provisions contained u/s 263 of the Act by pointing out that the AO has not made any enquiry as to the issue pertaining to the assessability of the income from mining business in the hands of the assessee.

8. The ld. AR for the assessee challenging the impugned order contended that the assessee has only taken assistance of his sons in his business by forming notional partnership, himself being as a principal partner to carry out the mining work which have not been barred by any law as on date and the assessee has not transferred the mining lease to any outsider or to third party in any firm and as such, there is no illegality in the assessment orders passed by the AO.

9. However, the ld. CIT by referring to section 37(1)(b) of the Mining Concession Rules, 1960 proceeded to hold that the assessee has not followed the precedence of including mining income in the hands of his partnership concern in subsequent years because in AY 2011-12 assessee has included income from his mining business in his computation of total income. To decide the controversy at hand, we find it necessary to examine the provisions contained u/s 37(1)(b) of the Mining Concession Rules, 1960 which are reproduced as under for ready perusal :-

"37. Transfer of lease: (1) The lessee shall not, without the previous consent in writing of the State Government and in the case of mining lease in respect of any mineral specified in 4 [Part 'A' and Part 'B'] the First Schedule to the Act, without the previous approval of the Central Government

(a) assign, sublet, mortgage, or in any other manner, transfer the mining lease, or any right, title or interest therein, or
(b) enter into or make any [bonafide] arrangement, contract, or understanding whereby the lessee will or may be directly or indirectly financed to a substantial extent by, or under which the lessee's operations or undertakings will or may be substantially controlled by, any person or body of persons other than the lessee"

10. The ld. AR for the assessee, by relying upon the decision rendered by Hon'ble jurisdictional Orissa High Court in the judgment cited as CIT vs. Wine Chamber 195 ITR 195, contended that the factum of entering into notional partnership by the assessee with his sons for getting assistance in the business does

not amount to sharing of the mining lease rights as has been held by the ld. CIT (A).

11 Operative part of the judgment in the case of CIT vs. Wine Chamber (supra) is reproduced as under for ready perusal :-

> *Where there is no prohibition for the holder of a licence for trading in liquor from entering into partnership arrangements, he can validly enter into partnership, and such partnership is legal and is entitled to registration. Under the provisions of section 23 of the Bihar and Orissa Excise Act, 1915, what is prohibited is the letting or assigning of the licence or permit, or any portion thereof without being expressly authorized. Rule 122 (2) of the Board's Excise Rules, 1965, deals with restrictions on the appointment of salesmen. The object of a partnership is always to carry on business. The expression "business" includes several activities out of which sale is one.*
>
> *Held that, in the instant case, the licence for trading in liquor stood in the name of the individual who had obtained it. He had entered into partnership with another person but the licence had not been transferred to the fir. The firm was, therefore, entitled to registration."*

12. In the judgment in the case of CIT vs. Wine Chamber (supra), the Hon'ble jurisdictional High Court further returned the findings by relying upon the decisions rendered by Hon'ble Apex Court in the case of Jer and Co. vs. CIT- (1971) 79 ITR 546 (SC) as under :-

> *" The decision of the apex court in Jer and Co.'s case [1971] 79 ITR 546 is an authority for the proposition that, where there is no prohibition for the holder of licence from entering into partnership arrangements, he can validly enter into partnership. and such partnership is legal and is entitled to registration. The Madhya Pradesh High Court in Kondra Durgaiya's case [1983] 143 ITR 315, considered the provisions of the Orissa Rules. Referring to section 23 of the Bihar and Orissa Excise Act, 1915, it was held that there is no contravention thereof if the holder entered into partnership arrangements. What is prohibited by section 23 is letting or assigning the licence or permit, or any portion thereof without being expressly authorised. In the instant case, there was no letting or assigning. The view of the Patna High Court in Md. Warasat Hussain v. CIT/1971] 82 ITR 718 and CIT v. Narpati Khan and Co. [1974] 97 ITR 645 that where the licence for trading in liquor stood in the names of only some of the partners of a firm and was not transferred to the firm, there was no illegality in the partnership. But where the licence itself is transferred to the partnership, it may result in an assignment of part of the licence, and section 23 may come into force. In the instant case, it is*

accepted that the licence continued to stand in the name of Ramesh Chotolal Thacker."

13. The ratio of the judgment in the case of CIT vs. Wine Chamber (supra) is that in case the licence for trading in liquor stood in the name of an individual who had obtained it and he had entered into partnership with another person but the licence had not been transferred to the firm, the firm is entitled for registration. Unless licence itself is not transferred to the partnership firm, it will not result in assignment of the part of the licence. In the instant case, Rule 37 (1) of Mining Concession Rules, 1960. prohibits assignment, subletting, mortgaging or in any other manner transfer the mining lease or any right, total or interest therein or entered into or make any arrangement, contract or understanding whereby the lease will directly or indirectly financed to a substantial extent by or under which assessee's portion or undertaking will or may be substantially controlled by any person or body of persons other than the lease,

14. Undisputedly, assessee in this case has entered into a notional partnership with his sons for getting business assistance and has not assigned, sublet, mortgage, transfer of mining lease right, title or interest therein nor there is an iota of evidence that the sons of assessee being partner in notional partnership with the assessee have directly or indirectly financed to a substantial extent and have substantially controlled the mining business of the assessee, so in the given circumstances, by following the ratio of the judgment in the case of CIT vs. Wine Chamber (supra), we are of the considered view that CIT has erred in invoking the provisions contained u/s 263 by misinterpreting the provisions contained u/s 37(1)(b) of the Mining Concessions Rules, 1960. No other fact or evidence has been brought on record by the CIT to prove that the assessment order passed by the AO u/s 143(3) was erroneous and prejudicial to the interest of the Revenue.

