IN THE INCOME TAX APPELLATE TRIBUNAL "DB" BENCH, CUTTACK

BEFORE SHRI DUVVURU RL REDDY, VP
AND
SHRI RAJESH KUMAR, AM

ITA Nos.179 to 182/CTK/2020

(Assessment Years:2009-10 to 2010-11)

DCIT	**Smt. Indrani Patnaik**
2nd Floor, Aaykar Bhawan Poorva, Ainthapali, Sambalpur, Odisha-768004	A-6, Commercial Estate, Civil Township, Rourkela, Odisha-769004,
(Appellant)	**(Respondent)**

PAN No. ACCPP6164E

Assessee by	:	Shri S.C. Bhadra, AR
Revenue by	:	Shri Ashim Kumar Chakraborty, DR

Date of hearing: 18.09.2025
Date of pronouncement: 11.12.2025

O R D E R

Per Rajesh Kumar, AM:

These are appeals preferred by the Revenue against the orders of the Commissioner of Income-tax (Appeals) [the learned CIT (A)](hereinafter referred to as the "ld. CIT (A)"] dated 20.03.2020, for the AY 2009-10 & 2010-11. The penalties were levied by the ACIT, Rourkela Circle u/s 271(1)(c) of the Act vide even dated 30.09.2016 for A.Ys. 2009-10 & 2010-11.

2. At the outset, we observe from the appeal folder that there is a delay of 4 days in filing the appeal by the department and in support of this a condonation petition was filed. It was stated in the condonation petition that the delay has occurred due to obtaining the administrative approval from the competent authorities, which took quite a long time and accordingly, the delay may be condoned. The

ld. AR, on the other hand, did not oppose the condonation of delay. Considering the reasons cited before us, we are inclined to condone the delay and admit the appeal for hearing.

3. As the facts and circumstances are similar in ITA Nos. 179 & 181/CTK/2020, hence, for brevity we will take ITA No.179/CTK/2020 for A.Y. 2009-10 and decide the issues accordingly.

A.Y. 2009-10

ITA No. 179/CTK/2020

4. The first issue raised by the Revenue in ground nos. 1 to 4 is against the quashing of reopening of assessment u/s 147 read with section 148 of the Act by the ld. CIT (A), thereby quashing the assessment framed by the ld. AO.

4.1. The facts in brief are that the assessee is an individual deriving income from business of mining. The assessee filed the return of income on 28.09.2009, declaring total income of ₹117,50,44,050/-. The case of the assessee was selected for scrutiny under Computer Assisted Scrutiny Selection (CASS) scheme and notice u/s 143(2) was issued. The ld. AO framed the assessee vide order dated 28.03.2016, determining the total income at ₹126,46,86,020/-, which was reduced by the ld. CIT (A) to ₹118,28,11,470/-. Subsequently, the Justice M.B. Shah Commission on illegal mining of Iron and Manganese Ore pointed out the assessee. It was pointed out that the discrepancy between the figure of production of Iron Ore in the books of account of the assessee and the figure submitted to Justice M.B. shah commission by the directorate of Mining & Geology. The ld. AO formed a reason to belief that assessee had escaped assessment for A.Y. 2009-10 in support of these observations of Justice M/B. Shah Commission. The ld. AO held that there was an underreporting of

1,86,500 Metric Tons of Iron and Ore had escaped assessment in the A.Y. 2009-10. Accordingly, the ld. AO initiated the proceedings u/s 147 of the Act and issued a notice u/s 148 dated 22.10.2014, served upon the assessee, which was complied with. The ld. AO made an addition of ₹93,25,00,000/- on account of suppressed production of Iron Ore and further disallowed expenses u/s 37 of the Act to the extent of ₹129,42,25,780/- by treating them as illegal expenses. Aggrieved, assessee preferred the appeal before the ld. CIT (A).

4.2. In the appellate proceedings, the ld. CIT (A) held the reopening to be nullity and bad in law after obtaining the submission and contention of the assessee by observing and holding as under:-

> *"I have perused the facts of the case and have examined the detailed submissions of the assessee. The assessment record of the assessee for AY.- 2009-10 was also requisitioned from the office of the DCIT, Rourkela Circle, Rourkela and was inspected. Now, the exercise of the re-opening of the assessment proceedings of the assessee for AY-2009-10 suffers from certain fatal shortcomings which are examined hereunder:*
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> *(a) The assessing Officer has based the entire re-assessment proceedings u/s. 147 on the report of the justice M.B. Shah Commission report on Illegal mining in the state of Odisha which was placed in the public domain in the months of July 2013 and October 2013. The Assessing Officer, without any independent application of mind, accepted the Commissions finding that the assessee had indulged in illegal mining of iron ore to the extent of 1,86,000 Metric tonnes. The Assessing Officer made no attempt to reconcile the production data furnished by the assessee in her H-1 report submitted to the Indian Bureau of Mines with the data shown by her in her tax audit report in Form 3CD. The Assessing Officer also failed to take cognizance of the decision of the Supreme Court in the case of Goa Foundation v/s. Union of India & others pronounced on 11/11/2013 in which the apex court cast aspersions on the findings of the Justice M. B. Shah Commission report by observing that the Commission had reached its findings without giving an opportunity to the affected parties to respond and had thus violated the provisions of sections 8B and 8C of the Commissions of Inquiry Act, 1952. In paragraph 11 of the said judgement, the apex court observed as under-:*

"At the same time, we cannot direct the prosecution of the mining lessees on the basis of the findings in the report of the Justice Shah Commission, if they have not been given the opportunity of being heard and to produce evidence in their defence and not allowed the right to cross examine and the right to be represented by a legal practitioner before the Commission as provide in section 8B & 8c respectively of the Commissions of Inquiry Act, 1952. We will, however, examine the legal and environmental issues raised in the report of the Justice Shah Commission and on the basis of our findings on these issues consider granting the relief prayed for in the writ petition filed by the Goa foundation and the reliefs prayed for in the writ petitions filed by the mining assesses, which have been transferred to this court.

Now, this decision of the apex court was available with the AD at the time of the issuance of a notice u/s 148 on 22/10/2014. In the objections filed by the assessee against the issuance of this notice the attention of the Assessing Officer had been drawn to this critical Supreme Court Judgement to establish that the report of the Justice M. B. Shah Commission cannot be relied upon as the same had been discredited by the apex court for violating the principles of natural justice. The AO was also informed that the Supreme Court had set up a Central Empowered Committee (CEC) to submit a report on illegal mining in Odisha. Vide Writ petition(C) No. 114 of 2014 the apex court had observed as follows-:

"It appears from the averments in paragraph 14 of the Writ petition that several lessees are operating without clearance under the Environment (Protection) Act, 1986 and the Forest (Conservation) Act, 1980, and without renewal by the Government. Hence, an interim order needs to be passed in respect of these lessees who are operating the leases in violation of the law. The Central Empowered Committee (CEC) in the meanwhile will make out a list of such lessees who are operating the leases in violation of the law. This list will be prepared by the Central Empowered Committee (CEC) without reference to the Shah Commission's report".

Thus, it can be seen from the above that the findings of the Justice M. B. Shah Commission report hardly constitute credible evidence which could have been used to re-open the assessment proceeding for AY. 2009-10. The Assessing Officer blindly followed the report of the Shah Commission and assumed illegal mining to the extent of 1,86,000 metric tonnes had been carried out by the assessee and took no cognizance of the Supreme Court observations in the Goa Foundation case discrediting the Shah Commission on grounds of violating the principles of natural justice and in the apex courts

direction to the Central Empowered Committee (CEC) which was instructed specifically to submit a report on illegal mining in Odisha without consulting the Justice M. B. Shah Commission's report. Further, before issuing the notice u/s 148 dt. 22/10/2014, the AO should have carried out an independent verification of the allegation contained in the Shah Commission report. The AD made no attempt whatsoever to tally the production data of the assessee in the tax audit report with the data submitted by the assessee to the Indian Bureau of Mines (IBM) in Form H-1 but hastily jumped to the conclusion that income equalling the sale value of 1,86,000 Metric tonnes of Iron ore had escaped assessment. The AD accepted information from an outside source without subjecting it to a critical scrutiny and her "reason to believe that income had escaped assessment was not based on an independant application of mind. Hence, the re-assessment proceedings, u/s. 147 for AY-2009-10 are clearly null and void

(b) As per the proviso to section 147, where an assessment has been made under subsection 3 of section 143 for the relevant assessment year, no action shall be taken under section 147 after the expiry of four years from the end of the relevant assessment year unless any income chargeable to tax has escaped assessment for such assessment year by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year. Now, for AY. 2009-10, an assessment order u/s. 143(3) was passed on 30/12/2011 and therefore, as per the proviso, any proceeding u/s. 147 could have been undertaken only till 31.03.2014. However, in the assessee's case notice u/s. 148 for AY.- 2009-10 was issued by the AO on 22.10.2014 which can be a valid notice only if the assessee had not disclosed fully and truly all material facts necessary for her assessment for AY.- 2009-10. Hence, it is important to inquire as to what these 'concealed" material facts were which necessitated a re-opening of the assessee's case for AY.-2009-10, To answer this we must turn once more to the reasons recorded by the AO for re-opening the assessee's case u/s. 147.

