IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "C", BANGALORE

Before Shri Chandra Poojari, AM & Shri George George K, JM

ITA No.3317/Bang/2018: Asst.Year 2013-2014
ITA No.3318/Bang/2018: Asst.Year 2014-2015
ITA No.3319/Bang/2018: Asst.Year 2015-2016

M/s.Gogga Gurusanthaiah and Brothers, Mine Owners, P.B.No.4, Nehru Co-operative Colony Hosapete – 583 201. **PAN : AACFG6895M.**	v.	The Asst.Commissioner of Income-tax, Circle – 1 Bellary – 583 103.
(Appellant)		(Respondent)

Appellant by : Sri.Sivaprasad Reddy, Advocate
Respondent by :Sri.Pradeep Kumar, CIT-DR

Date of Hearing : 27.07.2021		**Date of Pronouncement : 28.07.2021**

O R D E R

Per Bench :

These appeals at the instance of the assessee are directed against 3 orders of the CIT(A), all dated 25.10.2018. The relevant assessment years are 2013-2014, 2014-2015 and 2015-2016.

2. Some common issues are raised in these appeals, hence, they were heard together and are being disposed of by this consolidated order. The details of the issue arising in each of the assessment years, the relevant grounds, etc. are given in a tabulated form below:-

Issue No.	Issue	Ground Nos.	Assessment Year		
			2013-2014	2014-2015	2015-2016
1.	SPV deduction 10% / 15%	2.1 to 2.4	Issue raised	Issue raised	Issue raised
2.	Compensation for mining and dumping sub-grade material	3.1 to 3.3	Issue raised	Issue raised	N.A.

	outside the leased area.				
3.	Sales accounted in the following year)AY 2014-15) but added as income of the year.	4.1 to 4.2	Issue raised	N.A.	N.A.
4.	Difference in receipts as per 26AS treated as unaccounted receipts	5	Issue raised	N.A.	N.A.
5.	Contribution to the Deputy Commissioner Government of Karnataka for Hampi Utsav	3	N.A.	N.A.	Issue raised.

We shall adjudicate the appeal issue-wise as under.

3. Sale proceeds at 15% retained through SPV (Asst.Years 2013-2014, 2014-2015 and 2015-2016)

3.1 The assessee is into the business of mining. All the area minted by the assessee was categorized as per the Central Empowering Committee (CEC) / order of the Hon'ble Supreme Court in B Category. As per the Supreme Court order, all the mining activities in the State of Karnataka was stopped vide judgment dated 29.07.2011 in WP No.562 of 2009 dated 29.07.2011. Later CEC was constituted under the direction and supervision of the Hon'ble Supreme Court, which took control of mining, processing, production and sale of iron ore. The CEC sold the iron ore through e-Auction and retained 10% / 15% of the sale proceeds and remitted to a separate account with the Special Purpose Vehicle (SPV) under the Chairmanship of the Chief Secretary of Government of Karnataka. The CEC released the balance amount of 85% of sale proceeds to the assessee. The amount so withheld and retained was to be used exclusively for socio-economic development of the area / local population, infrastructure

development, conservation and protection of forest, etc. The assessee contended that the amount retained by CEC at 15% of the sale proceeds was an allowable expenditure in computing the total income in the manner laid down in the Income-tax Act. It was further contended that the amount retained by CEC at 15% of sale proceeds was not for violation of any law in force or towards any penalty and accordingly not covered by *Explanation 1* of section 37 of the I.T.Act. The contentions of the assessee was rejected by the Assessing Officer and 15% retained by CEC was not allowed as a deduction. The view taken by the A.O. was confirmed by the CIT(A).

3.2 Aggrieved, the assessee has filed these appeals before the Tribunal. The learned Counsel for the assessee submitted that the issue of allowability of 15% of sale proceeds remitted to the SPV is decided in favour of the assessee by the Co-ordinate Bench order of the Tribunal in the following cases:-

(i) M/s.Veerabhadrappa Sangappa & Co. in ITA No.1054/Bang/2019 order dated 08.12.2020.

(ii) Sri B.Rudragouda in ITA Nos.314 & 315/Bang/20 order dated 15.04.2021 for the assessment years 2015-16 and 2016-17.

3.3 The learned Departmental Representative filed a brief written submission, supporting the order of the A.O. and the CIT(A).

3.4 We have heard rival submission and perused the material on record. The Co-ordinate Bench order of the Tribunal in the case of M/s.Veerabhadrappa Sangappa & Co.

(supra), on identical facts had allowed deduction of 15% of sale proceeds in respect of B mines retained towards SPV as an allowable business expenditure. The relevant finding of the Tribunal in the case of M/s.Veerabhadrappa Sangappa & Co., reads as follow:-

"7. Ground No.2.3.1-2.3.9, 2.3.12-2.3.15 have been raised in respect of addition on account of Category A-10% of confiscated sale proceeds utilised towards SPV amounting to Rs.13,10,94,826/- and addition on account of Category B-15% of confiscated sale proceeds, utilised towards SPV, amounting to Rs.3,18,41,886/-. Assessee debited Rs.16,29,36,712/- to profit and loss account, under the head SPV charges.

Facts relating to this issue are as under:

7.1. Hon'ble Supreme Court in case of Samaj Parivartana Samudaya & Ors. Vs. State of Karanataka & Ors. (supra), approved the recommendation of CEC for deducting and retaining part of sale proceeds for purpose of taking various ameliorative and mitigative measures. CEC recommended retaining of 10% of sale proceeds. Hon'ble Supreme Court accepted 10% for Category "A" mines and increased deduction to 15% for Category "B" mines. These amounts were directed by Hon'ble Supreme Court to be used to implement R & R plans, for taking ameliorative and mitigative measures. During the year under consideration, amount deducted from sale proceeds as per Ld.AO was Rs.16,29,36,712/- and Rs.17,05,60,822/- as per the assessee. However the fact remains that the amount of Rs.16,29,36,712/- has been included in aggregate amount of Rs.77,71,82,153/-, which was claimed as expenditure in the original return of income and excluded from the sales revenue in the revised return of income contending that the same is diversion by overriding title. Hence, what was claimed/excluded in the returns of income and what was assessed by Ld.AO was Rs.16,29,36,712/- as per the assessment order.

7.2. Ld.AO called for information/detail in respect of the claim of deduction of Rs.16,29,36,712/-. Assessee vide letter dated 21/01/2016 filed detailed submissions. Ld.AO after considering the submissions held as under:

"4.2.b. The assessee's Consolidated submissions on deductions made by the monitoring committee mentioned in above table 3, 4, 5 and 6 in para (4) have been carefully perused and the same are not found acceptable for following reasons detailed below. However, the disallowance on the above deduction will be dealt with separately. In respect of explanation for allowability of expenditure claimed under the head SPV charges of Rs.16,29,36,712/-(Rs.131094826 + Rs.3018041886), the submissions are not acceptable for the following reasons. Entire sale proceeds as per the E auction bid sheets/invoices has to be assessed as trading receipts. The amount retained by the CEC/monitoring committee, as per the directions of the Supreme Court on behalf of the assessee, for SPV purposes is on account of damages and loss caused to the environment by contravention of loss. The said amount cannot be allowed as deduction out of

sale proceeds even after accrual of such liability which is being compensation and penalty in nature for contravention of loss. As observed by the Supreme Court, category "A" mines comprises of mines where there is marginal illegality as found by CEC.

4.2.c. The following observations were made by Honorable Supreme Court in its order dated 18/0412013, in the case of WRIT PETITION (CIVIL) NO. 562 of 2009 Samaj Parivartana Samudaya & Ors .... Petitioner (s) Versus State of Karanataka & Ors. . .. Respondent(s) WITH SLP (C) Nos.7366-7367 of 2010, SLP (C) Nos.32690-32691 of 2010, WP (CrI.) No.66 of 2010, SLP (C) Nos.17064-17065 of 2010, SLP (C) No (CC No.16829 of 2010), SLP (C)No ……(CC No. 16830 of 2010), WP (C) No.411 of 2010, SLP (C) No.353 of 2011 and WP (C) No.76 of2012: "5. We may now proceed to notice the relevant part of the two Reports of the CEC dated 3.2.2012 and 13.3.2012, as referred to herein above. "IV' CLASSIFICATION OF LEASES IN DIFFERENT CATEGORIES ON THE BASIS OF THE LEVEL OF ILLEGALITIES FOUND.

27. The CEC, based on the extent of illegal mining found by the Joint Team and as appropriately modified by the CEC in its Proceeding dated 25th January, 2012 and after considering the other relevant information has classified the mining leases into three categories namely "Category-A ", "Category-B" and "Category-C".

28. The "Category-A" comprises of (a) working leases wherein no illegality/marginal illegality have been found and (b) nonworking leases wherein no marginal/illegalities have been found. The number of such leases comes to 21 & 24 respectively.

29. "Category-B" comprises of (a) mining leases wherein illegal mining by way of (i) mining pits outside the sanctioned lease areas have been found to be up to 10% of the lease areas and/ or (ii) over burden/waste dumps, outside the sanctioned lease areas have been found to be up to 15% of the lease areas and (b) leases falling on interstate boundary between Karnataka and Andhra Pradesh and for which survey sketches have not been finalized. The numbers of such leases in "Category-B" comes to 72.