15 In view of what has been discussed above, both the appeals filed by the assessee for AYs 2009-10 & 2010-11 are hereby allowed and impugned orders passed u/s 263 are hereby quashed.

8. As in the present case, the ld. CIT(A) while allowing the appeal has followed the order of the Tribunal in subsequent years in ITA Nos.307&308/CTK/2016 and since the facts are identical, therefore, on the reasons given therein, we find no infirmity in the order of ld. CIT(A) and accordingly we confirm the order of ld. CIT(A) deleting the additions made in the hands of the assessee.

9. As a result, the appeal of the revenue in the case of Birat Chandra Dagara in ITA No.460/CTK/2019 for A.Y.2008-2008 is dismissed.

10. In ITA No.461/CTK/2019 in the case of M/s Nabadurga Minerals filed for the assessment year 2008-2009, the revenue has raised the following grounds :-

> ***Application of incorrect rate of net profit rate (10%) based on incorrect assumptions :***
>
> ***Ground No.1*** *: On the facts and in the circumstances of the case, the Ld.CIT(A), Cuttack was not justified in holding that where the substantive assessment has been cancelled, the protective assessment would also be cancelled as the reason for launching proceeding u/s. 147/144 no longer survives, without appreciating the fact that the order the Hon'ble ITAT quashing the relevant order u/s. 263 passed by the Pr. CIT has already been challenged before the High Court of Orissa and Review Petition seeking recall of the dismissed order passed by the High Court and for its decision on merit, has been filed.*
>
> ***Ground No.2:*** *On the facts and in the circumstances of the case, the Ld.CIT(A), Cuttack was not justified in law in holding that the mining lease issued in favour of Sri Birat Chandra Dagara was not transferred to M/s Nabadurga Minerals in contravention of Rule 37(i)(b) of the Mineral Concession Rules, 1960, ignoring the fact that 70% of the share holding in the partnership firm belongs to five other partners and substantial financial contribution had been made by such partners (refer to* ***Annexure-1),*** *thereby clearly bringing the case of the assessee within the mischief of Rule 37(i)(b) of the Mineral Concession Rules, 1960 and hence, the AO had rightly assessed the income from mining substantively in the hands of Sri Birat Chandra Dagara.*
>
> ***Ground No.3*** *: On the facts and in the circumstances of the case, the Ld.CIT(A), Cuttack was not justified in law in ignoring the contents of Form No. H-1 and Form No,H-9 submitted before Dy. Director of Mines by the assessee Sri Birat Chandra Dagara wherein it is mentioned that he had solely carried out the mining activities. A copy of Form No. H-1 and Form No. H-9, requisitioned u/s 133(6) of the I.T. Act, is enclosed herewith as* ***Annexure-2.***
>
> ***Ground No.4*** *; On the facts and in the circumstances of the case, the Ld.CIT(A), Cuttack was not justified in ignoring the judgment of the Supreme Court in the case of* ***ITO Vs Ch Atchaiah (1996) 218 ITR 239 (SC),*** *wherein the Supreme Court has held that the AO can, and, he must, tax the right person and the right person alone.*

By "right person" is meant the person who is liable to be taxed, accordingly to law, with respect to a particular income. The expression "Wrong Person" is obviously used as the opposite of the expression "Right Person". Merely because a wrong person is taxed with respect to a particular income, the A.O. is not precluded from taxing the right person with respect to that income.

Ground No.5 *: On the facts and in the circumstances of the case, the Ld.CIT(A), Cuttack was not justified in relying on the ratio of judgement passed in the case of* ***CIT vs. Wine Chamber [1992] 195 ITR 195 (Orissa),*** *which was rendered in the context of Rule-18 of Board's Excise Rules, 1965 framed in* ***exercise*** *of the powers conferred by section 90 of the Bihar and Orissa Excise Act, 1915, The provisions of Mining Concession Rules, 1960 are different from Board's Excise Rules, 1965, Hence, the CIT(A) should not have granted relief to the assessee based on the decision of Orissa High Court rendered in the context of Rule-18 of Board's Excise Rules, 1965, In any case, the ratio of the above decision no longer holds field after the Supreme Court's decision in the case of* ***Bihari Lal Jaiswal and others v CIT (1996) 217 ITR 746 (SC),*** *wherein it has been held that if license conditions prohibits transfer/sublet of license, any violation thereof cannot be allowed to grant benefit.*

General Ground :

Ground No.6 *: The appellant craves leave to add, alter, amend one or more grounds of appeal before the appeal is heard.*

11. Brief facts of the case are that the assessee is a partnership firm engaged in the business of mining and filed its return of income declaring income from mining activities. However, the ld. AO based on Justice M.B.Shah Commission Report reopened the assessment in the hands of the assessee and by holding that the mining lease were in the name of one Shri Birat Chandra Dagara has held that this income from mining activities are to be taxed in the hands of Shri Birat Chandra Dagara on substantive basis and addition on protective basis was made in the hands of assessee on this account.