In the reasons recorded by the AO, it is alleged that the assessee has indulged in 'illegal mining' and therefore the expenses corresponding to this illegal mining would be vulnerable to a disallowance u/s.37 as they too would be tainted with illegality. Now, on examining the assessment record of the assessee for the proceedings u/s. 143(3) for AY.- 2009-10, it is seen that there was no suppression of any material facts regarding any deduction of illegal expenses that were being claimed by the assessee. The AD could not identify any expenses which represented a violation of existing laws or were specifically prohibited by a statute but had been incorrectly claimed

by the assessee. It is noteworthy that in the original assessment proceedings, all the details of the expenditure incurred by the assessee in raising of iron ore had been examined and no adverse inference had been drawn by the AO. Ledger account of payments made by the assessee to M/s. Thriveni Earthmovers Pvt Ltd and M/s. Tarini Minerals Pvt Ltd for raising of Iron ore and other mining activities bad been placed on record and were accepted by the Assessing Officer. However, the very same expenses were held to be 'illegal by the AO while recording his reasons for re-opening the assessee's case u/s. 147. Further, as regards the allegation of suppression of production of Iron ore made while issuing the notice u/s. 148 all necessary facts were available with the AO at the time of the original assessment proceedings u/s. 143(3). Vide questionnaire u/s. 142(1) dt. 03.05.2011, the AO had called for exhaustive information relating to all aspects of the assessee's business including the quantitative details of the items produced by the assessee. The counsel for the assessee appeared before the AO on 29.11.2011 and 09.12.2011 with all books of account and ledger copies relating to production and sale of iron ore. The books of account were duly examined and accepted by the AO. Hence, no material facts relating to the production of iron ore were suppressed by the assessee during the course of the assessment proceedings u/s. 143(3) and the AO was incorrect in initiating re-assessment u/s. 147 by accepting the Justice Shah Commission report without making any independent inquiries regarding the allegations levied therein.

Hence, in view of the preceding observations, it is held that the re-assessment proceedings-initiated u/s. 147 of the I.T Act, 1961 for AY.- 2009-10 are null and void. The AO did not have tangible material to form a 'reason to believe' that income for AY.- 2009-10 had escaped assessment. The Assessing Officer accepted the allegation made in the Justice M. B. Shah Commission report against the assessee without any independent application of mind and inspite of the fact that the Supreme Court had cast doubts on the Shah Commission in its judgement in Goa Foundation v/s. Union of India & Others dt. 11.11.2013 and had further diluted the Shah Commissions' findings by setting up a Central Empowered Committee (CEC) that was directed to submit a fresh report on illegal mining in Odisha without reference to the Shah Commission report. Further, the notice u/s. 148 dt. 22.10.2014 for AY.- 2009-10 is barred by limitation and also violates the First proviso to section 147 as no material facts necessary for assessment were suppressed. by the assessee during the proceedings u/s. 143(3) for AY.- 2009-10"

4.3. After hearing the rival contentions and perusing the materials available on record, we find that the ld. CIT (A) has held that the finding of justice MB Shah Commission report is not credible evidence which could be used to reopen the assessment. The ld. CIT (A) noted that the ld. AO has blatantly followed the Justice MB Shah Commission report and presumed that there was a illegal mining to the extent of 1,86,000 metric tons by the assessee without taking any cognizance of supreme court observation in the case of Goa Foundation vs. Union of India & Others (2014) 6 SCC 738, discrediting the Justice MB Shah Commission report on the ground of violating the Principle of Natural Justice and directing the Central empower committee to submit a report on illegal mining at Orissa without consulting the Justice MB Shah Report. The ld. CIT (A) noted that before issuing notice u/s 148 of the act dated 22.10.2014, the ld. AO should have caried out independent verification of allegation contained in Justice MB Shah report. Thus, the ld. AO has relied on the information from outside source without doing any enquiry on the same and recorded a reason to believe that income has escaped assessment. In our opinion, the ld. CIT (A) has rightly held the reassessment proceeding u/s 147 of the Act to be null and void. Secondly, the ld. CIT (A) also quashed the reopening on the ground that the Proviso to Section 147 of the Act has not been specified as in the assessee's own case, the assessment was framed u/s 143(3) of the Act and in order to reopen the assessment u/s 147 of the Act, the satisfaction of pre-condition as provided in the proviso to Section 147 of the Act, are to be mandatory specified if the reopening is to be made after four years from the end of the assessment year.

4.4. This issue has also been decided by the coordinate bench of the Tribunal in the case of M/s Tarini Minerals Pvt. Ltd., passed in ITA

Nos.268, 270 & 272/CTK/2020 along with other connected appeals, dated 02.05.2022, wherein the Tribunal has upheld the view taken by the ld.CIT(A) in holding that the proceedings u/s.147 of the Act by the Assessing Officer is null and void and quashed the same after observing 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 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.*

4.5. The revenue has also taken the above decision of the Tribunal before the Hon’ble Jurisdictional High Court, however, the Ho’ble Jurisdictional High Court has also upheld the view taken by the Tribunal and dismissed the appeal of the revenue vide Judgment dated 11.03.2025, rendered in ITA No.74 of 2022.

4.6. In this case, we note that in conformity with the proviso to Section 147 of the Act, which provides that where the assessment was framed u/s 143(3) of the Act, any reopening u/s 147 of the Act, beyond the period of four years can only be made if the escapement of income is attributable to the failure of the assessee to file the return of income or not to disclose any information truly and materially during the course of assessment proceedings which has led to the escapement of income. However, even on this count and respectfully following the decision of the Tribunal, which has been upheld by the Hon'ble Jurisdictional High Court, referred to above, we uphold the order of ld. CIT (A) by holding the reopening of assessment to be null and void as same is not in accordance with the proviso to Section 147 of the Act. Therefore, we dismiss the ground no. 1 to 4 of the Revenue's appeal.

5. The issue raised by the Revenue in ground no.5 & 6 is against the order of CIT (A) deleting the addition of ₹93,25,00,000/- on account of illegal mining by holding that there is no difference between production as per Form H vis a vis figure shown in the Audit Report.

5.1. The facts in brief are that the ld. AO during the course of assessment proceedings noted that the assessee has shown lesser than the quantity of production of iron ore as compared to production data given by DMG data including production of iron ore from Unchabali iron ore mines which was not recorded in the books of account of the assessee and consequently the same was treated as production/ sales outside the books of account and amount equivalent to the market price of iron ore, which comes to 93,25,00,000/- was added to the income on account of differential figure of production of 1,86,000 Metric tons.

5.2. In the appellate proceedings, the ld. CIT (A) deleted the addition, which read as under:-

> *"I have perused the facts of the case and the detailed submissions tendered by the assessee. The essentially arbitrary nature of the discrepancy of 1,86,000 Metric tonnes pointed out by the Justice Shah Commission has been ably highlighted by the assessee's counsel. The 'conversion ratio' which relates the size of the Pit to the amount of Iron ore that can reasonably be excavated from it is the critical factor which underlies the allegation of over production levied on the assessee. The counsel submitted that the technical team appointed by the Justice Shah Commission chose a low conversion ratio which led them to believe that the production of Iron ore could not have come only from the Pit at Unchabali and therefore must have come from an area outside the licensed mining area. The assessee's counsel further stated that the actual conversion ratio was much higher than that adopted by the technical team and more importantly submitted that this ratio was adopted arbitrarily without giving an opportunity to the assesee to voice her objections. The Supreme Court has, in fact, cast aspersions on the Justice Shah Commission report on its failure to give the mining lessees an opportunity of being heard and has set up a Central Empowered Committee (CEC) to furnish a fresh report on illegal mining in Odisha. In the light of these facts, it is clear that the allegation of excess production of Iron ore levied on the assessee lacks credibility. Further, on examination of Form H-1 for AY.- 2009-10 submitted to the Indian Bureau of Mines (IBM) the production of Iron ore stands at 14,34,950 Metric tonnes and this is the very same figure reported by the assessee inher Audit report in Form 3CD for AY. 2009-10. As per the CBDT's instruction no 14/2015, Annual return in Form H-1 to IBM should be compared with details submitted to the Income Tax authorities to detect suppression. Clearly, in this case the figure in Form H-1 submitted to IBM and the figure in Form 3CD submitted to the IT Authorities tally.*
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> *Hence, the addition to income made by the AO on account of suppressed production is baseless and is not supported by evidence.*
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> *The counsel for the assessee also submitted that the assessee had appealed to the Mining Tribunal set up under the Ministry of Steel and Mines against the order of the State Govt. of Odisha in letter no. 7574/S & M/IV (AB) SM-19/10 dt. 25.11.2010 passed by the Under Secretary, Department of Steel and Mines, Govt of Odisha wherein the assessee had been charged with carrying out illegal mining for the period May, 2008 to September 2009. This appeal was filed u/s. 30 of the Mines and Minerals (Development and Regulation) Act, 1957.*

The Mining tribunal passed an order dt. 16.01.2012 in Revision order no. 25/2012 in the case of Smt. Indrani Patnaik (Revisionist) v/s Government of Odisha (Respondent). In the order the Mining Tribunal dismissed the findings of the State Government as baseless by observing that there was no evidence to support the allegation of illegal mining. The State Government of Odisha appealed to the Odisha High Court against this order of the Mining Tribunal. The Odisha High Court in Writ Petition (c) No. 10219 of 2012 dismissed the appeal of the State Govt and upheld the order of the Mining Tribunal.

