

**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.402/CTK/2024

(निर्धारण वर्ष / Assessment Years : 2008-2009)

M G Mohanty, 5A, Forest Park, Odisha	Vs	DCIT, Circle-2(1), Bhubaneswar
<b>PAN No. :A AFFM 2127 H</b>		

(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
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निर्धारिती की ओर से / Assessee by	:	Sh B.K.Mahapatra & Sh. A.K.Sabat, CAs
राजस्व की ओर से / Revenue by	:	Dr. Abani Kanta Nayak, CIT-DR
सुनवाई की तारीख / Date of Hearing	:	26/11/2024
घोषणा की तारीख / Date of Pronouncement	:	26/11/2024

**आदेश / O R D E R**

**Per Bench :**

This is an appeal filed by the assessee against the order of Id. CIT(A), National Faceless Appeal Centre (NFAC), Delhi, dated 01.08.2024, passed in appeal No.CIT(A), Bhubaneswar-1/10098/2016-17 vide DIN & Order No.ITBA/NFAC/S/250/2024-25/1067224134(1) for the assessment year 2017-2018.

2. The assessee has challenged the appellate order on the following grounds of appeal :-

*1. That on the facts and in the circumstances of the case, the order of the Learned Commissioner of Income Tax (Appeals), NFAC [in short "CIT (Appeals)"] dated 01.08.2024 u/s 250 of the Income Tax Act. 1961 [in short "I.T.Act/ "Act] in dismissing the appeal is against the principles of natural justice, contrary to facts, unjustified, arbitrary, erroneous, bad, both in the eye of law and on facts and legally untenable.*

*2. The order dated 28.03.2016 passed by the learned Assessing Officer u/s.143(3) r.w sec 147 of the I.T.Act at an assessed total income of Rs. 30,68,95,380/- being against the principles of natural justice, being without/lack/in excess of jurisdiction, contrary to facts, unjustified, arbitrary, excessive, erroneous, bad, both in the eye of law and on facts and legally untenable ought to have been quashed*

### 3. Re-opening and reassessment

a. That the learned CIT (Appeals) upholding the Order dated 28.03.2016 of the AO u/s. 147/143(3) of the Act in holding that there is no lacuna in issuing the notice u/s 148 of the Act as due procedure of law has been followed by the Assessing Officer and further holding that there was information before the AO at the time of reopening u/s 147 of the Act based on which he could reopen the case is contrary to / on mis-appreciation of facts, unjustified, arbitrary, erroneous, bad, both in the eye of law and on facts and legally untenable.

b. That the learned CIT (Appeals) in the Order dated 01.08.2024 holding that:

- i. the assessee has suppressed its production, and
- ii. the Assessing Officer has exercised his authority according to his own discretion, prudence and judgment is contrary to / on mis-appreciation of facts, unjustified, arbitrary, erroneous, bad, both in the eye of law and on facts and legally untenable.

c. That the case laws referred to and relied upon by the learned CIT (Appeals) in upholding the Order dated 28.03.216 are distinguishable on facts and/or not applicable in the facts and circumstances of the assessee's case.

d. Without prejudice to Grounds (a) to (c) above, the recording of the reason by the AO and the prior approval of competent authority, as such, being not sufficient in the absence of the satisfaction of the AO to reason to believe having not been satisfied, the order of the learned CIT (Appeals) in dismissing the Ground is contrary to facts, unjustified, arbitrary, erroneous, bad, both in the eye of law and on facts and legally untenable.

e. Without prejudice to above, the so called information before the AO, being no new information and there being no discrepancy between the audited accounts of the assessee along with the audit report for the accounting year 2007-08 and based on Justice Saha Commission report, the reopening u/s 147 is unjustified, arbitrary, erroneous, bad, both in the eye of law and on facts and legally untenable.

f. That the Notice of reopening u/s 148 having been issued four years after the end of the Assessment Year and the assessee

*having been disclosed the material facts and there being no concealment of any income and there being no new facts brought into the record by the learned AO, the reopening u/s 147 of the Act is unjustified, arbitrary, erroneous, bad, both in the eye of law and on facts and legally untenable.*

*g. Without prejudice to above, the learned CIT(A) ought to have held that the reopening u/s 147 of the Act and issue of Notice u/s 148 of the Act is bad in law is unjustified, arbitrary, erroneous, bad, both in the eye of law and on facts and legally untenable.*