12. In the case of Birat Chandra Dagara in ITA No.460/CTK/2019 (AYY: 2008-2009), we have already held that the action of the AO in treating Shri

Birat Chandra Dagara as the mining holder and making addition on the mining activities in his hands as illegal and also in subsequent assessment years i.e. 2009-2010 and 2010-2011, the proceedings initiated vide orders passed u/s.263 of the Act in the hands of Birat Chandra Dagara have already been quashed by the Tribunal. Therefore, once the main cause of action for making substantive additions in the hands of the Shri Birat Chandra Dagara held as bad in law and consequently such directions and all other actions are quashed, there is no need of confirming the additions made on protective basis on the same issue in the hands of the assessee. It is also a matter of fact that during the course of hearing ld. AR submitted that no appeal was appearing on the online Portal of the Hon'ble High Court of Orissa against the order passed by the Tribunal quashing the order u/s.263 of the Act passed by the ld. Pr.CIT in the case of Shri Birat Chandra Dagara for A.Y.2009-2010 and 2010-2011. Therefore, under these circumstances, we find no infirmity in the order of the ld. CIT(A) deleting the additions made in the hands of the assessee made on protective basis. Accordingly, all the grounds taken by the revenue are dismissed.

13. As a result, appeal of the revenue in ITA No.461/CTK/2019 is dismissed.

14. ITA Nos.386/CTK/2019 & ITA No.111/CTK/2020 are the cross appeals filed by the revenue and assessee for the assessment year 2009-2010.

15. The revenue in its appeal i.e. ITA No.386/CTK/2019 has raised for following grounds of appeal :-

> *Application of incorrect rate of net profit rate (10%) based on incorrect assumptions:*
>
> ***Ground No.1****: On the facts and in the circumstances of the case, the Ld. CIT(A) is not justified in law in restricting the net profit of the assessee at 10% of gross sale as against 65% of gross sales, without properly appreciating the relevant facts of the case, which have been brought on record by the Assessing Officer in the assessment order and without considering similar cases where higher rate of net profit has been shown by the assessees engaged in the same line of business. Two such instances disclosing 49.53% rate of net profit in the case of Kalinga Mining Corporation and 55.07% rate of net profit in the case of M/s. S.N. Mohanty (Mines owner) for the same year are enclosed herewith as Annexure-1 & 2.*
>
> ***Ground No.2*** *: On the facts and in the circumstances of the case, the Ld. CIT(A) is not justified in ignoring the specific deficiencies pointed out by the AO in the books of the assessee such as (i) inconsistency in disclosing the actual sales figure i.e. as per H-1 return the sales figure is at RS.6,35,32,719/-, whereas the same has been disclosed at RS.1 0,66, 16,082/- in the P&L account and (ii) suppression of value of closing stock to the tune of RsA,1 0,86,398/- (RsA,64,17,013/- as per H-1 return minus Rs.53,30,615/- as shown in the P&L account) and he is not justified in granting undue relief to the assessee based on past and subsequent years GP and NP rate declared by the assessee. Copies of (i) assessee's P&L account and (ii) statutory Form No. H-1 return filed before Dy. Director of Mines are enclosed herewith as Annexure-3 & 4 in support of the above ground.*
>
> ***Ground No.3*** *: On the facts and in the circumstances of the case, the Ld. CIT(A), Cuttack has erred in relying upon past and subsequent year's GP and NP rate declared by the assessee, without taking into consideration the specific defects pointed out by the Assessing Officer in the books of accounts maintained by the assessee for A. Y.2009-1 0 and without considering the well settled principle that the maxim of res judicata does not apply to Income Tax proceedings and each years' assessment is separate and assessment needs to be framed on the basis of material available on record for the year.*
>
> ***Ground No.4*** *: On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in law in directing the AO to determine the rate of profit as per the average rate of profit shown by the assessee without taking into account the rate of profit shown by other assessees in the same line of business as had been mentioned in Hon'ble Justice Shah Commission Report.*

***Failure to enhance assessment by Rs.4,1 0,86,398/- on account of suppression of closing stock**:*

***Ground No.5** : On the facts and in the circumstances of the case, the Ld. CIT(A), Cuttack should have enhanced the assessment on account of suppression of closing stock by an amount of RsA,1 0,86,398/- (RsA,64,17,013/- as per H-1 return minus Rs.53,30,615/- as shown in the P&L account) as no explanation was furnished by the assessee with regard to this discrepancy during re-assessment proceedings, as mentioned by the CIT(A) in Page 3 while disposing of Grounds of Appeal No. 1, 2 & 3.*

***Ground No.6** : On the facts and in the circumstances of the case, the Ld. CIT(A)'s failure to exercise right to enhancement granted u/s 251 (1)(a) of the Act, can't be sustained.*

***General Ground** :*

Ground No.7: The appellant craves leave to add, alter, amend one or more grounds of appeal before the appeal is heard.