In light of the preceding comments, the addition of Rs. 93,25,00,000/- made by the AO on account of illegal mining is hereby deleted.

(Relief allowed: Rs. 93,25,00,000/-)"

5.3. We have heard the rival contentions and perusing the materials available on record including the appellate order passed by the ld CIT(A). We find that the ld. CIT (A) passed a very detailed and reasoned order while deleting the addition. We note that the case of the assessee is squarely covered by the decision of co-ordinate Bench in assessee's own case in ITA No. 373/CTK/2018 for A.Y. 2015-16 and Ors, vide order dated 10.12.2021, wherein the co-ordinate bench has decided the similar issue in favour of the assessee. The case of the assessee is also squarely covered by the decision of the co-ordinate bench in case of ACIT Vs. Sri Dipti Ranjan Patnaik, Rourkela in ITA No. 229/CTK/2023 vide order dated 17.10.2023, wherein the co-ordinate Bench has decided the issue in favour of the assessee by upholding the order of ld. CIT (A) and dismissed the appeal of the Revenue by observing and holding as under:-

"7. We have considered the rival submissions. At the outset, the revenue has submitted that the reliance of the Id. CIT(A) on the ex-parte order in the case of Tarini Minerals Pvt. Ltd., wherein the coordinate bench of the Tribunal, where the undersigned is also a party, admittedly, cannot be considered because it is a decision rendered without hearing both the parties to the appeal. The said decision in the case of Tarini Minerals Pvt. Ltd. was in respect of

revenue's appeal and the in the said appeal the revenue had sought adjournment and the Id. AR had also submitted that as the revenue is seeking adjournment the assessee would not be in a position to argue and consequently as both sides did not present their case, the Tribunal had considered the recordings in the order of the Id. CIT(A) therein had upheld the order. Without considering the decision of the coordinate bench of the Tribunal in the ex-parte order in the case of Tarini Minerals Pvt. Ltd. A perusal of the decision of the Hon'ble Bombay High Court in the case of Sesa Sterlite Limited (supra), shows that the Hon'ble Bombay High Court had in para 15 onwards of its order, held as under :-

15. *Let us now see what was the information or material available to the Assessing Officer and which is disclosed in the reasons to believe stated in the original order sheet. The information is said to be the Shah Commission report, which inter alia reported under-invoicing of exports by the exporters of iron ore mentioned in it including the Assessee herein. If one has regard to the Shah Commission report and its use made in the reopening notice, it is at once apparent that under-invoicing in the concerned exports is nothing but a matter of expression of opinion by the commissioner. As this Court has explained in the case of Fomento Resources (P.) Ltd. v. Union of India [Writ Petition NO.606 of 2014, decided on 2-7-2019] where this very report of Shah Commission was a matter of direct challenge by the mining lessees and exporters, including the Assessee herein, facts found, as also conclusions drawn, by a Commission of Inquiry are not judicial pronouncements. The report of the Commission neither constitutes a binding judgment nor a definitive pronouncement. The Commission, as held by the Supreme Court in the State of Karnataka v. Union of India [1977] 4 SCC 608, is required to submit its report, which may or may not be accepted by the appointing authority. If it is not accepted, it has no legal consequences. The Commission, in other words, has no power to adjudicate in the sense of passing an order which can be enforced. What the Commission says is merely an expression of its opinion; it lacks both finality and authoritativeness. The differences in export prices of various exporters, so far as iron ore is concerned, maybe matters of fact, which are said to have been derived by Shah Commission from the material available in public domain, but the Commission's conclusion on the basis of these differences in prices that there was under-invoicing, is a matter of conclusion drawn by the commission. This conclusion is purportedly drawn on the basis of the primary facts of differences in export prices; and it is a deduction by the Commissioner by way of an expression of his opinion, as we have explained above. That per se cannot be treated as a primary fact, on the basis of which any belief can be formed by the assessing authorities. Besides, it must*

be noted that when the Shah Commission matters were argued before this Court, the Union of India made an express statement on the same lines as was made before the Supreme Court in the Goa Foundation petition. Learned Counsel appearing for the Union stated before this Court, and which statement has been noted in our orders dated 02/07/2019, that the Union would not take any action against mining lessees or traders for exports of ore only on the basis of the Commission's report without making its own assessment of facts and without first giving opportunity of producing evidence to the affected parties. For the reasons stated above, which bear generally on the status of the Commission's report and its findings, as well as the statement made by the Union of India as noted above, it is impermissible to the department to act exclusively on the basis of the Commission's report. It must make its own assessment of facts before any action is initiated. In the present case, since it is a reopening notice under Section 148, it may not be necessary to give any pre-notice opportunity of hearing or producing of evidence to the affected parties. The notice itself admits of a cause being shown by the affected parties, namely, in the present case, the Assessee. It is, however, imperative that the Assessing Officer must apply his own mind and make his own assessment of facts before he issues any notice under Section 148.

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

to draw inferences as regards certain other facts; and ultimately, from the primary facts and the further facts inferred from them, the authority has to draw a proper legal inference on whether any income has escaped assessment. But then, any inference to be drawn from the primary facts in possession of the Assessing Officer must be such as might follow from those primary facts; it cannot be a matter of conjecture or surmise and in any event, the officer has to apply his mind to arrive at such inference.

17. *As the Supreme Court has explained in the case of A. Raman and Co. (supra), the law does not oblige a trader to make maximum profit out of his trading transactions. It is the income which accrues to a trader which is taxable in his hands; not the income which he could have, but has not earned. No doubt, by adopting a device, if it is made to appear that income which really belonged to the assessee had been earned by some other person or by the Assessee in some other form or means, that income may be brought to tax in the hands of the Assessee and if such income has escaped tax in a previous assessment, a case for reassessment under Section 147(b) maybe made out. There is nothing, however, in the reasons indicated by the Assessing Officer in the present case to suggest that any such income has accrued to any person or the Assessee. The reasons do not indicate that the Assessing Officer has formed any belief that under-pricing was adopted by the Assessee as a device by which income had accrued to any other person or the Assessee himself in any other form and such income had escaped assessment.*

18. *In any event, as we have explained above, there must be a direct nexus or live link between the information found by the Assessing Officer and the escapement of income arising in the case. In the present case, all that was available to the Assessing Officer was the information that the export prices recovered by the Assessee were less in some cases than the market prices said to be prevailing on those days. This information itself is highly doubtful, since there is nothing to indicate that there was any particular market price as at the relevant date which ruled or which alone was the correct price. The export prices of other exporters, considered in Shah Commission report, do not suggest even a trend to indicate any particular market price. Besides, the price in an individual export contract is a function of various parameters as claimed by the Assessee, and as indicated whilst noting the Assessee's objections to the reopening notice. But, these are matters of merit and need not engage us today, except the fact that the Commission's conclusion that any particular price was the market price was itself a matter of conjecture and hardly a primary fact. For our purposes, even if we assume that the Assessee's export prices were in fact so less, there is nothing to indicate that any*

particular income has accrued to anyone as a result of such difference in prices. There is, thus, no direct nexus or live link between the difference in prices and escapement of income. There is, in other words, no way the Assessing Officer could have formed a belief that any income has escaped assessment simply on the basis of the differences in the export prices of the Assessee when compared to others.