*h. That without prejudice to Grounds (a) to (g) above, in the facts and circumstances of the case:*

*i. the issue of notice u/s.148 of the Act for re-opening the assessments u/s.147 of the Act being unjustified, erroneous, bad in law, without/lack / in excess of jurisdiction and legally untenable;*

*ii.the learned A.O having erred, both on facts and in law, in initiating the proceedings u/s. 147 read with Sec. 148 of the Act ignoring the fact that the same was bad in the eye of law as the condition and procedure prescribed under the statute having not been satisfied and complied with;*

*iii.the reassessment proceedings initiated by the learned A.O. being bad in the eye of law as the reasons recorded for the issue of notice u/s.148 of the Act being also bad in the eye of law and are contrary to the facts,*

*iv. no sanction having been given for reopening of the Assessment after expiry of four years as required under provision to Section 151 of the Act by the Commissioner or the Chief Commissioner, the reopening of the Assessment being bad in law and liable to be annulled,*

*v. the assessee having fully and truly disclosed its income, the Assessing Officer grossly erred in law in reopening the Assessment after expiry of four years from the end of the Assessment Year and therefore the reopening of the Assessment is bad in law and liable to be annulled*

*VI. the order of reassessment dated 28.03.2016 being without any jurisdiction and authority of law and in violation of the mandatory provisions of law and accordingly the said order dated 28.03.2016 ought to be annulled,*

vii. the reopening of the Assessment by invoking jurisdiction u/s 147 of the Act being otherwise bad in law is liable to be annulled.

viii. the re-assessment order dated 28.03.2016 passed by the learned Assessing Officer being without/lack/in excess of jurisdiction, erroneous, bad in law, legally unsustainable and liable to be quashed.

The learned CIT(Appeals) having not considered the above and dismissing the grounds of appeal of the assessee is against the principles of natural justice, contrary to facts, unjustified, arbitrary, erroneous, bad, both in the eye of law and on facts and legally untenable.

i. That without prejudice to Grounds (a) to (1) above, the learned AO having examined and found that there is no difference between the quantity of iron ore mined/ produced stated before the various authorities and the actual production as per the audited Accounts as well as the Tax Audit u/s 44AB of the Act, the notice and re-assessment order dated 28.03.2016 by the learned Assessing Officer is unjustified, arbitrary, erroneous, bad, both in the eye of law and on facts and legally untenable.

#### 4. Disallowances of Expenses u/s.37(1) of the Act:-

Under 'Direct expenses incurred towards illegal mining' Rs.10,91,55,429/-

a. That in the facts and circumstances of the case, the learned CIT(Appeals) sustaining the disallowance of Rs. 10.91,55,429/- made by AO Under 'Direct expenses incurred towards illegal mining' by holding that the AO has correctly disallowed the expenditure in terms of Section 37 of the Act is contrary to facts, unjustified, arbitrary, erroneous, bad, both in the eye of law and on facts and legally untenable.

b. That in the facts and circumstances of the case, the learned CIT(Appeals) upholding the disallowance of Rs. 10,91,55,429/- made by AO Under 'Direct expenses incurred towards illegal mining' u/s. 37 of the Act is based on irrelevant consideration, presumption / conjectures surmises without any materials evidence on record and is against the principles of natural justice, contrary to facts, unjustified, arbitrary, erroneous, bad, both in the eye of law and on facts and legally untenable.

c. That the learned CIT(Appeals) in holding that the learned AO has calculated the expenses said to be directly related to mining activity

*of Rs. 10.91.55.420/- is incorrect, wrong and s contrary to facts, unjustified, arbitrary, erroneous, bad, both in the eye of law and on facts and legally untenable*

*That without prejudice to Grounds (a) to (c) above, in the facts and circumstances of the case.*

*a the learned Assessing Officer having mis-appreciated/ misconstrued the facts and the disallowances of Rs.10.91,55.429/- Under 'Direct expenses incurred towards illegal mining u/s.37(1) of the Act. being based on presumptions, conjectures and surmises, without any material evidence on record, contrary to facts and is unjustified, excessive, arbitrary, erroneous and bad, both in the eye of law and on facts.*