16. The assessee in its appeal i.e. ITA No.111/CTK/2020 has raised for following grounds :-

1. *For that, the impugned order of Reassessment so passed U/s. 147/144 is without jurisdiction and without the authority of law, as such, the same being not sustainable in the eye of law is liable to be quashed in the interest of justice.*

2. *For that, when there is no excess or illegal mining by the Appellant, the Forums below should not have initiated 147 proceeding in the hand of the Appellant. The impugned thus being illegal and not sustainable is liable to be quashed in the interest of justice.*

3. *For that, the rejection of Books of account by the learned A.O. and confirmed by the learned C.I.T(A) is not justified and is illegal and is not based on any cogent reason, as such, the estimation of net profit by the Forums below is liable to be rejected and the Book result declared by the appellant needs to be accepted in the interest of justice.*

4. *For that, when the learned A.O. could not get any excess or illegal mining, he should have dropped the proceeding instead of enhancing the income by estimating the net profit @ 65 % of gross receipts and the learned C.I.T(A) should have quashed the impugned order of Reassessment instead of reducing the estimation to 10% of the gross receipts. The impugned order being pot sustainable in the eye of law is liable to be quashed in the interest of justice.*

5. *For that, when the learned C.I.T(A) held that, the estimation of net profit by the learned A.O. is illegal, not backed by any evidence and arbitrary, he should have accepted the Book result instead of estimating the net profit @ 10% of the gross receipts. The impugned estimation made by him being excessive, needs to be reduced in the interest of justice.*

6. *For that, the estimation of net profit by the learned CIT(A) for this impugned Assessment year @10% of the gross receipts is excessive, illegal and hence needs to be reduced in the interest of justice.*

7. *For that, your Appellant craves leave of this Hon'ble Tribunal to urge any other grounds, if any, at the time of hearing in the interest of justice.*

17. Brief facts of the case are that the assessee is a partnership firm engaged in the mining business. The case was reopened on the basis of Justice M.B.Shah Commission Report for illegal mining of iron-ore and manganese in the State of Odisha. As per the AO, Shri Birat Chandra Dagara is one of the partner of the assessee firm and has owned the mining lease and submitted the details as per which the assessee was found indulged in the illegal production of iron ore. Thereafter the AO held that the income from such illegal mining should be taxed in the hands of Shri Birat Chandra Dagara on substantive basis and addition on protective basis of the same income was made in the hands of the assessee firm. While making the addition the AO has estimated the income of the assessee by applying 65% profit rate on the gross turnover/sales, which the ld. CIT(A) has reduced to 10%. Against such order of ld. CIT(A), revenue and the assessee both are in appeals before the Tribunal.

18. During the course of hearing, ld. AR of the assessee submitted that the reassessment proceedings u/s.147 of the Act were initiated in the

hands of the assessee solely on the basis of Justice M.B.Shah Commissions Report. Besides this there was no material available with the AO for recording any satisfaction of escapement of income. He further submitted that this Tribunal in various cases has held that solely on the basis of the report of Justice M.B.Shah Commission report, no proceedings u/s.147 of the Act could be initiated. He also placed reliance on the judgment of the Hon'ble Bombay High Court at Goa in the case of Sesa Sterlite Limited and Ors., reported in (2019) 267 Taxmann 275 (Bom) and submitted that proceedings u/s.147 of the Act has wrongly been initiated in the hands of the assessee, and, thus, the proceedings initiated by the AO u/s.147 of the Act deserves to be quashed.

19. *Per Contra*, ld. CIT-Dr supported the order of the AO and submitted that in the case of the assessee, there was an information submitted before the Justice M.B.Shah Commission Report that certain illegal mining was carried out in this case. Moreover, as it has been observed by the AO that the mining lease was in the name of Birat Chandra Dagara and there was no order of transfer of mining lease in the name of assessee firm who declared income from such mining activity, therefore, it is a clear violation of Rule 37 of Mining Concession Rules, 1960. Therefore, in the case of Birat Chandra Dagara, proceedings u/s.263 of the Act were initiated by the ld. Pr.CIT for making additions on account of mining income from mining lease, however, such order has been quashed by the Tribunal. Despite this fact remains that assessee has declared income from such mining lease where as per the details given to Justice M.B.Shah Commission, illegal

mining activity was carried out. Therefore, the ld. CIT-DR submitted that additions made in the hands of the protective basis deserve to be confirmed. He further submitted that there were clear direction by the Justice M.B.Shah Commission that assessee was indulged in the illegal mining, therefore, the income estimated by the AO at 65% on the total turnover deserves to be upheld.