30. The "Category-C" comprises of leases wherein (i) the illegal mining by way of (a) mining pits outside the sanctioned lease area have been found to be more than 10% of the lease area and/or (b) over burden/waste dumps outside the sanctioned lease areas have been found to be more than 15% of the lease areas and/or (ii) the leases found to be involved in flagrant violation of the Forest (Conservation) Act and/or found to be involved in illegal mining in other lease areas. The number of such leases comes to 49. RECOMMENDATIONS (as modified by CEC by its Report dated 13.3.2012. Items 1 to IV of the Report dated 3.2.2012 stood replaced by Items A to I of the Report dated 13.3.2012 which are reproduced below along with Items V to XIV of the initial Report dated 3.2.2012). (E) the sale of the iron ore should continue to be through e-auction and .the same should be conducted by the Monitoring Committee constituted by this Hon'ble Court. However, the quantity to be put up for e-auction, its grade, lot size, its base / floor price and the period of delivery will be decided / provided by the respective lease holders. The Monitoring Committee may permit the lease holders to put up for e-auction the quantities of the iron ore planned to be produced in subsequent months. The system of sale through the Monitoring

Committee may be reviewed after say two year; (F) 90% of the sale price (excluding the royalty and the applicable taxes received during the e-auction may be paid by the buyer directly to the respective lease holders and the balance 10% may be deposited with the Monitoring Committee along with the royalty, FDT and other applicable Taxes / charges; (V) In respect of the mining leases falling in "CATEGORY-B" (details given at Annexure-R-10 to this Report) it is recommended that: . ii) for carrying out the illegal mining outside the lease area, exemplary compensation/penalty may be imposed on the lessee. It is recommended that: a) For illegal mining by way of mining pits outside the leases area, as found by the Joint Team, the compensation/ penalty may be imposed at the rate of Rs. 5.00 Crore (Rs.FiveCrore only) for per ha. of the area found by the Joint Team to be under illegal mining pit; and b) For illegal mining by way of over burden dump(s) road, office, etc. outside the sanctioned lease area, the compensation/penalty may be imposed @ is. 1.00 crores (Rs. One Crores only) for per ha. of the area found to be under illegal over burden dump etc. v) Out of the sale proceeds of the existing stock of the mining leases, after deducting: a) The penalty/compensation payable; b) Estimated cost of the implementation of the R& R Plan; and c) 10% of the sale proceeds to be retained by the Monitoring Committee for being transferred to the SPV d) The balance amount, if any, may be allowed to be disbursed to the respective lessees. (VI) In respect of the mining leases falling in "CATEGORY-C" (details are given at annexure-R-11 to this Report) it is recommended that (a) such leases should be directed to be cancelled / determined on account of these leases having been found to be involved insubstantial illegal mining outside the sanctioned lease areas (b) the entire sale proceeds of the existing stock of the iron ore of these leases should be retained by the Monitoring Committee and (c) the implementation of the R&R Plan should be at the cost of the lessee; (IX) A Special Purpose Vehicle (SPV) under the Chairmanship of Chief Secretary, Government Karnataka and with the senior officer of the concerned Departments of the State Government as Members may be directed to be set up for the purpose of taking various ameliorative and mitigative measures in Districts Bellary, Chitradurga and Tumkur. The additional resources mobilized by (a) allotment / assignment of the cancelled mining leases as well as the mining leases belonging to MIs. MML, (b) the amount of the penalty/compensation received! receivable from the defaulting lessee, (c) the amount received/receivable by the Monitoring Committee from the mining leases falling in "Category-A" and 'Category-B", (d) amount received! receivable from the sale proceeds of the confiscated material etc., may be directed to be transferred to the SPV and used exclusively for the socio-economic development of the areal local population, infrastructure development, conservation and protection of forest, developing common facilities for transportation of iron ore (such as maintenance and widening of existing road, construction of alternate road, conveyor belt, railway siding and improving communication system,. (X) Out of the 20% of sale proceeds retained by the Monitoring Committee in respect of the cleared mining leases falling in "Category-A ", 10% of the sale proceeds may be transferred to the SPV while the balance 10% of the sale proceeds may be reimbursed to the respective lessees. In respect of the mining leases falling in "Category-B", after deducting the penalty/compensation, the estimated cost of the implementation of the R&R Plan, and IO% of the sale proceeds to be retained for being transferred to the SPV, the balance amount, if any, may be reimbursed to the respective lessees; (XIII) the confiscated iron ore pertaining to the cancelled stock yards will be sold by the Monitoring Committee and the sale proceeds will be retained by the Monitoring Committee,' ... (XIV) the Monitoring Committee may be authorized to utilize up

to 25% of the interest received by it for engaging reputed agencies for the monitoring of the various parameters relating to mining. " ... III. In addition to the above, each leaseholder must pay a sum equivalent to 15% of the sale proceeds of its iron ore sold through the Monitoring Committee as per the earlier orders of this Court. In this regard, it may be stated that though the amicus suggests the payment @ 10% of the sale proceeds, having regard to the overall facts and circumstances of the case, we have enhanced this payment to 15% of the sale proceeds. Here it needs to be clarified that the CEC/Monitoring Committee is holding the sale proceeds of the iron ores of the lease holders, including the 63 leaseholds' being the subject of this order. In case, the money held by the CEC/Monitoring Committee on the account of any leaseholder is sufficient to cover the payments under the aforesaid three heads, the leaseholder may, in writing, authorize. the CEC to deduct from the sale proceeds on its account the amounts under the aforesaid three heads and an undertaking to make payment of any additional amount as compensatory payment."

4.2.d. As could be seen from the above observations of the Hon'ble Supreme Court the mine owners were placed in different category based on the illegal or marginal illegal mining done by them. The CEC was established to monitor the e-auction sale of the Iron-ore belonging to the mine-owners. The CEC is authorized to retain the portion of sale proceeds of the Ores collected from successful bidders. Further, the amount retained out of sale proceeds by the CEC has to be adjusted against penalty and compensation for illegal mining depending on Category of the mine owners i.e., 10% or 15% of the amount has to be deposited under Spy "for the purpose of taking various ameliorative and mitigative measures in Districts of Bellary, Chitradurga and Tumkur"

4.2.e. The amount to be retained out of sale proceeds after e-auction on behalf of the assessee against its penal liabilities is a part of sale proceeds and hence, the said amount is liable to be assessed to tax as trading receipts during the financial year of e-auction in view of the mercantile method of accounting followed by the assessee. In other words, the retention money is a part of the sale. proceeds and it ought to be recognized as a revenue. There are only two recognized methods of accounting namely the cash method of accounting and the mercantile method of accounting. In mercantile method of accounting, entries are posted in the books of accounts on the date of transaction when the rights accrue or liabilities are incurred, irrespective of the date of payment. The right to receive the said retained amount has accrued to the assessee and it cannot be diverted on the plea contrary to the accounting practice, since the assessee firm is following accrual method of accounting, a part of receipt cannot be taken on piecemeal receipt basis. Hence, the assessee's contention that, the said amount do not even constitute the income of the assessee, cannot be accepted.

4.2.f. The part of the sale proceeds to be retained by the CEC / Monitoring Committee for SPV and for adjusting penalty and other liabilities, is nothing but appropriation of the profit of the assessee. As per doubly entry system of accounting, the assessee should have accounted the entire sales consideration in its P & L Account and balance of sale amount should have been shown as receivable from Government. The balance of the sale amount will be reflecting as payable to seller-assessee in the accounts of the Government.

4.2.g. Further, the said SPV is Special Purpose Vehicle for social economic development of the mining area which is nothing but relating to corporate social

responsibility only. The deduction claimed towards SPY vis-a-vis against the amount retained by the Monitoring Committee is not allowable under section 37(1) of the Income Tax Act, 1961 as it was not incurred by the assessee wholly and exclusively for the purpose of business. The said part of the proceeds are retained to meet the penal and other liabilities for contravention of law and therefore, the said amount retained by the CEC/Monitoring Committee cannot be allowed as deduction in view of the specific Explanation to section 37(1) of the Act.

4.2.h. The Hon'ble Supreme Court thought on the lines of 'Corporate Social Responsibility' much before its actual introduction in the Act and wanted to improve the lives of people & environment affected by the mining activities. On this line of thought, the Apex Court wanted the CEC/MC to collect certain amount of profit from the beneficiaries of mining lease and use the same exclusively for the socio-economic development of the area / local population, infrastructure development, conservation and protection of forest, developing common facilities for transportation of iron ore (such as maintenance and widening of existing road, construction of alternate road, conveyor belt, railway siding and improving communication system, etc.), From this, it is evident that the amount recovered towards SPV is nothing but an appropriation of profits earned by the mine owners and cannot be said to have incurred for the purpose of business or earning the profits. Hence, the assessee's claim of deduction towards SPY Charges cannot be allowed. Accordingly, the entire sale proceeds are assessed as trading receipts on accrual basis keeping in view the mercantile method of accounting followed by the assessee and no deduction is allowed in respect of amount retained for SPV purpose keeping in view the provisions of section 37 of the Act.

4.2.i. Reliance is placed on the decision of the Hon'ble Supreme Court in the case of CIT Vs K.C.P Limited (SC) 245ITR 421 Dated: 0910812000. Wherein, "the assessee transferred the excess realization to fund in 1997. It was held that the excess amount was realized in the ordinary course of its business activity as price of sugar sold by the assessee. Accordingly, the Hon'ble Supreme Court has rightly held that excess collected is income in the year of collection even if it is retained in separate a/c and subsequently transferred to Sugar Equalization Fund of the Government."

4.2.j. Further, Reliance may be placed on the following decisions wherein, it is held that the transaction cannot be split in to Mercantile and Cash method of accounting - G. Padmanabha Chattiyar & Sons Vs CIT 182 ITR 1,5 (Mad.), - Reform Flour Mills Pvt. Ltd., Vs CIT 132 ITR 184, 196 (Cal), - CIT Vs A Krishnaswamy Mudaliar & Others 53 ITR 122 (SC).

4.2.k. In view of above facts brought on record, the amount of Rs.16,29,36,712/- (Rs.13,10,94,826+Rs.3,18,41,886) claimed as expenditure under SPY Charges and debited to P & L A/c is disallowed and added back to the returned income and brought to tax.

Aggrieved by addition made by Ld.AO, assessee preferred appeal before Ld.CIT (A).

7.3. Ld.CIT(A) observed and held as under:

"4.4) The facts of the case, submissions made by the assessee and the assessment order passed by the AO has been carefully considered. In connection with the illegal mining activities in Karnataka, the Hon'ble Supreme Court has established a Monitoring Committee called Central Empowered Committee (CEC) to monitor the e-auction sales of the iron ore and other related work entrusted to it. In this regard, the Hon'ble Apex Court has passed various judgments in the case of Samaj Parivarthana Samudaya &others Vs. State of Karnataka & Others, on various dates in Writ Petition No. 562 of 2009 along with SLP No. 7366-7367. The Hon'ble Supreme Court in its order dated 18.04.2013 in the same case of Samaj Parivarthana Samudaya & Others V/s. State of Karnataka & Others has pronounced its important judgment on illegal mining in the state of Karnataka and accordingly, a Central Empowered Committee (CEC)has identified three category of mining cases, Category - A, B & C. The assessee falls under the Category-B mines, the issues pertaining to category 'B' mines is discussed. B-Category mines comprises (a) mining leases wherein illegal mining by way of (i) mining pits outside the sanctioned lease areas have been found to be upto 10% of the lease areas and/or (ii) over burden/waste dumps outside the sanctioned lease areas have been found to be upto 15% of the lease areas and (b) leases falling on interstate boundary between Karnataka and Andhra Pradesh and for which survey sketches have not been finalized.

4.5) Further, the sale of Iron Ore should be through e-auction and the same should be conducted by Monitoring Committee constituted by the CEC and the sale proceeds are to be retained / disbursed to mine owner based on certain conditions.