*b. That in the order dated 28.03.2016, the learned Assessing Officer holding that the said Rs. 10,91,55,429/- expenses incurred towards illegal mining and disallowing the same u/s 37(1) of the Act being contrary to facts, arbitrary. erroneous and bad, both in the eyes of law and on facts.*

*c. That on the facts and in the circumstances of the case, the said Expense of Rs. 10,91,55,429/- having been incurred wholly and exclusively for the purpose of business and fully supported with documents/evidences and being not any expenditure falling under disallowance u/s 37 of the Act.*

*d. That the said additions/disallowances of Rs. 10,91,55,429/- made on the basis of /information obtained by the learned Assessing Officer behind the back of the assessee without providing any opportunity to the assessee to rebut the same being arbitrary, erroneous and bad, both in the eyes of law and on facts and being liable to be deleted on this ground alone*

*e. That without prejudice to the above, the working of Rs.10.91.55.420/- Direct expenses of mining by the learned Assessing Officer being arbitrary. excessive, incorrect, erroneous and bad, both in the eye of law and on facts*

*f. That without prejudice to the above,*

*i. the learned Assessing Officer holding that the assessee has indulged in Illegal mining basing on the report of "M.B. Shah Commission being arbitrary, unjustified, incorrect, wrong, erroneous and bad, both in the eye of law and on facts.*

*ii. That the issue of alleged illegal mining being sub-judice, at the time of assessment, the conclusion drawn by the learned Assessing Officer that the assessee is into illegal mining*

*being arbitrary, unjustified, incorrect, wrong, erroneous and bad, both in the eye of law and on facts.*

*iii. That the conclusion of the learned Assessing Officer that the mining activity, performed by the assessee is illegal and without any lawful authority, without any environment clearance, without any mining plan and in violation of Forest (Conservation) Act, 1980. Section 6 of the MMDR Act, 1957. Environment Impact Assessment notification dated 27.01.1994 (EIA Notification, 1994) issued by MoEF) under Environmental (Protection) Act, 1986 and circular dated 25.4.2005 of MoEF issued in continuation to Circular dated 28.10.2004 being on mis-appreciation/misconstruing of the facts and being incorrect. arbitrary, erroneous and bad, both in the eye of law and on facts.*

*iv. the learned Assessing Officer holding that the entire production of Iron Ore of 9790MT is on account of illegal mining being contrary to facts: unjustified, excessive, arbitrary, erroneous and bad, both in the eye of law and on facts.*

*the sustenance of the disallowance/addition of Rs.10.91.55.429/- under Direct Expenses' by the learned CIT(Appeals) is contrary to facts, unjustified, arbitrary, erroneous, bad, both in the eye of law and on facts and legally untenable.*

*g. That without prejudice to the above, assuming but not admitting that there is any irregular/illegal mining, the quantum of disallowance is to be limited to the production out of illegal mining, if any, finally determined and hence disallowance of the said Rs. 10,91,55,429/- being incorrect, arbitrary, excessive. erroneous and bad in law.*

*5. Disallowances of Expenses u/s.37(1) of the Act Under 'Expenses indirectly relates to mining' Rs.2,74,02,305/-*

*a. That in the facts and circumstances of the case, the learned CIT(Appeals) sustaining the disallowance of Rs.2,74,02,305/- on estimation basis @ 50% of Rs.5,48,04,610/- under 'Expenses indirectly relates to mining' relating to illegal production of Iron Ore) made by AO. Under 'Expenses indirectly relates to mining by holding that the AO has correctly disallowed the expenditure in terms of Section 37 of the Act is contrary to facts, unjustified, arbitrary erroneous, bad, both in the eye of law and on facts and legally untenable*

*b. That the learned CIT(Appeals) holding that it was the responsibility of the assessee to inform the learned AD as to the quantum of expenses relating to the alleged illegal mining and the assessee has failed to do so is not as per the Assessment Order and is based on presumptions, conjectures and surmises without any materials evidence on record and is contrary to facts,*

*unjustified, arbitrary, erroneous, bad, both in the eye of law and on facts and legally untenable*

*c. That the learned AO having disallowed Rs.2.74.02.305/- Expenses indirectly relates to mining' relating to illegal production of Iron Ore) on estimation basis @50% of Rs.5,48,04,610/-, without giving in any cogent reason for adopting such percentage.*