20. We have considered the rival submissions and perused the material available on record. With regard to the contention of the revenue that the no notice of hearing was issued by the CIT(A) to the AO before deciding the appeal of the assessee, it is seen that no specific ground was raised to this effect in any of the appeal filed by the revenue and thus we are of the view that the revenue was not serious in pressing this issue. Accordingly in absence of any specific ground, we cannot comment/ adjudicate this issue in the present set of appeals.

21. In the present case, admittedly reassessment proceedings u/s.147 of the Act were initiated solely based on Justice M.B.Shah Commission Report, no other material was available/brought on record, therefore, the action of the AO in reopening the completed assessment are bad in law\. This issue has come up before us in the case of Kalinga Mining Corporation, in ITA Nos.373&374/CTK/2023 where vide order dated 29.08.2024, after considering the facts and judgments of the various Hon'ble High Courts and coordinate bench of the Tribunal, we were of the view that no proceedings u/s.147 of the Act could be initiated solely on the basis of Justice M.B.Shah Commission Report without any other material

brought on record. The relevant observations as made in the case of Kalinga Mining Corporation (supra), are reproduced as under :-

> *11. We have considered the rival submissions and perused the material available on record. From the perusal of the reasons recorded, which has been reproduced hereinabove, it is seen that the case of the assessee has been reopened solely on the basis of the report of Justice MB Shah Commission. Admittedly, no new fact was brought on record and reopening is based on the opinion expressed by Justice MB Shah Commission with regard to illegal mining and production and expenses claimed on such illegal mining.*
>
> *12. The Hon'ble Bombay High Court at Goa in the case of Balaji Mines and Minerals Pvt. Ltd. vide its order dated 26th April, 2024 passed in WP Nos.262 of 2016 along with connected Writ Petitions, has held that the reopening on the basis of Justice MB Shah Commission Report is an expression of opinion without any authoritativeness and, therefore, no independent satisfaction is recorded by the AO for reopening the assessment. The relevant observations made by the Hon'ble High Court in paras 51 to 61 are as under :-*
>
>> *51. We have already dealt with the reasons for re-opening of the assessment on the basis of material borrowed from DRI authorities and how it cannot be considered as tangible material having a live link for the purpose of forming independent opinion of the Assessing Officer, which is in fact not formed in all the matters. Thus, as far as the re-opening on the basis of borrowed material from DRI is concerned, we are firm on our opinion that such material without application of mind of the Assessing Officer could not have been directly borrowed and used.*
>>
>> *52. Other reasons basically deals with the report from Justice M.B. Shah Commission as well as the observations of the Apex Court in the case of Goa Foundation, thereby holding that the mining leases beyond 22.11.2007 in Goa, were illegal.*
>>
>> *53. As far as the report of Justice M.B. Shah Commission is concerned, the Co-ordinate Bench of this Court(S.C. Gupte & N.D. Sardessai, JJ.) clearly observed that the third report of Justice M.B. Shah Commission contains merely the expression of its opinion and it lacks finality as well as authoritativeness. Only on the basis of expression of such opinion by the commission, there cannot be any prima facie belief which could be recorded by the Assessing Officer, without any independent material for the purpose of reopening.*
>>
>> *54. We are fully endorsing such view taken by the Co-ordinate Bench and have no reason to deviate from it in any manner. Similarly, we have taken the same view while deciding Writ Petition No. 233/2015 with Writ Petition No. 883/2016 in our Judgement dated 19.01.2024. All these petitions which are disposed of by the*

Co-ordinate Bench and by this Bench are in fact bunch of the matters which were taken together, however, detagged for the reasons disclosed therein. Thus, the third report of Justice M.B. Shah Commission is in fact only an expression of opinion without any authoritativeness.

55. In the present matters, the reasons for re-opening clearly goes to show that Assessing Officer, except borrowing the information from the third report of Justice M.B. Shah Commission, failed to record independently to his own satisfaction any reason so as to direct re-opening of assessment. We do not see any reason independently forming opinion by the Assessing Officer, apart from what was borrowed from the Justice M.B. Shah Commission report. Thus, such reasons which are not having any application of mind as well as any independent material and reason to believe, cannot be construed as legal reasons for re-opening of the assessment.

56. Finally, in some matters it is claimed that the assessee failed to disclose fully and truly the material findings that beyond 22.11.2007, the mining activities were illegally continued. In all these matters, the returns were filed somewhere in the year 2009-10, even though, there was no such decision passed by the Apex Court holding that mining leases beyond 2007 were illegal.

57. It is a fact that for making disclosure truly and fully the assessee must have the knowledge of it. It is necessary to note here that the case of Goa Foundation Vs. Union of India in Writ Petition No. 435 of 2012 was decided by the Apex Court on 21.04.2014. While deciding the said petition, the Supreme Court observed that the mining leases in Goa expired in the year 1997 and thereafter, renewal could have been granted only for 20 years upto 2007.