19. *Learned Counsel for the revenue places strong reliance on the case of Central Provinces Manganese Ore Co. Ltd. v. ITO [1991] 59 Taxman 17/191 ITR 662 (SC)**.** Relying on this case, it is submitted that based on export prices showing a systematic lesser value as compared with the prevailing market prices for the same quality of goods, a reopening notice could indeed be issued under Section 148. In Central Provinces Manganese Ore Co. Ltd. (supra), the facts were quite peculiar. The appellant before the Court was a non-resident company having its office in London. It also had an office in India at Nagpur and was assessed to income tax in Nagpur. It had been the practice of the appellant to produce before the Income Tax Officer relevant books kept at its local office at Nagpur and balance sheets, trading accounts and profit and loss accounts at its head office in London. The customs authorities came to know that the appellant had declared very low prices in respect of all its consignments of manganese ore exported out of India. It was also found that most of its export was only to 2 to 3 buyers, who in turn did not purchase ore from any other company except the appellant. After due inquiry/investigation, customs authorities had found that the appellant was systematically showing lesser value for the manganese ore exported as compared with the prevailing market prices for the same grade of manganese ore. The customs authorities accordingly came to a definite conclusion that the prices mentioned in the relevant contracts between the Assessee and its buyers were lesser than contemporaneous market prices and it was found as a fact that the appellant company was indulging in under-invoicing. Final orders were accordingly passed under the Customs Act. It is in the context of these facts that the Supreme Court countenanced a reopening notice under Section 148 in that case. It is to be noted, firstly, that what the customs authorities found was by way of an order passed under law; it was a final order of Collector of Customs, and it found under-invoicing as a matter of fact. Secondly, the facts disclosed peculiar circumstances such as all consignments of exports being systematically priced at lesser value. Thirdly, it must be noticed that these exports were made to related parties who did not buy from any other source. In the light of these circumstances, which were found as matters of fact, and that in a quasi, judicial order, which had attained finality, the Supreme Court found formation of belief by the*

Assessing Officer as having a reasonable connection with the information available to him and did not find fault with the reopening notice. These facts are entirely distinguishable. In our case, there is no systematic undervaluation of export prices. In fact, as pointed out by Mr. Pardiwala, there have been cases where the export prices of the petitioner are taken to be market prices and on the basis of those prices, under-invoicing has been claimed vis-a-vis other exporters. So much for systematic under-valuation. There is no finding by a court of law or a statutory authority as a matter of fact that there was any under-invoicing. The so-called finding is by a commission of inquiry; that commission has itself made it clear in its very opening statement that it was not in a position to finalize illegalities or irregularities with regard to the export of iron ore by individual lessees or their representatives or traders comprehensively due to time constraints. It is at best a tentative opinion expressed by a Commission of inquiry without affording any opportunity to the concerned exporters to explain the material used against them. Besides, there is no case of related parties to whom such exports were made. At least, the reopening notice and the reasons indicated by the Assessing Officer do not indicate any of these things. In the absence of these and such other materials, the simple and bare primary fact of the Assessee having charged lesser export prices from its counter-parties as compared to some other exporters, is no basis for formation of any belief that any income has escaped assessment to tax.

20. *The judgments in cases of Phool Chand Bajrang Lal v. ITO [1993] 69 Taxman 627/203 ITR 456 (SC), I.P. Patel & Co. v. Dy. CIT [2012] 27 taxmann.com 200/346 ITR 207 (Guj.), ITO v. Selected Dalurband Coal Co. (P.) Ltd. [1996] 217 ITR 597 (SC), Rattan Gupta v. Union of India [1998] 234 ITR 220 (Delhi), AGR Investment Ltd. v. Addl. CIT [2011] 9 taxmann.com 62/197 Taxman 177/333 ITR 146 (Delhi), Raymond Wollen Mills Ltd. v. ITO [1999] 236 ITR 34 (SC) and Asstt. CIT v. Rajesh Jhaveri Stock Brokers (P.) Ltd. [2007] 161 Taxman 316/291 ITR 500 (SC), cited by learned Counsel for the revenue, bear on the aspect of sufficiency or otherwise of the material used for formation of belief. These judgments make it clear that what can be submitted to judicial scrutiny is whether or not there was material on the basis of which belief could have been formed about escapement of income from assessment, and not whether the material was actually adequate or sufficient for formation of such belief. There is no quarrel with this proposition here. Here, we are precisely concerned with whether or not such belief could have been formed on the basis of such material as was available with the Assessing Officer. In every State action or order submitted to judicial scrutiny, the matter is assessed from the point of view of Wednesbury unreasonableness. The focus of the scrutiny is, firstly, on whether the*

authority has kept itself within the four corners of law and, secondly, and even if it has so kept itself, whether it has nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. A reopening notice issued under Section 148 of the Income Tax Act is no exception to this rule. The Courts have made it clear time and again that belief under Section 147 of the Act is not a matter of a mere opinion of the Assessing Officer. It must be demonstrably shown that the material used by Assessing Officer is reasonably capable of formation of his belief that income has escaped assessment. As the Supreme Court observed in LakhmaniMewal Das(supra), belief does not mean a purely subjective satisfaction on the part of the Income Tax Officer. It must be held in good faith; it cannot be merely a pretence. It is open to the Court to examine whether the reason has a rational connection with or relevant bearing on the formation of the belief; it must not be extraneous or irrelevant for the purpose. In the present case, as we have noted above, the reason has no such bearing or rational connection with the formation of the belief. It is purely speculative on the part of the Assessing Officer to form a belief of escapement of income from taxation simply on the basis of lesser export prices charged by the Assessee. There is no material or even suggestion that any income corresponding to the so-called under-invoicing of exports was in fact received by any party or by the Assessee through any backdoor method. In the premises, there is no legitimate reason to believe which can sustain the impugned notice issued by the Assessing Officer.

21. *The other main objection of the Assessee is that there was no belief on the part of the Assessing Officer that escapement of income had arisen by reason of any failure on the part of the Assessee to make a return under Section 139 or in response to a notice issued under sub-section (1) of Section 142 or Section 148 or to disclose fully or truly all material facts necessary for the assessment. It is not good enough for the Assessing Officer to simply make a bald assertion that escapement of income is as a result of failure on the part of the assessee to fully and truly disclose all material facts. He must indicate, however briefly, what is it that was not disclosed and which gives the Assessing Officer reason to believe that income has escaped assessment. The 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 Assessing Officer so as to enable him to form a belief that income has indeed escaped assessment.*

22. *When we come to the third reason alleged by the Assessing Officer for reopening the case, namely, illegality of the business and*

taxation of income derived from it as income from other sources, the department is on an even thinner ground. In the first place, when the income from the activity of mining and export of ore arose and also when it was assessed to tax, there was nothing to suggest that the activity was illegal. Six years later, when the Supreme Court decided the case of Goa Foundation, and declared that deemed mining leases had already expired and mining carried out thereafter was illegal, the question of illegality of the activity arose for the first time. But be that as it may, 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. Section 37(1) of the Act refers to expenditure incurred by an Assessee "for any purpose which is an offence" or "which is prohibited by law". Such expenditure is not deemed to be incurred for the purpose of business and no deduction or allowance can be made in respect of such expenditure. This does not imply that the character of the very activity itself changes having regard to the legality or otherwise of the activity. It is submitted on behalf of the revenue at the Bar that the mining activity itself being an illegal activity, expenditure incurred by the Assessee for it is not deductible. There is no such ground alleged in the reopening notice or the reasons indicated in support of the notice. For the first time, a faint suggestion to this effect was made in the order passed by the Assessing Officer on the objections communicated by the Assessee. As our Court in the case of Hindustan Lever Ltd. v. R.B. Wadkar [2004] 137 Taxman 479/268 ITR 332 (Bom.) has made it clear, the reasons, with a view to assess their reasonableness, are required to be read as they are recorded by the Assessing Officer; no substitution or deletion is permissible; no addition can be made to those reasons; and no inference can be allowed to be drawn based on these reasons which is not recorded. It is for the Assessing Officer to form an opinion as to whether there was escapement of income from assessment and whether such escapement occurred from failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year; and it is for him to put his opinion on record in black and white. The reasons recorded must disclose his mind and they should be self-explanatory. The reasons recorded cannot be supplemented by the time the matter reaches the Court by filing of any affidavit or making any oral submission. In the premises, it is not open to the revenue to seek to sustain the re-opening notice on a new reason, namely, disallowance of deduction of expenditure since the whole activity was illegal.

23. *In the premises, the impugned notice issued by the Assessing Officer under Section 148 of the Act cannot be sustained and must be set aside.*

24. *The following companion writ petitions, Writ Petition Nos.1015, 1016, 328, 329, 955, 959, 1019 of 2015, 3, 5, 22, 23, 99, 100, 113, 116, 117, 120, 133, 142, 166, 190, 191, 224, 225, 261, 263, 270 of 2016 are all matters which involve all four aspects referred to above as in the case of Writ Petition No.329 of 2015. Mr. Diniz appearing in WP Nos.22 and 23 of 2016 and Ms. Kakodkar appearing in WP No.120 of 2016 make additional submissions in support of their respective cases.*