*and merely stating that the expenses which are "indirectly related to the mining should be disallowed 50% to meet the legislative intent of Section 37(1) of the Act being unjustified, arbitrary and excessive, the learned CIT(A) sustaining the said disallowance of Rs.2.74,02.305/- (being 50% of Rs.5.48,04,610/-) is contrary to the facts, unjustified, arbitrary, excessive, erroneous, bad, both in the eye of law and on facts and legally untenable. and the learned CIT(Appeals) in sustaining the said disallowance by holding that the learned AO has correctly calculated such expenditure @ 50% of mining expenditure which are indirectly created with the activities is contrary to facts, biased in favour of Assessing Officer, erroneous and unjustified, arbitrary, erroneous, bad, both in the eye of law and on facts and legally untenable.*

*d) That without prejudice to ground (á) to (c) above, in the facts and circumstances of the case*

*a. the learned Assessing Officer having mis-appreciated/misconstrued the facts and the disallowances of Rs. 2.74,02,305/- (on estimated basis @50% of Rs.5.48.04,610/-) Under 'Expenses indirectly relates to mining u/s. 37(1) of the Act being based on presumptions, conjectures and surmises, without any material evidence on record being contrary to facts and is unjustified. excessive, arbitrary, erroneous and bad, both in the eye of law and on facts,*

*b. in the order dated 28.03.2016, the learned Assessing Officer holding that the aforesaid Rs.5,48,04,610/- is expenses incurred towards illegal mining and disallowing 50% of the same on estimate basis at Rs.2,74,02.305/-u/s.37(1) of the Act being contrary to facts, arbitrary, erroneous and bad, both in the eyes of law and on facts,*

*c. the said Rs.2,74,02,305/- (being 50% of d Rs.5.48.04,610/-) having been incurred wholly and exclusively for the purpose of business and being not any expenditure falling under disallowance u/s.37 of the Act;.*

*d. That without prejudice to the above:*

*i. the learned Assessing Officer holding that the assessee has indulged in illegal mining basing on the report of "M.B. Shah Commission" being arbitrary, unjustified, incorrect, wrong, erroneous and bad, both in the eye of law and on facts.*

ii. the issue of alleged illegal mining being sub-judice, at the time of assessment, the conclusion drawn by the learned Assessing Officer that the assessee is into illegal mining being arbitrary, unjustified, incorrect, wrong, erroneous and bad, both in the eye of law and on facts.

iii. the conclusion of the learned Assessing Officer that the mining activity performed by the assessee is illegal and without any lawful authority, without any environment clearance, without any mining plan and in violation of Forest (Conservation) Act, 1980, Section 6 of the MMDR Act, 1957, Environment Impact Assessment notification dated 27.01.1994 (EIA Notification, 1994) issued by MoEF under Environmental (Protection) Act, 1986 and circular dated 25.4.2005 of MoEF issued in continuation to Circular dated 28.10.2004 being on mis- appreciation/misconstruing of the facts is incorrect, arbitrary, erroneous and bad, both in the eye of law and on facts:

iv. the learned Assessing Officer holding that the entire production of Iron Ore of 162510 MT is on account of illegal mining being contrary to facts and being unjustified, excessive, arbitrary, erroneous and bad, both in the eye of law and on facts.

e. That without prejudice to the above, assuming but not admitting that there is any irregular/illegal mining the quantum of disallowance is to limited to the production out of illegal mining and hence disallowance of the said Rs.2,74,02,305/- (50% of Rs.5,48,04,610/- on estimate basis) is incorrect, arbitrary, excessive, erroneous and bad in law.