58. Thus, the Apex Court observed that from November 2007 all mining leases in Goa are required to be considered as illegal for the simple reason that there was no power to renew such leases beyond 20 years. The fact remains that these observations of the Apex Court are in connection with mining leases, however, the Apex Court no where expressed that till the date of such decision i.e. 21.04.2014, the mining activities carried on by the leaseholders were considered to be illegal. The illegality of the lease is one thing and carrying out business activities on assuming that such leases exists is another thing. Similarly, business activities were carried out and Iron Ore was extracted, sold, exported till all the activities came to a grinding hold. The lease-holders paid royalty, customs duty, other charges to the Government till such activities were stopped. Extraction of Iron Ore including export and payment of remaining charges to the concerned department till 2014 were not declared as illegal. Even this fact, that the mining leases beyond 2007 were not legal, was even not known to the Assessing Officer himself, till such declaration came from the Apex Court in the year 2014. Thus, claiming that the assessee failed to disclose truly and fully that such activities were illegally carried out and that too while filing returns for the assessment year 2009-10 would not arise. In this regard the observation in the case of Calcutta Credit Corporation (supra) would clearly attract.

59. Thus, we are of the considered opinion that notices issued for re-opening and assessment in all these matters failed to satisfy twin conditions. The Assessing Officer, therefore, could not have exercised jurisdiction for re-opening of assessment which were concluded way back.

60. The additional affidavit filed in two petitions cannot be looked into for the above reason as Revenue or the Assessing Officer is not entitled to supplement material beyond the reasons recorded at the time of issuance of notice under section 147/148 of Income Tax Act.

61. For all the above reasons, we hold that the impugned reopening notices and the orders passed rejecting the objection needs interference and are required to be quashed and set aside. Accordingly, we allow the Petitions by quashing and setting aside the notices as well as the orders rejecting objections field by the petitioners.

13. Similar view was expressed by the Hon'ble Bombay High Court at Goa in the case of Sesa Sterlite Limited and Ors., reported in (2019) 267 Taxmann 275 (Bom), wherein it has been held as under :-

Reassessment—Reason to believe—Full and true disclosure—Report of Inquiry Commission—Information or material available to the AO and which is disclosed in the reasons to believe stated in the original order sheet 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—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—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 AO within the meaning of s. 147, the further information, however, that there was 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 AO to indicate that he has applied his mind to this aspect of the matter—Further, entire case of the Revenue is founded on the so-called under-invoicing of exports—It is difficult to fathom what information or particulars was the assessee expected to disclose in its assessment insofar as the export prices charged by it are concerned and which is now available to the AO so as to enable him to form a belief that income has indeed escaped assessment—Even if it is assumed that at all times the activity carried on by the assessee, through which income was said to have accrued to it, was in violation of law, that does not alter the character of the activity—Income earned from the activity is still very much business income and any expenditure made for the activity is business expenditure—It is not open to the Revenue to seek to sustain the reopening notice on a new reason, namely, disallowance of deduction of expenditure since the whole activity

> *was illegal—Impugned notice issued by the AO under s. 148 cannot be sustained and must be set aside*

14. The ITAT Cuttack Bench of the Tribunal in the case of Tarini Minerals Pvt. Ltd., passed in ITA Nos.268/CTK/2020 along with other connected appeals, vide order dated 02.05.2022 has also expressed the same view and observed in para 9 as under :-

> *9. Perusal of Ground No.1 shows that the revenue has challenged the order of the ld CIT(A) in respect of quashing of the reopening. We find that at page 5 of 15 of the impugned order, the ld CIT(A) has examined the issue of reopening of assessment and has categorically given finding that the entire reassessment proceedings u/s.147 is based on report of Justice M.B.Shah Commission in regard to illegal mining in the State of Odisha which was placed in the public domain in the months of July, 2013 and October, 2013. Ld CIT (A) further goes on to hold that without any independent application of mind, the AO has accepted the Commissions finding that the assessee had indulged in illegal mining of iron ore. ld CIT (A) has categorically given a finding that the AO has made no attempt to Page4|9 ITA Nos.268, 270 & 272/CTK/2020 ITA Nos.269, 271 & 273/CTK/2020 C.O. Nos.6 to8/CTK/2021 Assessment Years : 2008-09 to 2010-2011 reconcile the production data furnished by the assessee in its H-1 report submitted to the Indian Bureau of Mines with the data shown by it in its tax audit report. Ld CIT (A) has further noted that the AO has failed to take the cognizance of the decision of Hon'ble Supreme Court in the case of Goa Foundation vs Union of India & others, in which the Hon'ble Supreme Court has cast aspersions on the findings of the Hon'ble Justice M.B.Shah Commission report in so far as the report had been made without giving an opportunity to the affected parties to respond. Ld CIT(A) while quashing the reopening of assessment has given a categorical finding that the AO has accepted information from outside source without subjecting it to critical scrutiny and that the AO's "reason to believe" that income had escaped assessment was not based on an independent application of mind to the facts available. The revenue, admittedly has not been able to dislodge any of the categorical findings of the ld CIT(A). This being so, we find no error in the order of the ld CIT(A) in quashing the reopening of assessment. Consequently, Ground No.1 of revenue stands dismissed.*

15. In view of the above facts and following the decision of the Hon'ble Bombay High Court at Goa and the coordinate bench of the Tribunal, we are of the considered view that the reopening in the present case is without any material on record and solely on the basis of the opinion expressed by Justice MB Shah Commission Report. Therefore, no independent mind was applied while recording the reasons by the AO and accordingly the notice issued u/s.148 of the Act is hereby quashed. The subsequent order is hereby held as illegal and same is hereby quashed.