*Mr. Diniz relies on the case of Sarada Mines (P.) Ltd. v. State of Orissa [W.P. (C) No. 24421 of 2012, dated 20-4-2017]**,** decided by Orissa High Court. The case was in respect of value added tax under Odisha Value Added Tax Act, 2004. There was a tax evasion report in that case against the assessee. Based on the report, reassessment proceedings were initiated against the assessee. This was also a mining lease case and concerned trade of iron ore. The error purportedly discovered by the Assessing Authority was on a reconsideration of the same material which was before the Authority at the time of the original assessment. The Court held that reopening in the case was on a mere change of opinion and was impermissible. The Court held that the factual background, which remained the same, could not constitute new/fresh information under Section-43(l) of the Odisha Act, for initiating reassessment proceedings. The main controversy in the matter concerned the quality of ore sold by the Petitioner. What the assessee claimed to have sold was "Run of Mines" (ROM) ore. Based on a fresh analysis of material on record, the Assessing Authority came to the conclusion that what was sold was not ROM but Calibrated Lump Ore (CLO). Apart from holding that this new conclusion was impermissible, being based on the same material which was available at the time of the original assessment, the Court held that there was nothing on record to show that the Petitioner had received any undisclosed sums beyond the record and which were suppressed during the self-assessment/audit assessment proceedings or had concealed any turnover. This latter part of the reasoning of the Orissa High Court does support the Petitioner's case even in these matters. Learned Counsel appearing in WP No. 120 of 2016 refers to the case of Hemant Traders v. ITO [2015] 59 taxmann.com 234/375 ITR 167 (Bom.). In that case, reassessment was initiated by issuance of a notice under Section 148(2) in pursuance of a survey action under Section 133A of the Act. The Court held that neither the survey report nor any other material indicated that any income chargeable to tax has escaped the assessment in the*

relevant assessment year. It was submitted by the Revenue that even if that was so, the writ jurisdiction of the Court should not be exercised to interfere with a notice at the threshold. The Court negatived this contention, observing inter alia that once the Court found that the foundation or basis for initiating of reassessment proceedings did not contain the requisite satisfaction or reason for belief, the Court was required to step in and at the threshold itself; it could not allow the officer to continue the proceedings which might result into undue harassment or embarrassment to the assessee. This part of the observation of the Court does support the assessee's case even in these matters. We are fortified in taking the view that we have taken in this group of writ petitions by these authorities cited additionally on behalf of the assessees.

25. *The following writ petitions, Writ Petition Nos.102, 325,327, 956, 958 of 2015, and Writ Petition Nos.4, 6, 15, 16, 17, 24, 25, 101, 102, 114, 115, 118, 141, 143, 144, 145, 150, 165, 167, 207, 226, 227, 777, 791 of 2016, are all cases where reassessment notices are issued within four years from the end of the relevant Assessment Years. There is no requirement or failure on the part of the assessee to disclose fully and truly material facts in these cases. So far as the information and belief formed on such information of escapement, of income from taxation, however, are concerned, the above discussion in Writ Petition No. 329 of 2015 squarely applies to these cases. Mr. Rivankar appearing in WP No.791 of 2016, makes a few additional submissions. Learned counsel submits that in his case, the assessee is a mere trader and not a mining lessee and that there is accordingly no case for any illegal activities so far as his business is concerned. Learned counsel submits that there is no response on the part of the Revenue to this aspect of the Petitioner's case. This is one more instance which exposes lack of application of mind on the part of the Revenue before issuing reopening notices. For the same reasons, as are discussed above in case of Writ Petition No.329 of 2015, reopening notices even in this group of petitions deserve to be set aside.*

26. *The following petitions, Writ Petition Nos.9, 12, 123, 124, 75, 80, 105,106, 110, 148, 149, 192, 604, 605, 606, 651, 674, 866 of 2016, are all matters where reassessment proceedings are initiated under the proviso to Section 147 of the Act, since four years have already expired from the end of the relevant assessment years in all these cases. The distinguishing feature of this group of petitions, however, is that there is no allegation in these cases that there was any income derived from illegal activities, which needs to be assessed as income from other sources. The reopening notices in these cases are solely on the ground of under-invoicing of exports. This aspect of the*

controversy has already been dealt with above in connection with Writ Petition No.329 of 2015, and these petitions also deserve to be allowed on that basis. Mr. Chaitanya, learned Counsel appearing for the Petitioners in Writ Petition No.866 of 2016 makes a few additional submissions. It is, firstly, submitted that though the re-opening notice is issued four years after the end of the relevant assessment year, there is not even an averment in the reasons stated for issuance of the notice that there was any non-disclosure on the part of the Petitioners. Learned Counsel relies on the cases of Hubtown Ltd. v. Dy. CIT [2016] 74 taxmann.com 18 (Bom.) and Akshar Developers v. Asstt. CIT [2019] 103 taxmann.com 162/411 ITR 602 (Bom.) in support of his case. The notice in the present case is indeed deficient and cannot sustain reassessment in accordance with the law stated in these cases. Learned Counsel also relies on the case of Asstt. CIT v. Dhariya Construction Co. [2011] 197 taxmann.com 202/[2010] 328 ITR 515 (SC) to assail reliance by the Revenue on the opinion of Shah Commission so far as the alleged case of under-invoicing is concerned. In that case, the opinion of District Valuation Officer (DVO) was held per se as no information for the purposes of reassessment under Section 147. It is quite plain that as in that case, even here the expression of opinion by Shah Commission on the alleged under-invoicing of exports cannot qualify as information so as to sustain a belief on the part of the Assessing Officer of income having escaped assessment.

***27.** The following cases, Writ Petition Nos.8, 10, 11, 125 of 2016, 1020 of 2015, 1022 of 2015, 173 of 2016, 174 of 2016, are on the same footing as the group of petitions referred to in the paragraph above inasmuch as the reopening is only on the basis of under-invoicing of exports and not accrual of income from illegal activities. They are, however, all cases of reopening within four years from the end of the relevant Assessment Years. For the reasons stated above, even these petitions deserve to be allowed and reopening notices quashed.*

***28.** The following petitions, Writ Petition Nos.141 and 233 of 2015, and Writ Petition Nos. 198,199, 262, 264, 265, 271, 272, 879, 880, 881, 882, 883 of 2016, are all petitions where reopening notices contained additional reasons involving issues under Section 10B of the Act or Section 14A of the Act or commission paid to foreign agents, etc. These petitions deserve to be detagged from the group of petitions to be disposed of by this order.*

8. The Hon'ble Bombay High Court had also considered the decision of the Hon'ble supreme Court in the case of Raymond Woollen Mills Ltd. (supra) in para 20 of this order and had held that the reopening

merely on the basis of the Justice M.B.Shah Commission Report was not valid. The Hon'ble Bombay High Court pointed out that there was no evidence that irregularity was present in the assessee's business. In the impugned assessee's case also there is no evidence available other than the MB Shah Commission Report to give any indication that the assessee has done any illegal mining. Further a perusal of the decision of the Hon'ble Gujarat High Court in the case of Rawmin Mining and Industries (P) Ltd., reported in [2020] 119 taxmann.com 454 (Gujarat), the Hon'ble High Court had categorically held that section 8B of the Commissions of Inquiry Act, 1952 provides that if a person is likely to be prejudicially affected by the inquiry, the Commission shall give to that person a reasonable opportunity of being heard and to produce evidence in his defence. It has been admitted that the said Shah Commission Report in which prejudice has been caused to the assessee has been passed without giving an opportunity to the assessee. The Hon'ble Gujarat High Court had upheld the decision of the ITAT in that case of deletion of the addition on account of under-invoicing in respect of the export of Iron Ore. Admittedly, the decision of the Hon'ble Gujarat High Court was the subject matter of the SLP before the Hon'ble Supreme Court by the revenue and the same has also been dismissed. The relevant observations of the Hon'ble Gujarat High Court in the case of Rawmin Mining and Industries (P.) ltd. (supra), in para 8 onwards had held as under:-

8. *Being dissatisfied, the assessee carried the matter further in appeal before the Income-tax Appellate Tribunal. The Appellate Tribunal, after taking into consideration the submissions made by the assessee, confirmed the decision of the CIT (A) for reopening the assessment. The Tribunal, however, on merits of the case, reversed the findings of the CIT (A) by observing as under;*

"15. We have considered rival submissions and gone through the record carefully. Short question for our adjudication is, whether solely on the basis of Hon'ble Mr. Justice M.B. Shah Commission report can it be construed that the assessee has exported iron ore by under-invoicing the price, which requires to be added in the taxable income?

16. First contention raised by the Ld.counsel for the assessee was that the assessee has maintained proper books of accounts, which were audited and its books have not been rejected. Section 145 provide the mechanism how to compute the income of the Assessee. According to Sub-section 1, the income chargeable under the head profit and gains of business or profession or income from other source shall be computed in accordance with the method of accountancy employed by an Assessee regularly, subject to sub-section 2 of

section 145 of the Act. Sub-section 2 provides that the Central Government may notify in the official gazette from time to time, the Accounting Standard required to be followed by any class of Assessee in respect of any class of income. Thus, it indicates that income has to be computed in accordance with the method of accountancy followed by an Assessee i.e. cash or mercantile, such method has to be followed keeping in view the Accounting Standard notified by the Central Government from time to time. Sub clause 3 provides a situation, that is, if the Assessing Officer is unable to deduce the true income. On the basis of method of accountancy followed by an Assessee than he can reject the book result and assess the income according to his estimation or according to his best judgment. The Assessing Officer in that case is required to point out the defects in the accounts of Assessee and required to seek explanation of the Assessee qua those defects. If the assessee failed to explain the defects than on the basis of the book result, income cannot be determined and Assessing Officer would compute the income according to his estimation keeping in view the guiding factor for estimating such income.