4.6) The Hon'ble Apex Court in its order dated 23.09.2011 has described the modalities for the sale of iron ore and has clearly mentioned the procedure to be adopted for e-auction of iron ore and procedure for accounting of sale proceeds. The account of sale proceeds is being maintained by the Government under double entry system of accounting which is duly being monitored by CEC.

4.7) The Hon'ble Supreme Court of India in SLP No. 7366 to 7361/2010 dated 29.07.2011 had banned the activity of mining of Iron Ore in the districts of Bellary, Tumkur and Chitradurga of Karnataka districts. In compliance with the orders of theHon'ble Supreme Court of India, the mining activity had been suspended by the appellant. It may be further stated that the Iron Ore held in the stock was not permitted to be sold by the appellant. However, subsequently, i.e., on 03.09.2012, the Hon'ble Supreme Court had lifted the ban and permission was given for resumption of mining operation in category B' mines.

4.8) The assessee is in Category 'B' where illegal mining was found to have been done in the manner described above. In respect of category "B" mines the Supreme Court ordered that compensation/ penalty has to be imposed on the lessee and accordingly it was observed by the court as under :

"(V) In respect of the mining leases falling in "CATEGORY-B" (details given at Annexure R-10 to this Report) it is recommended that : .....(ii) for carrying out the illegal mines out the lease area, exemplary compensation/penalty may be imposed on the lessee. It is recommended that: a) For illegal mining by way of mining pits outside the leases area, as found by Joint Team, the compensation/penalty may be imposed at the rate of Rs. 5.00 Crore (Rs. Five

Crore only) for per ha. Of the area found by the Joint Team to be under illegal mining pit; and b) For illegal mining by way of over burden dump(s) road, office, etc. outside the sanctioned lease area, the compensation/penalty may be imposed @Rs. 1.00 crores (Rs. One Crore only) for per ha. Of the area found to be under illegal over burden dump etc. ..... v) Out of the sale proceeds of the existing stock of the mining leases, after deducting : a) The penalty/ compensation payable; b) Estimated cost of the implementation of the R&R Plan; and c) 10% of the sale proceeds to be retained by the Monitoring Committee for being transferred to the SPV d) The balance amount, if any, may be allowed to be disburses to the respective lessees.

4.9) A perusal of the directions of the Supreme Court shows that the part proceeds are retained to meet the penal and other liabilities for contravention of law and therefore the said amount was retained by the CEC/Monitoring Committee. The Hon'ble Supreme Court wanted the CEC/MC to collect certain amount of profit from the beneficiaries of mining lease and use the same exclusively for the socio-economic development of the area / local population, infrastructure development, conservation and protection of forest, developing common facilities for transportation of iron ore etc. Hence, it is evident that the amount recovered towards SPV is nothing but appropriation of profits earned by the mine owners and cannot be said to have incurred for the purpose of business or earning the profits.

4.10) In view of the above, the AO was correct in adding the amount of Rs.16,29,36,712/- under SPV Charges. Further, the entire sale proceeds are assessed as trading receipts on accrual basis keeping in view the mercantile method of accounting followed by the assessee and no deduction is allowed in respect of the amount retained for SPV for the purpose in view of the provisions of section 37 of the Act. This ground fails.

7.4. Aggrieved by observations of Ld.CIT(A), assessee is in appeal before us now. Before us, Ld.Counsel submitted that, amount retained by CEC/MC towards SPV is nothing but diversion of income by overriding title for following reasons: i. MC to control of existing stock; ii. MC received sale proceeds directly from buyers; iii. MC was responsible for depositing statutory levies like royalty, taxes, fees, e-auction service fee etc on behalf of assessee.

7.5. On the above facts, Ld.Counsel primarily contended that, such sale proceeds since were retained by MC as per directions of Page 80 of 138 ITA No. 1054/Bang/2019 A.Y:2013-14 Hon'ble Supreme Court in case of Samaj Parivartana Samudaya & Ors. Vs. State of Karanataka & Ors. (supra), ought to have been regarded as having been diverted at source by overriding title towards SPV for R & R plans of mining areas. Ld.Counsel placed reliance on following decisions in support: (a) CIT vs. SitaldasTirathdas (1961)(41 ITR 367)(SC) (b) Motilal Chhadami Lal Jain vs. CIT (1991)(190 ITR 1)(SC) (c) CIT vs. Sunil J Kinariwala (2003)(259 ITR 10)(SC) (d) CIT vs. Karnataka State Agricultural Produce Processing & Export Corporation Ltd (2015)(377 ITR 496)(Kar) (e) CIT vs. United Breweries Ltd (2010)(321 ITR 546)(Kar) (f) CIT vs. A Tosh & Sons (P) Ltd (1987)(166 ITR 867)(Kol) (g) Shroff Eye Centre vs. ACIT (h) Sri T Jayachandran vs. DCIT (2012-TIOL-977-HC-MAD-IT) (i) FR Sabu P Thomas vs. UOI (2015-TIOL-514-HC-Kerala-IT) (j) A F Ferguson & Co vs. ACIT (2011-TIOL-604-ITAT-Mum) (k) CIT vs. PandavapuraSahakaraSakkareKarkhane Ltd

(1988)(174 ITR 475)(Kar) (l) CIT vs. PandavapuraSahakaraSakkareKarkhane Ltd (198 ITR 690 (Kar))

7.6. Ld.Councel submitted that the amount retained by MC for contribution to SPV is not taxable in the hands of the assessee, as the same has been diverted at source by overriding title as per the orders of Hon'ble Supreme Court. He submitted that there is no principal and agent relationship between the assessee and MC. Hence it cannot be said that the MC was acting on behalf of the assessee. In fact, the MC is acting as per the directions given by Hon'ble Supreme Court. It was submitted that assessee did not have absolute command, control and right of disposition of this receipt. Ld.Counsel thus submitted that this receipt has been diverted at source and cannot constitute income of the assessee.

7.7. Alternatively, he also proposed that, such receipts could be considered as business loss under Section 28 of the Act, since such proceeds were utilised by SPV towards reclamation and rehabilitation of mining areas, as per direction of Hon'ble Supreme Court. Ld.Counsel placed reliance on following decisions in support: (a) Dr. T.A. Quereshi vs. CIT (2006)(287 ITR 547)(SC) (b) CIT vs. S.N.A.S.A. Annamalai Chettiar (1972)(86 ITR 607)(SC) (c) CIT vs. S.C.Kothari (1971)(82 ITR 794)(SC) (d) CIT vs. Piara Singh (1980)(124 ITR 40)(SC) (e) CIT vs. T.C. Reddy (2013)(356 ITR 516)(AP) (f) RamachandarShivnarayan vs. CIT (1978)(111 ITR 263)(SC) (g) Bipinchand K Bhatia vs. DCIT (Tax appeal No.107 of 2004 dated 16.10.2014) (h) BadridasDaga vs. CIT (1958)(34 ITR 10)(SC) (i) Poona Electric Supply Co Ltd vs. CIT (1965)(57 ITR 521)(SC)

7.7.1. Ld.Counsel, thus, submitted that the amount deducted by MC may also be taken as business loss and hence the same is deductible u/s.28 of the Act. Ld.Counsel placed reliance on decision of Hon'ble Supreme Court in the case of Dr.T.A.Quereshi vs. CIT (Supra) and also the decision rendered in the case of CIT vs. S C Kothari (1971)(82 ITR 794)(SC).

7.8. Without prejudice to the above arguments, Ld.Counsel proposed that, such proceeds utilised by SPV, should be allowed as expenses under section 37(1) of the Act. Ld.Counsel submitted that amount deducted by MC is meant to be used for socio economic development and hence Explanation 1 to Section 37 will not apply. It was submitted that Explanation 1 to Section 37 would cover only such payments which is an offence or which is prohibited by law. He placed reliance on following decision in support: (a) Jai Surgicals Ltd vs. ACIT (2014)(33 ITR (Trib) 86)(Del) (b) Prakash Cotton Mills (P) Ltd vs. CIT (1993)(201 ITR 684)(SC) (c) M P Gupta vs. ITO (2014-TIOL-957-ITAT-Mum)

7.8.1. Ld.Counsel submitted that Hon'ble Supreme Court directed MC to deduct such amount in order to resume the mining activity. Hence it was incurred wholly and exclusively for the purpose of business and hence the same is allowable u/s.37 of the Act. Ld.Counsel, inter alia, placed reliance on following decisions:- (a) ACIT vs. Essel Mining &Inds. Ltd (2016-TIOL-371-ITAT-Kol) (b) NMDC Limited vs. ACIT (ITA No.1823 and 182/Hyd/2017) (c) Obulapuram Mining Company (P) Ltd (160 ITD 224)(Bang)

7.8.2. He submitted that deduction made by MC towards contribution to SPV for the purpose of restoration of environment is based on the principle, "Polluter pays principle" held by Hon'ble Clacutta High Court in the case of Shyam Sel

Ltd vs. DCIT reported in (2016) 72 taxmann.com 105. Ld.Counsel submitted that, Ld.AO was not justified in invoking Explanation 1 to sec. 37(1), which relates to the expenses incurred towards infraction of law. He submitted that the deduction was made by MC as per the directions of Hon'ble Supreme Court and the same cannot be equated with infraction of law. He submitted that MC deducted 10% of sale proceeds from Category "A" mine (Lease No.2296), where no illegality was found. He submitted that, the amount so deducted was contributed to the SPV for taking ameliorative measures and hence it is in the nature of compensation and not penal in nature. Further Explanation 1 shall apply only if the purpose of expenditure is for an offence or prohibited by law. Hence, Explanation 1 to sec.37 is not applicable to this payment. Ld.Counsel relied on following decisions in this regard:- (a) ITO vs. Reliance Share and Stock Brokers Ltd (ITA No.274/Mum/2013) (b) CIT vs. Ajanta Pharma Ltd (2017)(85 taxmann.com 252)(Bom) (c) CIT vs. Regalia Apparels (P) Ltd (2013)(352 ITR 71)(Bom) (d) CIT vs. Vikas Chemicals (2015)(53 taxmann.com 171)(Delhi)

7.8.3. He submitted that Hon'ble Hyderabad Tribunal examined identical issue in the case of NMDC Ltd (supra) and the deductions made by MC have been allowed as business expenditure.