6. Disallowance u/s. 37(1) of the Act of Rs. 13,65,57,734/-

a. That the disallowance of Rs. 13,05,57,734/-, (Rs.10,91,55,420 Rs. 2,74,02,305/ under 37(1) of the Act, treating the same as illegal expense, is unjustified, excessive, arbitrary, erroneous and bad, both in the eye of law and on facts.

b. That the additions/disallowances of Rs.13,65,57,734/- made on the basis of /information obtained by the learned Assessing Officer behind the back of the assessee without providing any opportunity to the assessee to rebut the same is arbitrary, erroneous and bad, both in the eyes of law and on facts and is liable to be deleted on this ground alone.

c. That without prejudice to ground (a) and (b) above, the sale of the alleged illegal ore mined/produced having been included in income of the assessee, the disallowance of the expenses of Rs.13,65,57,734/- is unjustified, arbitrary, excessive, erroneous and bad, both in the eye of law and on facts. and legally untenable.

d. That on the facts and in the circumstances of the case, the disallowance/ Addition of the expenses of Rs. 13,65,57,734/- made

by the learned Assessing Officer under 37(1) of the Act being unjustified, arbitrary, erroneous and bad. both in the eye of law and on facts, and legally untenable, the same ought to be fully deleted  
7. That the learned CIT(A) has sustained the additions and disallowances of Rs. 10,91,55,429/- Under 'Direct expenses" and Rs.2,74,02,305/- Under 'Indirect expenses" is without passing a speaking Order.

That without prejudice to the Grounds above, in view of the Hon'ble Supreme Court judgment dated 02.08.2017 holding that there is no illegal mining but the State Govt. to levy compensation to be paid and the said compensation having been paid by the assessee as per the aforesaid judgement of the Apex Court, the disallowance/ Addition of the expenses of Rs.13.65,57.734/- made by the learned Assessing Officer u/s. 37(1) of the Act is unjustified, arbitrary, erroneous and bad, both in the eye of law and on facts, and legally untenable and the same ought to be fully deleted.

9. Charge of Interest u/s. 234B and 234C of the Act- Rs.4,74,56,121/- and Rs.21,14,969/-respectively

a. That in the facts and circumstances of the case, the sustenance of the charging of interest in the Order dt. 28.03.2016, of Rs.4,74,56,121/- and Rs.21,14,969/- u/s 234B and 234C of the Act respectively by the learned Assessing Officer and upholding, by the learned CIT(Appeals) is contrary to facts, unjustified, arbitrary, erroneous, bad, both in the eye of law and on facts and legally untenable.

b. That the assessee denies its liability for interest of Rs.4.74.56.121/- and Rs.21,14,969/-charged u/s.234B and 234C of the Act respectively and the said interest charged is wholly unwarranted, unjustified, excessive, arbitrary, erroneous, wrong and bad in law and legally untenable.

c. That in the facts and circumstances of the case, the charging of interest of Rs.4,74,56,121/- and Rs.21,14,969/-u/s 234B and 234C of the Act respectively by the learned Assessing Officer, being unjustified, arbitrary, erroneous and bad, both in the eye of law and on facts, and legally untenable ought to be deleted.

10. That the appellant craves leave to add, supplement, modify the grounds here-in- above at the hearing of the appeal.

3. Brief facts of the case are that the assessee is a firm engaged in the mining business and filed its return of income on 28.09.2008 declaring total income at Rs.17,03,37,650/-. The assessment was completed u/s.143(3) of the Act vide order dated 17.09.2010 at a total income of

Rs.17,16,46,790/-. Thereafter notice u/s.147 of the Act was issued and the re-assessment was completed on 28.03.2013 at a total income of Rs.34,52,50,526/-. Again based on the report of Hon'ble Justice MB Shah Commission on mining in the state of Odisha, proceedings u/s.147 of the Act were initiated by issue of notice u/s.148 of the Act on 21.10.2014 and consequently the impugned order was passed u/s.143(3) r.w.s. 147 of the Act dated 28.03.2016 at a total income of Rs.30,68,95,380/- by making disallowances towards illegal mining expenses etc. The assessee preferred an appeal before the Id. CIT(A) against such re-assessment order, who has dismissed the appeal of the assessee, therefore, the present appeal is filed by the assessee before us.

4. Ground Nos.1 to 3 are legal grounds taken against the reopening of the assessment by challenging the validity of notice u/s.148 of the Act based on Justice MB Shah Commission Report. Since these are the legal grounds go to the root of the matter, thus, these are taken first and canvassed together for the sake of convenience.