17. In light of the above, if we peruse the record, then it would reveal that the Ld. AO has nowhere expressed his inability to deduce true income from the books of the assessee. He has not rejected the book results for determining the suppressed sales. The next contention raised by the Ld. counsel for the assessee was that in order to substantiate genuineness of its transaction, it has submitted the following documents:

I. Copy of Sales Purchase contract of iron ore no. IOF-2010-01 Dated: 4-01-2010.

II. Copy of Letter of Credit No. M16AR1001RS00203 Dtd. 07/01/2010.

III. Copy of Shipping bill & Custom Duty Challan no. 6404 Dtd.21/01/2010.

IV. Copy of Bill of Lading No. GOA/RMIPL/101 DTD.23/01/2010.

V. Copy of Certificate of Analysis by SGS India Private Limited Dtd. 25-01-2-2010.

VI. Copy of Invoice No. RMIPL/IOF/2009-10/01 & 02 Dated: 27/01/2010 & 29/03/2010 respectively.

VII. *Copy of Bank Realisation Credit Advise dtd. 28/01/2010 & 29/03/2010.*

VIII. *Copy of Shipment advice in terms of clause 46A of Letter of Credit.*

18. All these documents are available on paper book. The Ld. counsel for the assessee also produced extract of Customs Act specifically section 28. He submitted that the assessee has presented the above documents to the custom authorities; it had paid export duty on declared export price value, which has been finally assessed by the custom authorities. Certificate to this effect is available on page 110.66 of the paper book, wherein Shri P.K. Shanna, Superintendent of Customs, Customs House, Marmagoa had issued a letter dated 28-4-2010 intimating the assessee qua finalization of provisional assessed shipping bill no. 5024727 dated 15-1-2010 vide vessel MV Bonasia. Vide this shipping bill, the assessee has exported 44,000 MTs of iron ore. According to section 28 of the Customs Act, the limitation to recover duty by rejection of declared value has expired. Hence, the assessed duty has become final, and no question of under-invoicing under Custom Act can be raised now, Consequently, there cannot be any inquiry under Income Tax Act.

19. It was also pointed out that during the course of reassessment proceedings or in the remand report submitted before the Ld.CIT(A), the A0 unable to lay his hand on any evidence exhibiting under-invoicing by the assessee. The AO is solely harboured upon Commission's report. It is pertinent to observe that a charge of suppressed sales carried out by the assessee has been raised by the AO against it. It is the duty of the AO to prove the prima facie that such a charge can be leveled against the assessee, only thereafter it can be called for disproving that. The AO assumed charge and thereafter put a negative burden upon the assessee to prove that it has not exported iron ores by under-invoicing. This cannot be enforced in law. It is the AO who has to first prove the factum of under-invoicing done by the assessee with the support of reliable evidence in law. With regard to the alleged report of Hon'ble M.B.Shah Commission, it was contended that this report was challenged before the Hon'ble Supreme Court by way of writ petition. Government of India and other law enforcement agencies took the stand that on the basis of this report they are not going to take any action, rather they will investigate the issue further. This stand of Solicitor General as well as Advocate General appearing for the State of Goa have been noted down by the Hon'ble Supreme Court in the judgment, which is reflected in para 10. It is worth to take note of this finding as under:

"10. Mr. Mohan Prasaran, learned Solicitor General for the Union of India, on the other hand, submitted that as the notification dated 22-11-2010 of the Central Government appointing the Justice Shah Commission under section 3 of the Commissions of Inquiry Act, 1952 would show, reports were received from various State Governments of widespread mining of iron ore and manganese ore in contravention of the MMDR Act, the Forest (Conservation) Act, 1980 and the Environment (Protection) Act, 1986 or other Rules and Licenses issued thereunder and for this reason, the Central Government appointed the Justice Shah Commission for the purpose of making inquiry into these matters of public importance. He submitted that after the Justice Shah Commission submitted the report pointing out various illegalities, the Union Government has kept the environment clearances in abeyance and it will legal action on the basis of its own assessment of the facts and not on basis of the facts as found in the Justice Shah Commission's report. Similarly, Mr. Atmaram N.S. Nadkarni, the Advocate General appearing for the State of Goa, submitted that after going through the report of the Justice Shah Commission, the State Government has suspended all mining and transportation of ores and no legal action will be taken against the mining lessees on the basis of the findings in the Justice Shah Commission's report unless due opportunity is given to the mining lessees to place their defence against the findings of the Justice Shah Commission.

11. We find that section 8B of the Commissions of Inquiry Act, 1952 provides that if a person is likely to be prejudicially affected by the inquiry, the Commission shall give to that person a reasonable opportunity of being heard and to produce evidence in his defence and section 8C of the Commissions of Inquiry Act, 1952 provides that every such person will have a right to cross-examine and the right to be represented by a legal practitioner before the Commission. As the State Government of Goa has taken a stand before us that no action will be taken against the mining lessees only on the basis of the findings in the report of the Justice Shah Commission without making its own assessment of facts and without first giving the mining lessees the opportunity of hearing and the opportunity to produce evidence in their defence, we are not inclined to quash the report of the Justice Shah Commission on the ground that the provisions of Sections 8B and 8C of the Commissions of Inquiry Act, 1952 and the principles of natural justice have not been complied with. At the same time, we cannot also direct prosecution of the mining lessees on the basis of the findings in the report of the Justice Shah Commission, if they have not been given the opportunity of being heard and to produce evidence in their defence and not allowed the right to cross-examine and the right to be represented by a legal practitioner before the

Commission as provided in sections 8B and 8C respectively of the Commissions of Inquiry Act, 1952."

20. In the light of the above, let us examine the report. Whether it can be used against the assessee and solely on the basis of it, it can be established that the assessee has under-invoiced its export. According to the Ld. counsel for the assessee, the methodology adopted by the Commission itself is improper and its comparison is misplaced. Under invoicing has been worked out qua the assessee at page no. 236. Before that we would like to take note of three-four serial numbers in order to appreciate the error. We would like to make comparative analysis of certain exports made by other assessees. It is pertinent to note that the assessee has exported FD grade 58 iron ore. Therefore, we take note of rate of this grade noticed by the Commission with regard other parties. For example, Sesa Goa Ltd., has exported FE grade 58 vide two shipping bills bearing no. 5024395 and 5024397 on 10-12-2009. The rates were 2179.04 WMT. On the same day, this concern has exported same quality of iron ore at the rate of 3008.73. Thereafter, Commission noticed export was made by the Sesa Goa Ltd. on 15-12-2009 FE grade 58 at the rate of 2222 per MT. The next rate noticed by the Hon'ble Commission on 15.12.009 pertained to Chowgule& Co. P. Ltd. It relates to FE grade 58 and this concern exported at the rate of 2492.98. On 12-1-2010 Sesa Goa again exported FE 588 grade at the rate of 2120.76. The rates of the assessee which have been considered by the Hon'ble Commission are of 15-1-2010, FE 58 grade at the rate of Rs. 2604/-. If all these rates are being compared, then it would reveal that on 10-12-2009, the Commission has accepted reasonable rate at 3008/- and compared other rates from this. But on 15-12-2009 it accepted the rate at 2492. It worked out under-invoicing by Rs. 270 per WMT when rates of Sesa Goa and Chowgule were compared. Chowgule exported at the rate of 2492 per WMT. Sesa Goa exported the same grade of iron ore at 2222.26 per WMT. Under-invoicing has been worked at the rate of 270 per MT. For benchmarking, rate of Rs. 2492 was considered as reasonable rate. If this rate is being compared with the rates of the assessee on 15-1-2010, then rate of assessee was Rs. 2604/-. It is higher than the Chowgule& Co. In that case Chowgule& Co. should also be considered for under-invoicing. But it was not recommended. Apart from this discrepancy, the assessee has contended that rates considered by the Hon'ble Commission for compression were adopted on 15-1-2010. The assessee has entered into an agreement for export on 4-1-2010. The rates of 4-1-2010 should have been compared. The Commission has accepted two different rates in the case of Seasa Goa i.e. on 15-12-2009 and 10-12-2009. In other words, in time span of 5 days, if two different rates can be accepted as reasonable, and benchmarking was considered at 2492 per MT then why it is not

possible that at the time of business, sale agreement with the importer rates applicable on 4-1-2010 were not according to the market conditions. There is no comparative price stated by the Commission on 4-1-2010. It is also important to note that value cannot be judged on one factor only. Price depends on many factors and terms of sale contract. It is also pertinent to observe that the assessee is a trader and not a miner. It has purchased goods from the open market and exported. It has exported a single shipment to world renowned large multi-national company and it is not a sister concern of the importer. The goods were sold at arms length. It has purchased royalty paid iron ore and evidence to this effect has been brought to our notice and available on page no. 113 to 129 of the paper book. Therefore, we are of the view that report which has been termed by the Commission itself as tentative report could be setting the investigation machinery in motion. But it cannot be treated equivalent to a decree which is required to be executed as it is, more so, in the light of finding recorded by the Hon'ble Supreme Court and the stand taken by the respective States. The AO has miserably failed to collect any evidence against the assessee demonstrating the fact that it has under-invoiced its export and therefore, received unaccounted sale proceeds. The undisclosed sales cannot be worked out on the basis of this report, and no addition required to be made in the absence of any evidence. We allow this fold of contention raised by the assessee and delete the addition. "