7.9. Ld.CIT.DR supported orders passed by authorities below. According to Ld.CIT DR, Hon'ble Supreme Court in case of Samaj Parivartana Samudaya & Ors. Vs. State of Karanataka & Ors. (supra), directed assessee to contribute 10%/15% under category 'A'/'B' towards SPV account. Referring to paragraph 10 for Catagory 'A' and paragraph 11(III) for Category 'B' at page 171-173 of decision by Hon'ble Supreme Court (supra), Ld.CIT.DR submitted that, assessee was also directed to give authorisation letter to CEC/MC for contributing such sum of sale proceeds equivalent to 10% and 15% of its iron ore sold through MC, towards SPV account, which would be utilised for rehabilitation and reclamation activities. It was submitted that, subject to such contributions, assessee would be granted permission to resume its business of extracting of iron ore. He thus submitted that, such payment therefore cannot be treated as diversion of income, but has to be taxed in the hands of assessee. Ld.CIT.DR submitted that decision of Hon'ble Supreme Court, is clear regarding categorization that is drawn based on percentage of violations carried by mining lessees. It was thus submitted that, payments have been attributed for infraction of law committed by assessee.

7.9.1. Ld.CIT.DR once again emphasised on true nature of obligation attached to the alleged sum, which is the factor, to decide whether, such sum has been diverted before it reached assessee as held by Hon'ble Supreme Court in case of CIT vs Sitaldas Tirathdas (supra). Ld.CIT.DR. 7.10. We have perused submissions advanced by both sides in light of records placed before us.

7.10.1. Ld.Counsel again raised 3 prepositions before us in respect of the contribution made to SPV account from the sale proceeds. • Primarily he contended that there is diversion of income by overriding title to SPV account, and therefore such amount is not liable to tax in the hands of assessee. • Alternatively he submitted that the said sum may be treated as loss under section 28 while computing profit and loss under the head income from business and profession. Or • He submitted that it may be treated as an expenditure incurred by assessee for purposes of business.

7.10.2. On the contrary, Ld.CIT DR submitted that it is an application of income and therefore has to be disallowed in the hands of assessee. He submitted that Ld.AO in support of disallowing the claim of expenditure relied on following decisions: Page 85 of 138 ITA No. 1054/Bang/2019 A.Y:2013-14 • CIT vs.KCP Ltd. reported in 245 ITR 421(SC) • G.Padnabha Chettiyar & Sons vs.CIT reported in 182 ITR 1(Mad) • ReformFlour Mills Pvt.Ltd Vs.CIT reported in 132 ITR 184,196(Cal) • CIT vs.A.Krishnaswamy udaliar & Ors reported in 53 ITR 122(SC) We note that these decisions are on the accrual of income, which has been considered by us in forgoing paras. We have already held that entire income accrued to assesee while deciding grounds 2.1 &2.2. In the issue of contribution towards SPV, one has to consider its correct nature. In our opinion these decisions do not assist revenue in any manner.

7.10.3. On careful reading of decision of Hon'ble Supreme Court in case of Samaj Parivartana Samudaya & Ors. Vs. State of Karanataka & Ors. (supra), it is clear that 10%/15% contribution to SPV account was guarantee payment for implementing of R & R plan, which would be deducted from sale proceeds. This was one of the conditions for resuming mining operations under categories 'A' and 'B' respectively.

7.10.4. With this background, we once again refer to and rely on observations by Hon'ble Supreme Court in case of CIT vs Sitaldas Tirathdas (supra). Hon'ble Supreme Court laying down following principal referred to various rulings that illustrated aspects of diversion of income by overriding title. "These are the cases which have considered the problem from various angles. Some of them appear to have applied the principle correctly and some, not. But we do not propose to examine the correctness of the decisions in the light of the facts in them. In our opinion, the true test is whether the amount sought to be deducted, in truth, never reached the assessee as its income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to pay out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee. Whereby the obligation income is diverted before it reaches the assessee, it is deductible but where the income is required to be applied to discharge an obligation after such income reaches the assessee the same consequence in law does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another portion of one's own income which has been received and essence applied. The first is a case in which the income never reaches the assessee, who, even if he were to collect it, does so, not as part of his income but for and on behalf of the person to whom it was payable." Emphasis Supplied

7.10.5. Applying, thin line of difference interpreted by Hon'ble Supreme Court to present facts, we are of the opinion that, contribution to SPV account, cannot be considered to be diversion of income. This is because, we have already held while deciding ground 2.1 and 2.2 hereinabove, that entire sale proceeds accrued to assessee, and it is only due to direction of Hon'ble Supreme Court that such amount was contributed to SPV account, for which assessee was to authorise CEC/MC in relevant paragraph 11(III) refer to and relied by Ld.CIT DR.

7.10.6. In the present facts of the case, we note that 10%/15% of sale proceeds was payable to SPV account, after it accrued to assessee, and the fact that, assessee was obliged to part with such portion of income, by virtue of directions of Hon'ble Supreme Court in case of Samaj Parivartana Samudaya & Ors. Vs. State of Karanataka & Ors. (supra), as a precondition to resume mining operations under Category 'A and 'B'. At this juncture we also emphasise that, but for the intervention by Hon'ble Supreme Court, assessee would not have contributed 10%/15% to SPV account for implementation of reclamation and rehabilitation scheme on its own, as there was no statutory requirement to do so under relevant statutes that regulate mining activities.

7.10.7. In our view contributing 10%/15% to SPV account on account of Category 'A'/ 'B' respectively, would be application of income, and therefore should be considered as expenditure incurred for carrying out its business activity. This we hold so, for the reason that, contributions determined by Hon'ble Supreme Court are in the nature of guarantee payment necessary for resuming mining activity. We also note that, alleged sum in these grounds are for implementation of R&R Plans in respective sanctioned lease areas held by assessee, where illegal mining activities or which were used for illegal overburden dumps, roads, offices etc., beyond sanctioned lease area were carried out. Here, we also note that, Hon'ble Supreme Court directed CEC to refund any leftover guarantee money, after completion of implementation of R& R plan, subject to satisfaction of CEC and approval by Hon'ble Supreme Court. For this peculiar reason amount so contributed towards SPV being 10%/15% of sale proceeds, under category A/B, cannot be treated as penal in nature.

7.10.8. We note that co-ordinate Hydrabad bench of Tribunal in NMDC (supra) was the case of Category 'A' wherein it was allowed as expenditure by observing as under: Page 88 of 138 ITA No. 1054/Bang/2019 A.Y:2013-14 "2. Brief facts of the case are that the assessee-company, a Public Sector Undertaking, engaged in the business of 'mining of iron ore diamonds; and generation and sale of wind power', filed its return of income for the relevant Assessment Years 2013-14 and 2014-15 both under the normal provisions as well as u/s 115JB of the Act for the relevant AYs. During the assessment proceedings u/s 143(3) of the Act, the A.O. observed that the assessee-company is carrying out mining activity in India and particularly in Karnataka and that the Hon'ble Supreme Court of India took note of the large scale illegal mining activity carried on by various companies in Karnataka at the cost or detriment of environment and delivered their judgment on 18.04.2013 levying appropriate charges on the leaseholders. A.O. also observed that the Hon'ble Supreme Court, based on the extent of illegal mining, classified the mining leases into three categories viz., Category "A", "B" and "C" and that the assessee is falling in Category-B in respect of Donimali Complex and that in their order, the Apex Court observed that before consideration of any resumption of mining operations by Category-B leaseholders, each of the lease holder must pay compensation for the areas under illegal mining pits outside the sanctioned area at the rate of Rs. 5 Crs per hectare and for illegal overburden for at the rate of Rs. 1 Cr per hectare. Further, A.O. observed that the said direction of the Apex Court was subject to the final determination of the notional loss caused by the illegal mining and illegal use of the land; and that the Hon'ble Supreme Court had directed that each of the leaseholder should pay a sum equivalent to 15% of the sale proceeds of its iron ore sold through the Monitoring Committee. In accordance with the said direction, the assessee made payment of Rs. 337.13 Crs towards contribution for the Special Purpose Vehicle

and the sum of Rs. 68.66 Crs towards penalty / compensation for encroachment of the mining area beyond the sanctioned / leased area. The A.O. observed that the total of the above payment of Rs. 405.79 Crs was punitive in nature and accordingly sought to disallow the same by issuance of a show-cause notice. …… 4. The A.O. however did not accept the assessee's explanation and held that the assessee, being a Category-B leaseholder, has been directed to make the payment for infringement of MMDR Act and other allied laws. Therefore, he observed that the payment of Rs. 405.79 Crs is punitive in nature and brought it to tax. ……. 10. Thus, from the table reproduced above, it is seen that the assessee has been classified as Category-'A' whereas the Assessing Officer has considered the assessee as Category-'B' company. The Hon'ble Supreme Court has clearly indicated that Category-A comprises of (i) 'working leases' wherein no illegality / marginal illegality have been found and (ii) 'non-working leases' wherein no marginal / illegalities have been found, whereas Category-B comprises of (i) mining leases wherein illegal mining is 10% to 15% of the sanctioned lease areas. However, CEC had recommended that both "A" and "B" categories may be allowed to resume the mining activity subject to the payment of penalty / compensation decided by the Court. Thus, according to the assessee, the said expenditure is nothing but a payment which was required to be made without which the assessee could not have carried on the mining activities and therefore, it is a 'business expenditure'. Since the CEC had categorised the assessee as a Category-A company and the Hon'ble Supreme Court has accepted the said categorization, there would have been marginal illegalities committed by the assessee and the compensation / penalty as directed by the Hon'ble Supreme Court is only to compensate the Government for the loss of revenue from such mining or marginal illegalities and not as a penalty. Though the nomenclature given is "penalty" it is not for infraction or violation of any law to hold it to be punitive in nature, as presumed by the Assessing Officer. Learned Counsel for the Assessee placed reliance on various case law, particularly the decision of the Coordinate Bench of the ITAT, Kolkata in the case of Essel Mining & Industries Ltd vs. Addl. CIT (ITA No. 352/Kol/2011 and others, dated 20.05.2016); ACIT vs. Freegade& Co. Ltd (ITA No.934/Kol/2009, dated 05.08.2011) and also the decision of the Hon'ble Calcutta High Court in the case of ShyamSel Ltd vs. DCIT (72 Taxmann.com 105) (Cal.). On going through the said decisions, we find that the Hon'ble Calcutta High Court has considered the case of an assessee who failed to install Pollution Control Device within factory premise within prescribed time and that the assessee had to pay Rs. 12.50 lakh for compensating damage to environment and the same was recovered by State Pollution Control Board on the principle of 'polluter pays' and the A.O. had treated it as penalty and did not allow the same as business expenditure. The Hon'ble High Court had taken note of the fact that the assessee's business was not illegal and that compensation was paid because of its failure to install pollution control device within prescribed time and therefore, such payment was undoubtedly for the purpose of business and in consequence of business carried on by the assessee and was thus covered by section 37 of the Act. For coming to this conclusion, Hon'ble High Court has also considered the judgment of the Hon'ble National Green Tribunal in the case of State Pollution Control Board vs. Swastik Ispat (P.) Ltd wherein at para 38 of the judgment the Tribunal held as under:- "Being punitive is the essence of 'penalty'. It is in clear contradistinction to 'remedial' and / or 'compensatory'. 'penalty' essentially has to be for result of a default and imposed by way of punishment. On the contrary, 'compensatory' may be resulting from a default for the advantage already taken by that person and is intended to remedy or compensate the consequences of the