22. Admittedly, in the present case, it is undisputed that the proceedings u/s.147 of the Act were initiated solely on the basis of opinion expressed by Justice M.B.Shah Commission and no new fact/material was brought on record by the assessing officer. This being so, in our considered view, no action u/s.147 of the Act could be taken under these facts and circumstances. Accordingly, the proceedings initiated u/s.147 of the Act are held as illegal and the consequent notice u/s.148 of the Act and the reassessment order passed is hereby quashed.

23. With regard to the merit of the issue as has been held by us in ITA No. 461 for AY 2008-09 in the case of appellant itself that his bench of Tribunal in the case of Shri Birat Chand Dagra vide order dt. 29.05.2017 in ITA No.307/CTK/2016 had struck down the order u/s. 263 passed by the Pr.CIT, Cuttack. This bench of ITAT in its order clearly held that no mining lease was transferred by the Shri Birat Chand Dagra to any other entity in contravention of Rule 37(i)(b) of the Mineral Concession Rules, 1960. This being so, when no such contravention of Rule 37(i)(b) of Mineral Concession Rules, 1960 has taken place, assessee cannot be assessed on protective basis for any alleged illegal mining as has been alleged by the lower authorities. Accordingly the protective additions made in the hands of the assessee firm based on the findings given in the case of Birat Chand Dagara are hereby deleted.

24. Moreover, from the perusal of entire series of event happened in this case, we find that the reassessment order was passed by making additions on protective basis on 31.03.2016. However, when such

reassessment order was passed, no order was passed in the hands of other persons making additions of the said amount on substantive basis. There cannot be any protective addition without making substantive addition. In the instant case, from the perusal of the reassessment order passed it is clear that when the reassessment order was passed on 03.03.2016 by making additions on protective basis, no order was available or passed prior to such order showing that substantive addition have been made in the hands of other assessee. This view finds support from the judgement of the Hon'ble Supreme court in the case of Lalji Hira Das V/S ITO reported in 43 ITK 387(SC) where in Hon'ble court has observed as under:

> *"We would, however, like to add one direction in fairness to the appellants. The proceedings taken against both the appellants should continue and should be dealt with expeditiously having regard to the fact that the matter is fairly old. In the proceedings taken against Lalji the Income-tax Officer should make an exhaustive enquiry and determine the question as to whether Lalji is liable to pay the tax on the income in question. All objections which Lalji may have to raise against his alleged liability would undoubtedly have to be considered in the said proceedings. Proceedings against Chhotalal may also be taken by the Income tax Officer and continued and concluded, but until the proceedings against Lalji are finally determined no assessment order should be passed in the proceedings taken against Chhotalal. If in the proceedings taken against Lalji it is finally decided that it is Lalji who is responsible to pay tax for the income in question it may not become necessary to make any order against Chhotalal. If, however, in the said proceedings Lalji is not held to be liable to pay tax or it is found that Lalji is liable to pay tax along with Chhotalal it may become necessary to pass appropriate orders against Chhotalal. When we suggested to the learned counsel that we propose to make an order on these lines they all agreed that this would be a fair and reasonable order to make in the present proceedings*

25. Following the aforesaid judgement of Hon'ble Supreme court in the case of Lalji Hira Das (Supra) co-ordinate bench of ITAT, Indore has taken

similar view. The relevant finding of the said order are reproduced here in below :-