5. Before us, Id. AR submitted that in the present case, the assessment was already completed u/s.143(3) of the Act and later u/s.147 of the Act wherein all the details and particulars as sought from time to time were filed by the assessee and the AO has considered the same while completing the assessment and in subsequent re-assessment proceedings now solely on the basis of Justice MB Shah Commission Report, present reassessment proceedings were initiated. For this, he brought our attention to the impugned order page 2 wherein a reference

to the information and data supplied by the assessee to Justice MB Shah Commission is reproduced and based on such information a satisfaction was recorded of escapement of income for the issue of notice u/s.148 of the Act. The Id. AR, thus, submitted that except Justice MB Shah Commission Report, there was no material available on record indicating any escapement of income and it is already settled by this bench of the Tribunal and also by various Hon'ble High Courts that reopening and issuance of notice u/s.148 of the Act based on Justice MB Shah Commission Report is not valid. Ld. AR also filed his written submission on this issue which reads as under :-

*Reopening and issuance of Notice u/s 148 have been made on the basis of Justice M.B. Shah Commission Report alleging illegal mining, whereas there is no illegal mining at all in the case of the assessee.*

*The issue is squarely covered by this Hon'ble Bench Order dated 17.01.2023 in the case of Bikash Deb vs DCIT Circle-2(1), ITAT, Cuttack Bench, Cuttack (ITA Nos. 357 & 388/CTK/2019) [Ref. Pages 1 to 19 of Case Laws Compilation] and also covered by the judgements of various Hon'ble High Courts as below:*

*(i) Sociedade de Formento Industrial (P) Ltd. vs ACIT [2024] 158 taxmann.com 576 (Bombay)*

*(ii) Mudra Exports v. DCIT [2024] 161 taxmann.com 811 (Allahabad)*

*(iii) Sesa Sterlite Ltd. vs ACIT, Circle 1(1), Panaji [2019] 107 taxmann.com 388 (Bombay)*

6. Ld. AR also placed reliance on the following case laws :-

1. *Bikash Deb vs DCIT Circle-2(1), ITAT, Cuttack Bench, Cuttack (ITA Nos. 357 & 388/CTK/2019)*

2. *Balaji Mines and Minerals Pvt. Ltd and Othes vs ACIT & Others in WP No.262 of 2016 & others vide Judgment dated 26.04.2024 (Bombay High Court at Goa)*

3. *Sesa Sterlite Ltd. (Formerly Sesa Goa Ltd.) and Others vs. ACIT, Circle 1(1), Panaji, Goa and Others in WP Nos. 141 of 2015 & Others vide Judgment dated 09.07.2019 (Bombay High Court at Goa)*

7. On the other hand, Id. CIT-DR has vehemently supported the orders of the lower authorities and submitted that there was clear observations by Justice MB Shah Commission that the assessee is engaged in the illegal mining and is an office prohibited by law. Therefore, the expenses related to such illegal mining cannot be allowed u/s.37(1) of the Act. Thus, there was no infirmity in the reopening of the assessment which has been done after following due procedure of law and, therefore, he prayed for the confirmation of the orders of the lower authorities.

8. We have heard the rival submissions and perused the material available on record. Admittedly, in the present case the proceedings for reassessment by way of issue of notice u/s.148 of the Act dated 21.10.2014 were initiated on the basis of report of Justice MB Shah Commission. While recording the reasons the AO has categorically observed that the satisfaction was based on the information and the material and data supplied by the assessee to Justice MB Shah Commission. The reasons so recorded and filed before us during the course of hearing by the Id. AR of the assessee are reproduced hereunder :-

21.10.2014

The assessee e-filed its original return of income on 28.09.2008 showing total income at Rs.17,03,37,650/-. Assessment in this case has been completed on 17.09.2010 u/s.143(3) of the I.T. Act, 1961 determining the total income at Rs.17,16,46,790/-. Further, assessment u/s.147/143(3) has been completed on 28.03.2013 determining the total income at Rs.34,52,50,526/-.

In the meanwhile going through the report of Hon'ble Justice M. B. Shah Commission (Volume-II/A) on mining in the State of Odisha, it was seen that there is difference in production of Iron/Manganese for the F.Y.2007-08 in the case of above assessee, while comparing the data supplied by the director of Mines & Geology to the Shah Commission with that submitted by the Miners/Lessee, which is as follows:

Sr. No.	Name of the lessees & leases and Area (ha.)	Production as per submission of DMG for Iron (MT)	Production as per submission of lessee for Iron (MT)
1	M/s. M. G. Mohanty Patabeda iron ore Mines (14.00)	129790	131780

The above differences in production need to be verified, which has not been done during earlier scrutiny assessment.