wrong done. For instance, if a unit has been granted conditional consent and is in default of compliance, causes pollution by polluting a river or discharging sludge, trade affluent or trade waste into the river or on open land causing pollution, which a Board has to remove essentially to control and prevent the pollution, then the amount spent by the Board, is thus, spent by encashing the bank guarantee or is adjusted thread and this exercise would fall in the realm of compensatory restoration and not a penal consequence. In gathering the meaning of the word 'penalty' in reference to a law, the context in which it is used is significant." 11. Applying this ratio to the facts of the case before us, we find from para 43 of the Hon'ble Supreme Court's order reproduced above that the condition of payment for resuming the mining activity by Categories 'A' & 'B' companies is to not to punish the companies for any violation of law but is to ensure scientific and planned exploitation of mineral resources in India. Further the Hon'ble Supreme Court had directed as under:- "(X) Out of the 20% of sale proceeds retained by the Monitoring Committee in respect of the cleared mining leases falling in "Category- A", 10% of the sale proceeds may be transferred to the SPV while the balance 10% of the sale proceeds may be reimbursed to the respective lessees. In respect of the mining leases falling in "Category-B", after deducting the penalty / compensation, the estimated cost of the implementation of the R & R Plan, and 10% of the sale proceeds to be retained for being transferred to the SPV, the balance amount, if any may be reimbursed to the respective lessees;" The fact that the compensation is proportionate to area of illegal mining outside the leased area and that the assessee has paid the proportionate compensation for mining in the areas outside the sanctioned area allotted to it and that 10% of sum is to be transferred to SPV and the balance 10% is to be reimbursed to the respective lessees, according to us, proves that it is a payment made as 'compensation' for extra mining, without which the assessee could not have resumed its activities. Therefore, we are inclined to accept the contention of the assessee that it is compensatory in nature and is a 'business expenditure' and is allowable u/s 37(1) of the Act. Thus, Grounds No.2 and 3 raised by the assessee are allowed."

7.10.9.We also notice that the co-ordinate Bangalore bench of Tribunal has also considered identical issue in the case of Ramgad Minerals & Mining Ltd (ITA No.1270 & 1271/B/2019 dated 04-11- 2020) being Category 'B', an identical addition made by Ld.AO was held to be allowable as expenditure with following observations:- "7.8.9. In present appeals, only issue raised for our consideration is in respect of 15% contribution made to SPV for assessment year 2013-14 and 2014-15; and issue in respect of R&R expenses incurred during assessment year 2013 – 14. First of all, we summarise objections of Ld.AO as in respect of SPV expenses as under:- (a) This is one of the objections of the AO that the SPV Expenses is not allowable because it is not compensation but it is penal in nature for contravention of law as observed by him in para 4.3 of the assessment order for AY:2013-14. (b) Second objection of the Ld.AO is contained in para 4.9 of the assessment order for AY:2013-14 and as per the same, this is the objection of Ld.AO that the said SPV is nothing but CSR Expenses only and therefore not allowable. (c) Third objection of Ld.AO is also contained in para 4.9 of the assessment order for AY:2013-14 and as per the same, this is the objection of the Ld.AO that the said SPV is not allowable u/s 37 (1) as it was not incurred by the assessee wholly and exclusively for the purpose of business. (d) In para 4.8 of the assessment order for AY:2013-14, Ld.AO is stating this that SPV rate is 10% in category 'A' Mines but 15% in Category 'B' Mines and this extra 5% in Category 'B' Mines is for various violations and illegal mining and even after

this observation, he finally held in the same para that whole SPV Expenses of 15% is not allowable.

7.8.10. Ld.AO observed that, these SPV were deducted pursuant to directions of Hon'ble Supreme Court (supra) by order dated 18/04/2013, wherein, it was directed that, sum so paid towards SPV charges should be exhaustively and exclusively used to undertake socio economic and infrastructure development, afforestation, soil and biodiversity conservation and for ensuring inclusive growth of the area surrounding mining leases.

7.8.11. Ld.AO further observed that these payments are nothing but appropriation of profits earned by assessee that cannot be said to have incurred for purpose of business or earning profits. Accordingly, entire amount adjusted towards SPV was disallowed by Ld.AO. Ld.AO was of opinion that entire sale proceeds as per E auction bid Sheets/invoices were to be assessed as trading receipts. The amount retained by CEC/monitoring committee as per directions of Hon'ble Supreme Court, on behalf of assessee for SPV purposes, was on account of damages and loss caused to environment due to contravention of law, and therefore, cannot be allowed as deduction out of sale proceeds, even after accrual of such liability. Ld.AO was of opinion that, even in Category 'A' mines, there was marginal illegality found by CEC, because of which 10% of contribution was attributed out of sale proceeds to the SPV.

7.8.12. On careful reading of decision of Hon'ble Supreme Court dated 18/04/2013, it is clear that 15% contribution to SPV account was guarantee payment for implementing of R & R plan, which would be deducted from sale proceeds. This was one of the conditions for resuming mining operations under Category 'B'. We refer to and rely on observations by Hon'ble Supreme Court in case of CIT vs SitaldasTirathdasreported in(1961) 41 ITR 367.Hon'ble Supreme Court laying down following principal referred to various rulings that illustrated aspects of diversion of income by overriding title. "These are the cases which have considered the problem from various angles. Some of them appear to have applied the principle correctly and some, not. But we do not propose to examine the correctness of the decisions in the light of the facts in them. In our opinion, the true test is whether the amount sought to be deducted, in truth, never reached the assessee as its income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to pay out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee. Whereby the obligation income is diverted before it reaches the assessee, it is deductible but where the income is required to be applied to discharge an obligation after such income reaches the assessee the same consequence in law does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another portion of one's own income which has been received and essence applied. The first is a case in which the income never reaches the assessee, who, even if he were to collect it, does so, not as part of his income but for and on behalf of the person to whom it was payable." Emphasis Supplied

7.8.13. In the present case, we note that 15% of sale proceeds was payable to SPV account after it accrued to assessee and the fact that, assessee was obliged to part with such portion of income, by virtue of directions of Hon'ble Supreme Court, as a precondition to resume mining operations under Category 'B'. At

this juncture, we also emphasise that, but for the intervention by Hon'ble Supreme Court, assessee would not have contributed 15% to SPV account for implementation of reclamation and rehabilitation scheme on its own, as there was no statutory requirement to do so under relevant statutes that regulate mining activities.

7.8.14. Hon'ble Supreme Court has been very clear regarding the types of payments that needs to be recovered from lessee's under Category 'B', from the sale proceeds as well as otherwise. All the payments form part of R&R plan for recouping and rehabilitating the environment. Certain payments are onetime payment and some others are recurring depending upon the sale of iron ore sold in the name of each licensee or depending on the need for rehabilitation.

7.8.15. In our view, contributing 15% to SPV account on account of Category 'B', would be application of income, and therefore, should be considered as expenditure incurred for carrying out its business activity. This we hold so, for the reason that, contributions determined by Hon'ble Supreme Court are in the nature of guarantee payment necessary for resuming mining activity. We also note that, alleged sum in these grounds are for implementation of R&R Plans in respective sanctioned lease areas held by assessee, where illegal mining activities or which were used for illegal overburden dumps, roads, offices etc., beyond sanctioned lease area were carried out. Here, we also note that, Hon'ble Supreme Court directed CEC to refund any leftover guarantee money, after completion of implementation of R& R plan, subject to satisfaction of CEC and approval by Hon'ble Supreme Court. For this peculiar reason, amount so contributed towards SPV being 15% of sale proceeds, under Category B, cannot be treated as penal in nature. We, therefore, reject observations of authorities below that, such sum having contributed by assessee fall within ambit of explanation 1 to section 37 (1) of the Act."

7.10.10. We note that the CEC, vide its report dated 3-2-2012 and 13-3-2012 made recommendations with regard to setting up of SPV, transfer of funds collected from all lease holders under various heads, manner of utilisation of said funds etc., to Hon'ble Supreme Court, which is incorporated in Paragraph 7 at Page 164 to 171 as under: "(IX) A Special Purpose Vehicle (SPV) under the Chairmanship of Chief Secretary, Government Karnataka and with the senior officers of the concerned Departments of the State Government as Members may be directed to be set up for the purpose of taking various ameliorative and mitigative measures in Districts Bellary, Chitradurga and Tumkur. The additional resources mobilized by (a) allotment/ assignment of the cancelled mining leases as well as the mining leases belonging to M/s. MML, (b) the amount of the penalty/ compensation received/ receivable from the defaulting lessee, (c) the amount received/ receivable by the Monitoring Committee from the mining leases falling in "Category- A" and "Category-B", (d) amount received/ receivable from the sale proceeds of the confiscated material etc., may be directed to be transferred to the SPV and used exclusively for the socio-economic development of the area/local population, infrastructure development, conservation and protection of forest, developing common facilities for transportation of iron ore (such as maintenance and widening of existing road, construction of alternate road, conveyor belt, railway siding and improving communication system, etc.). A detailed scheme in this regard may be directed to be prepared and implemented after obtaining permission of this Hon'ble Court;"

7.10.11. Hon'ble Supreme Court at 176 of its order made following observations with regard to SPV:- "By order dated 28-09-2012, this Court had constituted a Special Purpose Vehicle (for short "SPV") on the suggestion of the learned amicus curiae. The purpose of constitution of the SPV, it may be noticed, is for taking of ameliorative and mitigative measures as per the "Comprehensive Environment Plans for Mining Impact Zone (CPEMIZ) around mining leases in Bellary, Chitradurga and Tumkur. By order dated 28-09-2012, the Monitoring Committee was to make available the payments received by it under different heads of receivables to the SPV"

7.10.12. It is noticed that amounts collected from assessee are directed to be given to the SPV, which will in turn take various types of ameliorative and mitigative steps in the interest not only of the environment and ecology but the mining industry as a whole so as to enable the industry to run in a more organized, planned and disciplined manner. Under these set of facts, it cannot be said that these amounts are penal in nature. We notice that the Hyderabad bench of Tribunal in the case of NMDC Ltd (supra) and Co-ordinate bench of Bangalore Tribunal in Ramgad Minerals (supra) came to the same conclusion. We note that in NMDC case (supra), Hon'ble Hydrabad Tribunal followed decision of Hon'ble Kolkatta High Court in the case of ShyamSel Ltd (supra) and State Pollution Control Board vs. Swastik Ispat (P) Ltd (supra), wherein identical types of payments made to remedy the river pollution caused by the parties were held to be compensatory in nature. Hence the provisions of Explanation 1 to sec.37 will not apply to these payments. We also note that Hon'ble Supreme Court at page 171 observed that, these payments are necessary to be made by the mining lease holders. Hence there is merit in the submission of Ld.Counsel that, without making these payments, assessee could not have resumed the mining operations. Hence, these expenses are incidental to carrying on the business and hence allowable u/s 37(1) of the Act.