> *"8. I have considered the rival submissions and perused the entire evidence on record. There could be no dispute to the proposition that the ITO had jurisdiction to complete the assessments on protective basis. In cases where it appears to the income-tax authorities that certain income has been received during the relevant assessment year but it is not clear as to who has received that income, and, prima facie, it appears that the income may have been received either by A or by B or both together, it would be open to the appropriate authority to determine the said question by taking appropriate proceedings both against A and B. Reference may be made to the ratio of decision in the case of LaljiHaridas v. ITO [1961] 43 ITR 387 (SC). I may state at this stage that there is no specific provision in the Indian Income-tax Act, 1922 regarding making the assessments on protective basis. Such concept has been borrowed from law and practice as prevalent in England. The leading case on the subject is Attorney-General v. Aramayo [1925] 1 KB 86 (CA). Similar matter came before the Calcutta High Court in the case of B.V.Bagchi v. LadhuramTaparia [Appeal from the original order No. 71 of 1951, dated 17.1.1952]. In the said decision, his Lordships Harries, CJ., while deciding the controversy observed as under:*
>
> > *The income-tax authorities also made an alternative assessment, assessing each of the firms separately and this was what is referred to as a protective assessment and is permissible in order to prevent assessment being barred by limitation.*
>
> *Reference may be made to the ratio of decision in the case of Jagannath Hanumanbux. TTO [1957] 31 ITR 603 (Cal). The Hon'ble Calcutta High Court, while deciding the said case made observations as under:*
>
> > *...It is also true that there cannot be any assessment excepting of an assessee and there can be no doubt that the income-tax authorities must confine themselves within the four corners of the statute and not invent new procedures outside the limits of the Indian Income-tax Act (p. 609) If we read those decisions carefully, it would be clear that before completing the assessments on protective basis, the ITO is supposed to point out the name of the assessee who may be the owner of such income. It is common ground that in the present cases, till this date, the authorities below did not bring on record any material to show that the declared income in question really belongs to some other assessee. The learned departmental representative frankly conceded that till this date no*

> *proceedings in respect of the disputed income have been started against any other assessee.*
>
> *9. The learned counsel for the assessee contended that the income-tax authorities have no right to call the present assessments as protective because till this date they have not started any proceedings against the alleged real owner of such income. In my opinion, the contention of the assessee has substance. No doubt, the income-tax authorities has the right to make the assessments on protective but while doing so they are supposed to point out the name of the real owner of such income. At least some proceedings should be [commenced] against such assessee. Under the circumstances, in my opinion, the present assessment orders cannot be called the protective assessments. The learned AAC, without bringing on record any evidence, was of the view that the assessments were rightly made on protective basis. Even the learned AAC did not point out that who was the real owner of such income. When the matter came before the learned AAC, at least he should have come to a conclusion that really such income belonged to somebody else. Even if the ITO can blow hot and cold, it is certainly not open to the learned AAC or the Tribunal to blow hot and cold. Again it might be open to the ITO to make the protective assessments, but it is certainly not open to the AAC and the Tribunal to make a protective order. When the assessments are completed on protective basis and the appeals are pending before the Tribunal, in such situation the Tribunal ought to have decided both the appeals together and finally determined as to whether the said sum was, if at all, the income of the assesses or somebody else."*

26. After considering the judicial pronouncements and facts of the case, we are of the considered view that there cannot be any protective assessment / addition without a substantive assessment / addition. In other words, there has to be some substantive assessment/ addition first, then only AO can proceed to make protective addition / assessment by way of reopening the assessment u/s 147 of the Act in other case. In the instant case AO has assumed jurisdiction u/s 147 of the Act, however, there was no substantive assessment on the date when the jurisdiction was assumed in the case of assessee firm. Therefore, the addition made on protective basis without giving any finding as to whether the

substantive assessment / addition in the other case has already been passed / made is bad in law. Accordingly the reassessment order passed in the hands of appellant by making addition on protective basis without any order in the hands of Shri Birat Chandra Dagara by making addition on substantive basis is illegal and bad in law.

27. As a result, the appeal of the revenue in ITA No.386/CTK/2019 for A.Y.2009-2010 is dismissed and appeal of the assessee in ITA No.111/CTK/2020 for the assessment year 2009-2010 is allowed.

28. As the facts of the appeals for A.Y. 2010-2011 in the appeal of the assessee in ITA No.112/CTK/2020 and appeal of the revenue in ITA No.387/CTK/2019 are similar to the cross appeals decided by us in ITA Nos.386/CTK/2019 & ITA No.111/CTK/2020 for A.Y.2009-2010, the findings given in the said appeal are *pari materia* applicable to the cross appeals for AY 2010-2011 also. Accordingly, the appeal of the assessee for the A.Y.2010-2011 in ITA No.112/CTK/2020 is allowed and appeal of the revenue for A.Y.2010-2011 in ITA No.387/CTK/2019 is dismissed for the reasons given in the cross appeals decided by us above for A.Y.2009-2010.

29. In the result, appeals of the revenue in ITA No.460/CTK/2019 in the case of Birat Chandra Dagara and ITA Nos.461, 386 & 387/CTK/2019 in the case of M/s Nabadurga Minerals are dismissed and appeals filed by the assessee in ITA Nos.111&112/CTK/2020 in the case of M/s Nabbadurga Minerals are allowed.

Order pronounced in the open court on 19/09/2024.

Sd/-	Sd/-
(GEORGE MATHAN)	**(MANISH AGARWAL)**
न्यायिक सदस्य / JUDICIAL MEMBER	लेखा सदस्य / **ACCOUNTANT MEMBER**

कटक Cuttack; दिनांक Dated 19/09/2024
Prakash Kumar Mishra, Sr.P.S.

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

1. अपीलार्थी / The Appellant-
2. प्रत्यर्थी / The Respondent-
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कटक** / DR, ITAT, Cuttack
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

(**Assistant Registrar**)
आयकर अपीलीय अधिकरण, कटक/ITAT, Cuttack