9. *Thus, the Tribunal has taken into consideration the applicability of the report of the Justice M.B. Shah Commission so as to make addition of the alleged amount under-invoicing by the Assessing Officer.*

10. *We are in agreement with the findings recorded by the Tribunal, referred to above, and, therefore, no question of law, much less the substantial question of law arises. Accordingly, the appeal is dismissed with no order as to costs.*

9. Ld.AR has also drawn attention to the decision of the Hon'ble Supreme Court in the case of Goa Foundation, passed in Writ Petition (Civil) No.435 of 2012, dated 11.11.2013, wherein the Hon'ble Supreme Court had held that the M.B.Shah Commission Report have been passed in violation of the principle of natural justice and had consequently disregarded the Shah Commission Report. This decision of the Hon'ble Supreme Court was available as on 11.11.2013. The reopening in the Assessee's case is on 15.10.2014, which is much after the decision of the Hon'ble Supreme Court in the case of Goa Foundation (supra). It would also be worthwhile here to refer to the decision of the Hon'ble Supreme Court in the case of Common Cause (supra), wherein also the Hon'ble Supreme Court did not consider the

M.B.Shah Commission Report but went ahead and created a separate Central Empowered Committee (CEC) for quantifying the alleged illegal mining. The Hon'ble Supreme Court in the case of Common Cause (supra) in para 31, though did not agree, however, in the same para, has held that under these circumstances on account of non-issuance of notice u/s.8B or Section 8C of the Commissions Inquiry Act, 1952, the report given by the Shah Commission was vitiated and, therefore, the foundation of the writ petition filed by the Common Cause was taken away. Going on further in para 33, the Hon'ble Supreme Court went on to hold that in the case of Common Cause (supra), the Hon'ble Supreme Court was not relying upon any of the facts determined by the shah Commission for the purpose of its judgment and order. Clearly the Hon'ble Supreme Court in Common Cause (supra) set up a separate Central Empowered Committee (CEC) and the said Committee submitted its report. The Central Empowered Committee in assessee's case has also recognized that the assessee has undertaken mining of only 1,88,794 MT of Iron Ore which tallies with the quantity disclosed in its Audit Report as also the Form H-1 submitted before the mining authority. This also tallies with the quantification as done by the Deputy Director of Mines on 02.09.2017. A perusal of the reasons recorded for reopening in the present case clearly shows that the reasons recorded are solely on the basis of Shah Commission Report. Admittedly, the Hon'ble Bombay High Court and the Hon'ble Gujarat High Court against whose orders the SLP has also been dismissed by the Hon'ble Supreme Court, shows that the reopening cannot be validly done exclusively basing reliance upon the M.B. Shah Commission Report. This being so, respectfully following the decision of Hon'ble Bombay High Court in the case of Sesa Sterlite Ltd. (supra) as also the decision of Hon'ble Gujarat High Court in the case of Rawmin Mining and Industries (P.) Ltd., the reopening as quashed by the Id. CIT(A), stands upheld for the detailed reasoning as given above.

10. A perusal of the facts in the present case clearly shows that the Id. CIT(A) has taken into consideration the fact that the production of the Iron Ore as disclosed by the assessee in Form 3CD Report and as per the H-1 Form and as per the report submitted to the Central Empowered Committee in the case of Common Cause 9supra) before the Hon'ble Supreme Court were identical and there is no mention of any illegal mining by the assessee. Admittedly, in the demand notice issued by the Deputy Director of Mines in his reported dated 02.09.2017, there is a quantification of excess production but this is not illegal mining. Excess production has also been disclosed by the assessee in its report and in the Form H-1 and as per the demand notice issued by the Director ofMines, the assessee has been asked to pay compensation for the said excess mining as quantified in the

report submitted to the Central Empowered Committee (CEC). A perusal of the assessment order alsoshows that the AO has quantified the mining as done by the assessee at 2,04,834 MT. This figure is adopted out of the Justice M.B.Shah Commission Report. This figure has not been determined by the AO on the basis of any evidence. However, in fact, the subsequent examination for the purpose of the Central Empowered Committee report in the Common Cause (supra), the actual production has been quantified at the same figure as disclosed by the assessee. Thus, it cannot be said that the assessee has undertaken illegal mining. This has also been considered by the Id. CIT(A) while deciding the issue on merits. The findings recorded by the Id.CIT(A) in this regard on merits have also not been dislodged by the revenue. In these circumstances, the findings recorded by the Id. CIT(A) on this issue stands confirmed.

5.4. Here it must also be mentioned that the Hon'ble Jurisdictional High Court of Orissa has also upheld the order of the Tribunal and has dismissed the appeal filed by the revenue.

5.5. Considering the facts and circumstances of the instant issue before us in the light of the decision of the coordinate bench in assessee's own case as well as in the case of related party, which has been affirmed by the High Court as stated hereinabove and respectfully following the same, we are inclined to uphold the order of the ld.CIT(A) on this issue by dismissing the ground Nos.5 & 6 of the revenue's appeal.

6. The ground no.7 is against the order of ld. CIT (A) deleting the addition of ₹9129,42,25,780/- as made by the assessee on account of illegal expenses in the light of explanation to Section 37(1) of the Act.

6.1. The facts in brief are that the ld. AO during the course of assessment proceedings noted that assessee got environmental clearance without having forest clearance under F.C. Act, 1980 in violation of Circular no.J-11015/12/94/1A.II(M) dated 17.06.1996 of

MOEF. The ld. AO noted that the MOEF approval date of E.C. was 05.06.2006 and MOEF date of EC was dated 05.06.2006 and the production limit was 2,10,000 metric tons. Therefore, the production during the financial year 2008-09, was in accessible of EC limit to the tune of 12,24,950 metric tons even as per lessee's data and of 14,11,450 MT as per Mines Department's data. The ld. AO accordingly held that there is also clear violence of provision of environment (protection Act 1986) (EPF) 1996. Thereafter, the ld. AO refer to the business report refer to Justice MB Shah Commission and thereafter, Criminal Complaint against the assessee. According to the ld. AO the assessee could not satisfactorily explained the illegal mining done by the assessee. Accordingly, the ld. AO computed the expenses incurred on the said illegal mining at ₹1,29,42,25,780/-, which was disallowed by considering the same as inadmissible u/s 37(1) of the Act and added to the income of the assessee.

6.2. In the appellate proceedings, the ld. CIT (A) deleted the addition by observing and holding as under:-

> *"The final ground of appeal relates to the disallowance of expenses of Rs. 129,42,25,780/- u/s. 37 of the I.T Act, 1961 by holding them to be 'illegal expenses.*
>
> *I have perused the facts of the case and have examined both the assessment order u/s. 147/143(3) dt. 28/03/2016 and the detailed submissions tendered by the counsel for the assessee. The line of reasoning followed by the AO in her assessment order is that since the assessee has indulged in 'illegal' mining, therefore all the expenses corresponding to this illegally mined tron ore would also be 'illegal in nature and thus liable to be disallowed as per the Explanation to Section 37(1) of the LT Act, 1961*
>
> *Since the AO has invoked the Explanation to section 37(1) of the LT Act, 1961 16 make the disallowance, it is necessary to examine the said statute in detail to see whether the expenditure of Rs. 129,42,25,780/ incurred by the assessee falls within its ambit Section*

37(1) of the IT Act, 1961 and the Explanation appended to it are reproduced as under

Section 37(1): Any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee) lead out or expended wholly and exclusively for the purpose of the business or profession shall be allowed in computing the income chargeable under the head "Profit and gains of business or profession Explanation-For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure.

The Explanation to section 37(1) was introduced in 1998 and the amendment was made retrospective from 1st April, 1962. The memorandum explaining the provisions of the Finance Bill 1998 stated as follows-:

It is purposed to insert an explanation after sub-section (1) of section 37 to clarify that no allowance shall be made in respect of expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law. This purposed amendment will result in disallowance of the claim made by certain tax payers of payments on account of protection money, extortion, habta, bribes etc as business expenditure.

Now, a perusal of the explanation to section 37(1) and of the Memorandum to the Finance Bill 1998 makes it clear that the disallowance under this Explanation rests on the fulfilment of the following two conditions:-

(1) There should have been an expenditure incurred by the assessee, and

(ii) This expenditure should have been incurred for any purpose which is an offence or which is prohibited by law.

The first condition is satisfied as an expenditure has been incurred by the assessee which is not a capital expenditure and has also been borne by the assessee, wholly and exclusively for the purpose of his business. Hence, it only now remains to examine whether this expenditure was incurred by the assessee for a purpose which is an offence or which is prohibited by law.

Now, both the terms 'offence' and prohibited by law have not been defined in the Income Tax Act, 1961. The term 'offence' has, however, been defined in section 3(38) of the General Clauses Act, 1887 as follows:

"Offence shall mean any act or omission made punishable by any law for the time being in force."