7.10.13. Based on above discussions and analysis, we are of opinion that contribution to SPV being 10%/15% of sale proceeds, under category A/B, is to be allowable as expenditure for year under consideration. Thus, alternative plea raised by assessee in ground 2.3.6 and 2.3.7 does not arise. In any event, such payment cannot be considered to be loss in the hands of assessee. Accordingly we allow grounds 2.3.8-2.3.9 and dismiss grounds 2.3.1-2.3.7."

3.5 In the light of the above order of the Co-ordinate Bench of the Tribunal, we hold that 15% retained in the case of assessee by CEC is an allowable business expenditure. It is ordered accordingly.

3.6 In the result, ground Nos.2.1 to 2.4 for assessment years 2013-2014 to 2015-2016 are allowed.

4. Amount retained towards SPV for mining and dumping sub-grade material outside the leased area (Asst. Years 2013-2014 and 2014-2015)

4.1 The above issue is also covered in favour of the assessee by the order of the Co-ordinate Bench of the Tribunal in the case of M/s.Veerabhadrappa Sangappa & Co. (supra). The relevant finding of the Co-ordinate Bench order reads as follow:-

> *"8. Ground No.2.5 has been raised against the disallowance of Rs.9,69,00,000/-, by treating it as penalty. Ld.AO observed that, for year under consideration, assessee debited sum of Rs.9,69,00,000/- under the head, compensation for Category 'B'. It was observed that, the said amount have been deducted by MC towards penalty/compensation for various irregularities found by CEC being illegal mining pit, illegal dumping of waste, illegal encroachment of wrote and other violations by assessee. It was also noted by Ld.AO that, said amount has been retained by CEC as per directions of Hon'ble Supreme Court, out of sale proceeds for purpose of taking various ameliorative and mitigate of measures as penal payment. Ld.AO noted that, said retention was towards damages caused to Forest and Environment by contravention of law and cannot be said to have incurred wholly and exclusively for purpose of business within the meaning of provisions of section 37 of the Act as expenditure.*
>
> *8.1. Ld.AO also noted that, Department of Mines and Geology, Bangalore, vide notice dated 28/02/2013, in obedience to order of Hon'ble Supreme Court, directed assessee to make immediate payment of Rs.5 crore per hectare for illegal mining and Rs.1 crore per hectare for dumping of waste outside sanctioned lease area for involving illegal Act. Ld.AO observed and held as under:*
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> *4.3 DISALLOWANCE OF EXPENDITURE – i) COMPENSATION – CAT- "B" – Rs.9,69,00,000/- & ii) PROBABLE EXPENDITURE FOR R & R Rs.1,48,97,000/- Further, on going through the above table detailed in para (4) of this order at SI.No.5 & 6 of the said table, it is noticed that the assessee firm has debited an amount of Rs.9,69,OO,OOO/- under the head Compensation - Cat- "B" & Rs.1,48,97,OOO/- under the head Probable Expenditure for R & R retained/deducted by Monitoring Committee - Cat- "B" and charged the same to the Profit & Loss Nc. The said amounts have been deducted by Monitoring Committee towards Penalty/Compensation for various irregularities found by the CEC in Mining area of the assessee firm viz., Illegal Mining Pit, Illegal dumping of waste, Illegal encroachment of road & Other violations. The said amount was retained by the Central Empower Committee (CEC) as per the directions of the Supreme Court out of sale proceeds for the purpose of taking various ameliorative and mitigative measures as a penal payment. Further, the said retention of penal payment is towards damages caused to the forest and environment by contravention of laws. The said payment cannot be said to be*

incurred wholly and exclusively for the purpose of business within the meaning of the provisions of section 37 of the IT Act as the expenditure is penal in nature. Further, the Dept., of Mines and Geology, Bangalore vide its Lr.F.No.DMGIR& RlNotice/2012-13/11 Dated: 28/02/2013 in obedience to the Order of Hon'ble Supreme Court has issued notice to the assessee firm as under: The relevant portion of the letter is extracted below: " The Central Empowered Committee had noticed during the Survey by Joint Team that you, holder of Mining Lease No.2160 in PMB range, Sandur taluk, Bellary, have illegally conducted mining operations and / or illegally dumped the waste outside the lease area and committed certain other illegalities. Accordingly, in the reports dated: 03/02/2012 and 13/03/2012 submitted to the Hon'ble Supreme Court, the Central Empowered Committee had recommended imposing a penalty of Rs. 5 Crores per hectare for illegal mining and Rs.l Crore per hectare for dumping the waste outside the lease area on you for involving yourself in the above illegal act. The Hon'ble Supreme Court in its Orders dated: 13/04/2012 and 28/09/2012 referred to at Sl.No. (2) above accepted the recommendations of the Central Powered Committee." In the circumstances, you are hereby called upon to pay immediately, by way of penalty, a total amount of Rs.9.69 Crores for committing various irregularities such as (i) illegal mining pit in 0.46 Hectares (Rs.2.30 Crores), (ii) illegal dumping of waste in 2.50 Hectares (Rs.2.50 Crores), (iii) illegal approached road 4.40 Hectares (Rs.4.40 Crores) and other violations (Rs.0.49 Crores) in proportion to the area encroached by you outside the lease area in contravention of the relevant provisions of the MMDR Act, 1957, MC Rules, 1960 and MCD Rules, 1988 respectively. At the same time, in pursuance of the order dated: 28/09/2012 of the Hon'ble Apex Court, you are also hereby called upon to make a payment of Rs.148.97 Lakhs towards the probable expenditure indicated by ICFRE for implementation of R & R Plan in respect of your mining lease. You are hereby directed to make the above payments immediately failing which action will be initiated to recover the dues from you in accordance with law."

4.3.a. It is evident from the above Notice (emphasis added) that the demand raised by the Dept., of Mines and Geology, Bangalore is in the nature of penalty for various irregularities committed by the assessee in the mining area like Illegal Mining, Illegal Dumping of Waste and Other Violations like Encroachments, etc., Since the said expenditure is penalty imposed by the DM&G for various violations, the same cannot be allowed as a deduction U/S 37 of the Act while computing the profits and gains of business. In view of this, it was put across to the assessee with a proposal to disallow the assessee's claim of expenditure of Rs.9,69,00,000/- vide Para No.(11) of this office Lr:F.No.55/Scr./ACIT/C-I/BLY/2015-16 Dated: 04/12/2015. Further, in the same para of the proposal the amount of Rs.l,48,97,000/- debited under the head probable expenditure for R & R referred above was also proposed to be disallowed as the said amount is a provision made by the assessee and provisions are 'not a allowable expenditure u/s 37 of the Act. Accordingly, the assessee firm was asked to file / furnish objections, if any, along with the necessary details and evidences .

4.3.b. In response to the said proposition the assessee firm filed consolidated objections in its letter dated 21/01/2016, which have already been enumerated above in para No.(4.1.a) of this order.

4.3.c. As already discussed above as per the Order of the Hon'ble Apex Court, the mine owners were placed in different category based on the illegal or marginal illegal mining done by them. The CEC had noticed during the Survey by Joint Team that the assessee holding a Mining Lease No.2160 in PMB Range, Sandur Taluk, Bellary have illegally conducted mining operations and illegally dumped the waste outside the lease area and committed certain other illegalities. In view of this, the DM&G has imposed certain penalty· on the assessee firm as per the recommendations of the Apex Court and further has called upon the assessee firm to made payment towards the probable expenditure by ICFRE for implementation of R & R Plan. Out of this, the assessee has claimed a deduction towards penalty imposed at Rs. Rs.9,69,00,000/- and probable expenditure for implementation of R & R Plan Rs.l,48,97,000/- respectively, during the previous year in question.

4.3.d. The explanation offered by the assessee firm for claiming deduction of said expenditure has been perused and found not acceptable. The various case laws relied on by the assessee firm have no direct nexus to the facts of the instant case, hence, fail to give support the assessee firm's stand that the expenditure incurred is Compensatory/Compounding fee and paid as a Commercial expediency. Further, the assessee's contention that, the said expenses are in nature of Compensatory/ Compounding fee paid to regularise the pending issue and by doing so the Company is allowed to commence its business operations be treated as payment made under commercial expediency cannot be considered and allowed as deduction.

4.3.e. The part of the sale proceeds retained by the CEC / Monitoring Committee are to meet the penal and other liabilities in the form of penal nature for contravention of law, is nothing but assessee firm's personal expenditure, which is not allowable as per the specific Explanation to Section 37(1) of the Act.

4.3.f. It is a General rule that, if an assessee is penalised under one Act, he cannot claim that the amount to be set off against his income under another Act, because that will be frustrating / defeating the entire object of imposition of penalty. If the assessee resorts to unlawful means to augment his profits or reduce his loss, then the expenditure incurred for these unlawful activities cannot be allowed to be deducted whether the business is lawful or otherwise. Even if the entire business of the assessee is illegal and income is sought to be taxed by the Assessing Officer, the expenditure in the illegal activities is not deductible after the insertion of Explanation to Section 37(1) by the Finance Act, 1998. It has been consistently held by the Courts that fines or penalties payable for violation of law of the land cannot be permitted as deduction under the Income-tax Act. That will be against public policy to allow the benefit of deduction under one statute, of any expenditure incurred in violation of the provisions of another statute or any penalty imposed under another statute [Maddi Venkataramana & Co (P) Ltd Vs CIT (1998) 229 ITR 534 (SC)]. Even though the need for making such payments arose out of trading operations, the payments were not wholly and exclusively for the purpose of the trade. In the instant case, if the deductions claimed are allowed, the penalty provisions as per the MMDR Act, 1957, MC Rules, 1960 and MCD Rules, 1988 respectively will become meaningless. It has also to be borne in mind that evasion of law cannot be trade pursuit. The penalties paid for violating the law in the course of the conduct of business cannot be regarded as deductible expenditure, as the assessee is expected to carry on the business in accordance with law and not in violation of law. In the

instant case, the assessee has violated the law and has formed Illegal Mining Pits and Illegal Dumping of waste, whereby, the Hon'ble Apex Court on the recommendation of the CEC has directed to collect the amounts as penalty for violation of such law.