Also, it was seen that the above assessee has done illegal/without any lawful authority, production of Iron ore in the F.Y. 2007-08, which is as follows:

Sr. No.	Name of the lessees & leases and Area (ha.)	Approval Area and Production Limit (MT)	Illegal/without any lawful authority production based on DMG Data for Iron Ore (MT)
1	M/s. M. G. Mohanty Patabeda iron ore Mines (14.00)	14.00 ha. (0 to 120000)	9790

The expenditure incurred by the above assessee to the extent of illegal mining, which is an offence / prohibited by law and shall not be deemed to have been incurred for the purpose of business or profession. Hence, no deduction shall be allowed in respect of such expenditure u/s.37(1) of the I. T. Act, 1961, which has not been done during earlier scrutiny assessment and will be considered while completing the re-assessment proceeding.

In view of the above, I have reason to believe that income chargeable to tax has escaped assessment as far as there is underassessment of income to the above extent, within the meaning of section 147 of the I. T. Act, 1961.

21.10.2014

Issue notice u/s.148 requiring the assessee to file his return of income within 30 days of receipt of the notice.

D.C.I.T.  
D.C.I.T.

Certified true copy  
 21/10/2024  
 Ramakanta Pradhan  
 भागीदार एवं आयुक्त, सर्कल-2(1)  
 Commissioner of Income Tax, Circle-2(1)  
 भुवनेश्वर/Bhubaneswar

9. From the perusal of the reasons recorded, we find that in the case of the assessee, assessment completed twice one u/s.143(3) of the Act and later u/s.143(3) r.w.s. 147 of the Act was again reopened solely on

the basis of the information of Justice MB Shah Commission Report. This issue has already been decided by this bench in the case of Kalinga Mining Corporation Vs. ACIT, passed in ITA Nos.373&374/CTK/2023, vide order dated 29.08.2024, wherein the Tribunal by following the judgment of the Hon'ble Bombay High Court at Goa in the case of Balaji Mines and Minerals Pvt. Ltd. Vs. ACIT, passed in WP No.262 of 2016, vide judgment dated 26.04.2024 and also in the case of Sesa Sterlite Ltd. (Formerly Sesa Goa Ltd.) Vs. ACIT, reported in (2019) 267 taxmann.com 275 (Bom), was of the view that the notice issued u/s.148 of the Act is illegal. The observations made in the said order from para 11 to 15 are 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. Sardesai, 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 nowhere 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 exist 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 filed 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 Id CIT(A) in respect of quashing*

*of the reopening. We find that at page 5 of 15 of the impugned order, the Id 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. Id 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 Id CIT(A). This being so, we find no error in the order of the Id 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.*

10. Thus, by respectfully following the orders of the Hon'ble Bombay High Court at Goa and the also following the decision of this bench of Tribunal in the case of Kalinga Mining Corporation (supra), we hold that

the notice issued u/s.148 of the Act in the instant case is illegal and hereby quashed and the consequential order passed u/s.143(3) r.w.s. 147 of the Act is also quashed. Thus, ground Nos.1 to 3 are allowed.

11. Since we have already decided the legal grounds taken by the assessee in its favour, therefore, other grounds of appeal taken on merits of the issue become academic, thus, require no adjudication.

12. In the result, appeal of the assessee is partly allowed.

Order dictated and pronounced in the open court on 26/11/2024.

**Sd/-**  
**(GEORGE MATHAN)**

**न्यायिक सदस्य / JUDICIAL MEMBER**

**कटक** Cuttack; दिनांक Dated 26/11/2024

*Prakash Kumar Mishra, Sr.P.S.*

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

1. अपीलार्थी / The Appellant-  
M G Mohanty,  
5A, Forest Park, Odisha
2. प्रत्यर्थी / The Respondent-  
DCIT, Circle-2(1), Bhubaneswar
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//

**Sd/-**

**(MANISH AGARWAL)**

**लेखा सदस्य/ ACCOUNTANT MEMBER**

**आदेशानुसार/ BY ORDER,**

**(Assistant Registrar)**

**आयकर अपीलीय अधिकरण, कटक/ITAT, Cuttack**