In a similar manner, the term 'prohibited by law' may also be taken to mean any act which is expressly or impliedly prohibited by statute. As an aid to interpreting the intent of the legislature in introducing Explanation 1 to section 37 one may refer to the Memorandum to the provisions of the Finance Bill, 1998 which specifically mention that this proposed amendment was intended to check the practice whereby assessee's were seeking deduction as business expenditure of amounts paid as bribes, extortion money and protection money. Apart from the various types of expenditure covered in this memorandum, the other category of expenditure which is within the ambit of Explanation 1 to section 37 are penalties/fines paid for the infraction of law.

Before delving into the specifics of the appeal before the undersigned it would be instructive to examine the various decisions of tribunals/High Courts to appreciate the scope and ambit of Explanation 1 to section 37 of the I.T. Act, 1961.

In Gwalior Road Lines V/s CIT(1998) 234 ITR 230 (MP), it was held as follows:-

"It is the legal expenditure that can be claimed as allowable deduction. No law point would arise regarding expenditure for unlawful acts. Where a transport operation claimed deduction on expenditure incurred on paying mamools, tips, and payments for greasing the hands of employees of the transport department on the ground that the payments were necessitated for smooth running of business, the tips paid might be allowable expenditure on the ground that they were made to persons engaged in the assistance of the business, like loaders and unloaders of goods. On the contrary, greasing the palms of the RTO staff would not only be an illegal act but would amount to illegal gratification Such illegal gratification could not be allowed to be deducted, since it is also opposed to public policy."

In CIT v/s Pt. Vishwanath Sharma (2009) 182 Taxman 643 (Allahabad), the Court opined as follows:

"Payment of commission to Government doctors for obtaining a favour there from by prescribing medicines in which assessee is dealing will come within category of 'illegal gratification' or 'bribe' and, therefore, cannot be allowed as business expenditure under section 37."

In CIT V/s M. N. Swaminathan (2011) 198 Taxman 140 it was held that payments made by the assessee to police and rowdies to keep them away from business premises, was illegal and could not be considered as an allowable deduction. In J. K. Panthaki& Co. V/s. ITO (2012) 22 taxman 49 (Karnataka), the court held that commission paid to MD, ete of a company awarding civil contract being a bribe could not be construed as an expenditure at all.

The courts have also adjudicated in cases where the assessee had been penalised for an infraction of law and was claiming the penalty/fine as a deductible expenditure u/s. 37. As an illustration, the following instances can be quoted-:

In CIT v/s India Cements Ltd (2000) 108 Taxman 67 (Mad.) it was held as follows:-

"Infraction by assessee-company of provisions of section 349 of the Companies Act, 1956, in not deducting interest on borrowing, while computing net profit, a percentage of which was paid to managing agent, could not be ignored and remuneration paid to managing agent in excess of what was permissible under section 348, read with section 349 of the Companies Act could not be allowed as business expenditure."

In CIT v/s Smt. Amarjeet Kaur (2007) 159 Taxman 178(Karnataka) the court held that expenditure incurred by assessee on deposit-linked incentive scheme which scheme had all basic ingredients of money circulation scheme, which is banned under section 3 of Prize Chits and Money Circulation Schemes (Banning) Act, 1978, could not be allowed as deduction in view of Explanation to section 37(1). In Overseas Trading & Shipping Co. (p) Ltd v/s ACIT(2013) 38 Taxman 86 (Gujarat) the court held that where assessee got its contract executed with a foreign company for import of furnace oil through its sister concern but subsequent purchases made by assessee from sister concern of furnace oil, its storage and consequent sale were in complete breach of Solvent, Raffinate & Slop (Acquisition, Safe Storage & Prevention of Use in Automobiles) Order, 2000, payment made by assessee to sister concern for executing contract could not be allowed under section 37(1).

A perusal of the above mentioned judicial decisions reveal the scope and ambit of Explanation 1 to section 37 of the IT Act, 1961 and also illustrate the situations in which this legislation should be invoked. These are two, namely, where the assessee seeks a deduction on account of bribes, extortion money, 'hafta' or kickbacks paid by him in the course of his businss and also where deduction as a business expenditure is sought on account of penalties/fines paid for the infraction or violation of statutory laws.

The assessee's case, in the appeal before the undersigned falls in neither of the above mentioned categories. The assessee has never been penalised by the State Government or the relevant Mining authorities for the violation of any provision of the Mines & Minerals (Development & Regulation) Act, 1957 or the Mineral Concession Rules, 1960. The assessee has also complied with all the requirements of the Orissa Minerals (Prevention of theft, smuggling and illegal mining and Regulation of possession, storage, trading and Transportation) Rules 2007 that have been framed by the Odisha Government in accordance with Section 23C of the Mines and Minerals (Development and Regulation) Act, 1957. In the assessment order u/s. 143(3) the AO contends, suo motu, that the assessee has violated the provisions of the Forest (Conservation) Act, 1980, Section 6 of the MMDR Act, 1957 and the Environmental Impact Assessment Notification dt. 27.01.1994 issued by the Ministry of Environment and forest. However, the disallowance u/s. 37 would only come into play if the assessee had been penalised under the appropriate rules of the above mentioned statutes and the assessee had claimed this penalty as an expense in her profit/loss account. The AO is an Income Tax authority only and it is beyond her purview to judge whether the assessee has in any manner transgressed the above mentioned Statutory Laws. In the assessment order u/s. 143(3)/147, the AO has herself calculated the 'illegal expenses' that the assessee would have incurred and then has made the disallowance under Explanation 1 to section 37 of the 1. T Act, 1961. This action of the AO is arbitrary and wholly unjustified as only the State Government of Odisha or the Ministry of Environment & Forest can penalise the assessee for any infraction of these laws. Neither was the assessee ever penalised by the State Government or the Ministry of Environment nor has the assessee debited any expenditure which relates to a penalty/fine paid for the violation of a statutory law. The payments made by the assessee to various parties like M/s. Thriveni Earthmovers Pvt Ltd and M/s Tarini Minerals Pvt Ltd represent genuine business expenditure for mining activities carried out by these parties like raising of Iron ore and transportation of the same. They are neither in the nature of bribes/protection money and nor do they suffer from the taint of illegality as no statutory law has

been violated by the assessee in the course of incurring this expenditure.

Hence, in view of the preceding observations, the disallowance of Rs. 129,42,25,780/- made by the AO by invoking Explanation 1 of section 37 of the 1.T Act, 1961, is hereby deleted and the assessee's appeal is upheld.

(Relief allowed: Rs. 129,42,25,780/-)"

6.3. After hearing the rival contentions and perusing the materials available on record, we find that the ld. AO has just estimated the expenses in connection with the illegal mining, which according to the ld. AO has been booked in the profit and loss account of the assessee. We have perused the order of ld CIT(A) and find that the ld CIT(A) has passed a very reasoned and speaking order. Moreover the issue is squarely covered by the order of the coordinate bench in in assessee's own case in ITA No. 373/CTK/2018 for A.Y. 2015-16 and Ors, vide order dated 10.12.2021, wherein in paras 17 to 25, the co-ordinate bench has decided the similar issue in favour of the assessee. The case of the assessee is also squarely covered by the decision of the co-ordinate bench in case of ACIT Vs. Sri Dipti Ranjan Patnaik, Rourkela in ITA No. 229/CTK/2023 vide order dated 17.10.2023, wherein the co-ordinate Bench has decided the issue in favour of the assessee by upholding the order of ld. CIT (A) and dismissed the appeal of the Revenue. The said order has been extracted above. We, therefore, respectfully following the same uphold the order of ld CIT(A) and dismiss the ground no. 7 of the revenue appeal.

A.Y. 2010-11

ITA No. 181/CTK/2020

7. The issues raised in this appeal is similar to one as decided by us in ITA No. 179/CTK/2020 for A.Y. 2009-10. Accordingly, our decision would, mutatis mutandis, apply to this appeal of assessee in ITA No.

181/CTK/2020. Hence, the appeal of Revenue in ITA No. 181/CTK/2020 is dismissed.

A.Ys. 2009-10 &2010-11

ITA No. 180 & 182/CTK/2020

8. As we have already deleted the quantum appeal upholding the appellate order passed by the ld CIT(A) by dismissing the revenue's appeal for both the assessment years, Consequently the penalty appeals become infructuous and hence are dismissed.

9. In the result, all the four appeals of the Revenue are dismissed.

Order pronounced in the open court on 11.12.2025.

Sd/-	Sd/-
(DUVVURU RL REDDY)	(RAJESH KUMAR)
(VICE PRESIDENT)	(ACCOUNTANT MEMBER)

Kolkata, Dated: 11.12.2025
Sudip Sarkar, Sr.PS
Copy of the Order forwarded to:

1. The Appellant
2. The Respondent
3. CIT
4. DR, ITAT,
5. Guard file.

BY ORDER,

True Copy//

Sr. Private Secretary/
Asst. Registrar
Income Tax Appellate Tribunal, Cuttack