4.3.g. Infraction of the law is not a normal incident of business and, therefore, no expense which is paid by way of penalty for breach of the law can be said to be an amount wholly and exclusively laid for the purpose of business [Haji Aziz & Abdul Shakoor Bros. Vs. CIT (1961) 41 CTR 350 (SC)J. A payment made under a statutory obligation, because the assessee was in default could not constitute expenditure laid out for the purpose of assessee's business [Indian Aluminium Co. Ltd. Vs CIT (SC) 79 ITR 514].

4.3.h. Further, probable expenditure for implementation of R & R Plan Rs.l,48,97,000/- claimed by the assessee firm is a provisional & probable one. Provisions are contingent liabilities which do not constitute expenditure and cannot be the subject matter of deduction even under the mercantile system of accounting. Further, it is well established fact that the assessee has carried out illegal mining over a period of time and hence, cannot be related and allowed in the year under consideration. Further, allowing such huge deduction though not only belongs to the previous year in question but also for earlier years is against the "Principle of Consistency" which disturbs uniform earning capacity of the firm.

4.3.i. In view: of above facts brought on record, the amount of Rs.ll,17,97,000/- (Rs.9,69,00,000/- + Rs.l,48,97,000/-) being penalty for breach of law & provisions but claimed as expenditure under the head Reclamation & Rehabilitation and debited to P & L A/c is disallowed and added back to the returned income and brought to tax.

8.2. Aggrieved by observations of Ld.AO, assessee preferred appeal before Ld.CIT(A). Assessee contested that, expenditure was incurred as compensatory/compounding fee, and paid as commercial expediency to regularise pending issues and by doing so, assessee was allowed to commence its business operations.

8.3. However, Ld.CIT(A) observed that, assessee had violated law and formed illegal mining pits and illegal dumping of waste, whereby, Hon'ble Supreme Court on recommendation of CEC directed to collect such amounts for violated of laws under relevant statutes governing miming activities in the State. Ld.CIT(A) observed and held as under:

"5.0) The next ground is disallowance of expenditure towards compensation of "Cat - B" of Rs.9,69,00,000/- and probable expenditure for R&R of Rs. 1,48,97,000/-. The AO observed that the above two amounts were deducted by the Monitoring Committee towards penalty/ compensation for various irregularities found by the CEC in the Mining area of the assessee and retained by the CEC as per the directions of the Supreme Court out of sale proceeds for the purpose of taking various ameliorative and mitigative measures as a penalty payment. Further, the said retention for penalty payment is towards damages caused to the forest and environment by contravention of laws and hence the payment could not be said to be incurred wholly and exclusively for the purpose

of business within the meaning of the provisions of section 37 of the Act, as the expenditure is penal in nature.

5.1) The assessee contested that the expenditure was incurred as compensatory/ compounding fee and paid as a commercial expediency to regularize the pending issue and by doing so the company was allowed to commence its business operations. As such the payment made under commercial expediency be considered for allowing the same as deduction.

5.2) I have gone through the facts of the case and the submissions of the appellant. As per the directions of the Supreme Court part proceeds are to be retained by the CEC/Monitoring Committee to meet the penal and other liabilities for contravention of law. Further, if an assessee is penalized under one Act, he cannot claim that the amount to be set off against his income under another Act, because that will be frustrating/ defeating the entire object of penalizing under the other Act. If the assessee resorts to unlawful means to augment his profits or reduce his loss, then the expenditure incurred for these unlawful activities cannot be allowed to be deducted whether the business is lawful or otherwise. Even if the entire business of the assessee is illegal and income is sought to be taxed by the Assessing Officer, the expenditure in the illegal activities is not deductible after the insertion of Explanation to Section 37(1) by the Finance Act, 1998. It has been consistently held by the Courts that fines or penalties payable for Violation of law of the land cannot be permitted as deduction under the Income-tax Act. That will be against public policy to allow the benefit of deduction under one statute, of any expenditure incurred in violation of the provisions of another statute or any penalty imposed under another statute[Maddi Venkataramana & Co. (F) Ltd vs. CIT (1998) 229 ITR 534 (SC)]. Even though the need for making such payments arose out of trading operation, the payments were not wholly and exclusively for the purpose of the trade.

5.3) Infraction of the law is not a normal incident of business and therefore, no expense which is paid by way of penalty for breach of the law can be said to be an amount wholly and exclusively laid for the purpose of business [Haji Aziz & Abdul Shakoor Bros. Vs. CIT (1961) 41 ITR 350 (SC)]. A payment - made under a statutory obligation because the assessee was in default could not constitute expenditure laid out for the purpose of assessee's business [Indian Aluminium Co. Ltd Vs. CIT (SC) 79 ITR 514].In the case of Indian Aluminum Co. Ltd Vs. CIT (SC) 79 ITR 514 it was held by the Apex Court that - A payment made under a statutory obligation because the assessee was in default could not constitute expenditure laid out for the purpose of assessee's business.It is not out of place to emphasize once again the judgment in the ,Z case of Maddi Venkataraman & Co. (P) Ltd Vs. CIT (1998) 229 ITR 534 (SC)" wherein the Hon'ble Supreme Court has held that - Even if the entire business of the assessee is illegal and income is sought to be taxed by the assessing Officer, the expenditure in the illegal activities is not deductible after the insertion of Explanation to Section 37(1) by the Finance Act, 1998. It has been consistently held by the Courts that fines or penalties payable for Violation of law of the land cannot be permitted as deduction under the Income-tax Act. That will be against public policy to allow the benefit of deduction under one statute, of any expenditure incurred in violation of the provisions of another statute or any penalty imposed under another statute. The fines/penalties paid for violating the law in the course of the conduct of business cannot be regarded as deductible expenditure, as the

assessee is expected to carry on the business in accordance with law and not violation of law. In the instant case, the assessee has violated the law and has formed Illegal Mining Pits and Illegal Dumping of waste, whereby, the Hon'ble Apex Court on the recommendation of CEC has directed to collect the amounts for violation of such law. In view of the above, the said deduction cannot be allowed which is being compensation and penalty in nature for contravention of laws. This ground is dismissed." Aggrieved by order of Ld.CIT(A), assessee is in appeal before us now.

8.4. Before us, Ld.Counsel referred to breakup of Rs.9,69,00,000/- at page 201 of paper book:
Compensation (mining pit) 0.4 6Ha Rs.2,30,00,000
Compensation (dump, received etc, 2.50 HA) Rs.2,50,00,000
Encroachment of road (4.40 HA) Rs.4,40,00,000
Other category (0.49 HA) Rs. 49,00,000

8.5. Ld.Counsel submitted that payment advises issued by Department of Mines and Geology, clearly mentions that, above amounts retained by MC are towards R&R plan as compensation, and that, no where in the payment advise, the term, "penalty" is used. Ld.Counsel, therefore, emphasised that, lower authorities erred in treating said compensation as penalty. He thus submitted that the said amount ought to have been allowed as expenditure in the hands of assessee incurred for the purpose of business.

8.6. Alternatively, Ld.Counsel submitted that, since said amount has been diverted to SPV account by direction of Hon'ble Supreme Court, the said sum must be treated as having diverted at source by overriding title.

8.7. It was also submitted that failing the above two submissions, the said sum may be treated as business loss under section 28 as the amount retained by MC has rightly forwarded to SPV for reclamation and rehabilitation of mining area as per directions of Hon'ble Supreme Court.

8.8. On the contrary, Ld.CIT.DR submitted referred to para 20, 32- 33 of the decision of Hon'ble Supreme Court, which are reproduced hereunder:

"20. Relying on the provisions of the Mines and Minerals (Development & Regulation) Act, 1957; Forest (Conservation) Act, 1980 and Environment (Protection) Act, 1986 (hereinafter referred to as "MMDR Act", "FC Act" and "EP Act" respectively) it is argued that each of the statutes contemplate a distinct and definite statutory scheme to deal with the situations that have allegedly arisen in the present case. To resolve the said issues it is the statutory scheme that should be directed to be followed and resort to the powers of this Court under Article 32 read with Article 142 of the Constitution, when a statutory scheme is in existence, would be wholly uncalled for. Specifically, it has been pointed out that none of the conditions that are required to be fulfilled by Category 'A' leaseholders and none of the compulsory payments contemplated for Category 'B' leaseholders for recommencement of operation are visualized in any of the statutory schemes. Insofar as Category 'C' leaseholders are concerned, it is contended that cancellation, if any, has to be in accordance with the statute which would provide the lease holder with different tiers of remedial forums as compared to the finality that would be attached if any order is to be passed by this Court. In this regard, several earlier opinions of this

Court, details of which will be noticed in the discussions that follow, had been cited at the bar to persuade us to take the view that we should desist from exercising our powers under the Constitution and instead relegate the parties to the remedies provided by the statute.

8.9. Ld.CIT.DR submitted that, Hon'ble Supreme Court summarised arguments advanced by leaseholders as under:

27. On the above issue the short and precise argument on behalf of the leaseholders is that the provisions of each of the statutory enactments, i.e., the MMDR Act, FC Act and EP Act prescribe a distinct statutory scheme for regulation of mining activities and the corrective as well as punitive steps that may be taken in the event mining activities are carried out in a manner contrary to the terms of the lease or the provisions of any of the statutes, as may be. The argument advanced is that as the statutes in question contemplate a particular scheme to deal with instances of illegal mining or carrying on mining operations which is hazardous to the environment, the CEC could not have recommended the taking of any step or measure beyond what is contemplated by the statutory scheme(s) in force. It is argued that it will not be proper for this Court to act under Article 32 and to accept any of the said recommendations which are beyond the scheme(s) contemplated by the Statute(s). In other words, what is sought to be advanced on behalf of the leaseholders is that no step should be taken or direction issued by this Court which will be contrary to or in conflict with the provisions of the relevant statutes. Several judgments of this Court, which are perceived to be precedents in support of the proposition advanced, have been cited in the course of the arguments made.

8.10. Ld.CIT.DR referring to paragraph 37 of the order, submitted that Hon'ble Supreme Court after considering arguments advanced by both sides observed as under:

37. Even if the above observations is understood to be laying down a note of caution, the same would be a qualified one and can have no application in a case of mass tort as has been occasioned in the present case. The mechanism provided by any of the Statutes in question would neither be effective nor efficacious to deal with the extraordinary situation that has arisen on account of the large scale illegalities committed in the operation of the mines in question resulting in grave and irreparable loss to the forest wealth of the country besides the colossal loss caused to the national exchequer. The situation being extraordinary the remedy, indeed, must also be extraordinary. Considered against the backdrop of the Statutory schemes in question, we do not see how any of the recommendations of the CEC, if accepted, would come into conflict with any law enacted by the legislature. It is only in the above situation that the Court may consider the necessity of placing the recommendations made by the CEC on a finer balancing scale before accepting the same. We, therefore, feel uninhibited to proceed to exercise our constitutional jurisdiction to remedy the enormous wrong that has happened and to provide adequate protection for the future, as may be required.

8.11. It was thus been submitted by Ld.CIT.DR that, Hon'ble Supreme Court in cognizance of enormous wrong happened to the environment due to illegal mining, illegal dumping, illegal encroachment of road etc by the lessees directed such payments from lease holders. He thus relying on above categorical

observations by Hon'ble Supreme Court, submitted that, sum of Rs.9,69,00,000/- should be treated as penalty for infraction of law. He thus supported order passed by authority below.

8.12 . We have perused submissions advanced by both sides, in light of records placed before us.

8.12.1. Ld.AO took the view that these payments are penal in nature as they have been levied for contravention of laws by way of damages caused to forest and environment. Ld.AO referred to the Page letter F.No.DMG/R & R/Notice/2012-13/11 dated 28-02-2013 issued by Department of Mines and Geology, Bangalore demanding the payment from the assessee. It is pertinent to note that the above said letter uses the expression "penalty" for these payments. Accordingly, the AO took the view that these payments are in the nature of penalty for various irregularities committed by the assessee in the mining area like illegal mining, illegal dumping of waste and other violations like encroachment etc. Ld.AO relied upon following case laws to buttress his view that the penalty is not allowable as deduction:- (a) Maddi Venkataramana& Co (P) Ltd vs. CIT (1998)(229 ITR 534)(SC) (b) Haji Azis& Abdul Shakoor Bros. Vs. CIT (1961)(41 ITR 350)(SC) (c) Indian Aluminium Co. Ltd vs. CIT (79 ITR 514)(SC) 8.12.2. Assessee claimed Rs.9,69,00,000/- as expenditure in the original return of income and excluded the same from Sales revenue in the revised return of income contending that the same is diversion by overriding title.

8.12.3. Ld.CIT.D.R placed his reliance on certain observations made by Hon'ble Supreme Court in M/s Samaj Parivartana Samudaya and Oth. Vs.State of Karnataka & Oth.(supra). First of all, there should not be any dispute that the writ petition filed by M/s Samaj Parivartana Samudaya and Others was admitted by Hon'ble Supreme Court under Article 32 of the Act. Hence the lessees, inter alia, challenged before Hon'ble Supreme Court, the necessity to invoke Article 32 and Article 142 of the Act.

8.12.4. In the CEC report dated 3/02/2012 and 13/03/2012, following recommendations were provided in respect of Category B lease holders. Hon'ble Supreme Court extracted the same at page 166 of its order which is as under:

"(V) In respect of the mining leases falling in "CATEGORY-B" (details given at Annexure-R-10 to this Report) it is recommended that: i) the R&R Plan, under preparation by the ICFRE, after incorporating the appropriate changes as per the directions of this Hon'ble Court, should be implemented in a time bound manner by the respective lessees at his cost. In the event of his failure to do so or if the quality and/or the progress of the implementation of the R&R Plan is found to be unsatisfactory by the Monitoring Committee or by the designated officer(s) of the State of Karnataka, the same should be implemented by the State of Karnataka through appropriate agency(ies) and at the cost of the lessee; ii) for carrying out the illegal mining outside the lease area, exemplary compensation/ penalty may be imposed on the lessee. It is recommended that: a) For illegal mining by way of mining pits outside the leases area, as found by the Joint Team, the compensation/ penalty may be imposed at the rate of Rs. 5.00 crore (Rs. Five Crore only) for per ha. of the area found by the Joint Team to be under illegal mining pit; and b) For illegal mining by way of over burden dump(s) road, office, etc. outside the sanctioned lease area, the compensation/ penalty may be imposed @ Rs. 1.00 crores (Rs. One Crores only) for per ha. of the area found to

be under illegal over burden dump etc. iii) Mining operation may be allowed to be undertaken after (a) the implementation of the R& R Plan is physically undertaken and is found to be satisfactory based on the pre-determined parameters, (b) penalty/ compensation as decided by this Hon'ble Court is deposited and (c) the conditions as applicable in respect of "Category-A" leases are fulfilled/followed; iv) In respect of the seven mining leases located on/nearby the interstate boundary, the mining operation should presently remain suspended. The survey sketches of these leases should be finalized after the interstate boundary is decided and thereafter the individual leases should be dealt with depending upon the level of the illegality found; and v) Out of the sale proceeds of the existing stock of the mining leases, after deducting : a) The penalty/compensation payable; b) Estimated cost of the implementation of the R& R Plan; and c) 10% of the sale proceeds to be retained by the Monitoring Committee for being transferred to the SPV d) The balance amount, if any, may be allowed to be disbursed to the respective lessees".

8.12.5. Hon'ble Supreme Court in para 11 at page 172 accepted the recommendation of CEC by observing as under:

"11. The order of the Court dated 28.9.2012, laying down certain conditions "as the absolute first step before consideration of any resumption of mining operations by Category–'B' leaseholders" would also be required to be specifically noticed at this stage. "I. Compensatory Payment a) Each of the leaseholders must pay compensation for the areas under illegal mining pits outside the sanctioned area, as found by the Joint Team (and as finally held by the CEC) at the rate of Rs.5 crores per hectare, and (b) for the areas under illegal overburden dumps, roads, offices, etc. outside the sanctioned lease area, as found by the Joint Team (as might have been finally held by the CEC) at the rate of Rs.1 crore per hectare. It is made clear that the payment at the rates aforesaid is the minimum payment and each leaseholder may be liable to pay additional amounts on the basis of the final determination of the national loss caused by the illegal mining and the illegal use of the land for overburden dumps, roads, offices, etc. Each leaseholder, besides making payment as directed above, must also give an undertaking to the CEC for payment of the additional amounts, if held liable on the basis of the final determination. At the same time, we direct for the constitution of a Committee to determine the amount of compensatory payment to be made by each of the leaseholders having regard to the value of the ore illegally extracted from forest/non-forest land falling within or outside the sanctioned lease area and the profit made from such illegal extraction and the resultant damage caused to the environment and the ecology of the area. The Committee shall consist of experts/officers nominated each by the Ministry of Mines and the Ministry of Environment and Forests. The convener of the Committee will be the Member Secretary of the CEC. The two members nominated by the Ministry of Mines and the Ministry of Environment and Forests along with the Member Secretary, CEC shall co-opt two or three officers from the State Government. The Committee shall submit its report on the aforesaid issue through the CEC to this Court within three months from today. The final determination so made, on being approved by the Court, shall be payable by each of the leaseholders."

8.12.6. Hon'ble Supreme Court further directed as under(page 173 clause):

"III.. In addition to the above, each leaseholder must pay a sum equivalent to 15% of the sale proceeds of its iron ore sold through the Monitoring Committee as per the earlier orders of this Court. In this regard, it may be stated that though the amicus suggests the payment @ 10% of the sale proceeds, having regard to the overall facts and circumstances of the case, we have enhanced this payment to 15% of the sale proceeds. Here it needs to be clarified that the CEC/Monitoring Committee is holding the sale proceeds of the iron ores of the leaseholders, including the 63 leaseholds being the subject of this order. In case, the money held by the CEC/Monitoring Committee on the account of any leaseholder is sufficient to cover the payments under the aforesaid three heads, the leaseholder may, in writing, authorize the CEC to deduct from the sale proceeds on its account the amounts under the aforesaid three heads and an undertaking to make payment of any additional amount as compensatory payment. On submission of such authorization and undertaking, the CEC shall retain the amounts covering the aforesaid three heads and pay to the concerned leaseholder the balance amount, if any. It is expected that the balance amount, after making the adjustments as indicated here, would be paid to the concerned leaseholder within one month from the date of submission of the authorization and the undertaking. In the case of any leaseholder, if the money held on his account is not sufficient to cover the aforesaid three heads, he must pay the deficit within two months from today.

8.12.7. The contentions of the lessees have been succinctly stated as under by Hon'ble Supreme Court in paragraph 20 of the order, which is extracted below:-

"To resolve the said issues it is the statutory scheme that should be directed to be followed and resort to the powers of this Court under Article 32 read with Article 142 of the Constitution, when a statutory scheme is in existence, would be wholly uncalled for."

8.12.8. This contention was discussed in detail as "Issue 2" in paragraphs 27 to 37 (pages180 to 187) Hon'ble Supreme Court. Following are the observations of Hon'ble Supreme Court:

27. On the above issue the short and precise argument on behalf of the leaseholders is that the provisions of each of the statutory enactments, i.e., the MMDR Act, FC Act and EP Act prescribe a distinct statutory scheme for regulation of mining activities and the corrective as well as punitive steps that may be taken in the event mining activities are carried out in a manner contrary to the terms of the lease or the provisions of any of the statutes, as may be. The argument advanced is that as the statutes in question contemplate a particular scheme to deal with instances of illegal mining or carrying on mining operations which is hazardous to the environment, the CEC could not have recommended the taking of any step or measure beyond what is contemplated by the statutory scheme(s) in force. In other words, what is sought to be advanced on behalf of the leaseholders is that no step should be taken or direction issued by this Court which will be contrary to or in conflict with the provisions of the relevant statutes. Several judgments of this Court, which are perceived to be precedents in support of the proposition advanced, have been cited in the course of arguments made. 29. According to Shri Divan (Amicus Curiae), the present is a case of mass tort resulting in the abridgment of the fundamental rights of a large number of citizens for enforcement of which the writ petition has been filed under Article 32. Shri Divan has submitted, by relying on several decisions of

this Court, that in a situation where the Court is called upon to enforce the fundamental rights and that too of an indeterminate number of citizens there can be no limitations on the power of Court. It is the satisfaction of the Court that alone would be material. Once such satisfaction is reached, the Court will be free to devise its own procedure and issue whatever directions are considered necessary to effectuate the Fundamental Rights. The only restriction that the Court will bear in mind is that its orders or directions will not be in conflict with the provisions of any Statute. However, if the statute does not forbid a particular course of action it will be certainly open for the Court under Article 32 to issue appropriate directions….. 31. The question that has been raised on behalf of the leaseholders is whether the aforesaid provisions under the different statutes should be resorted to and the recommendations made by the CEC including closure of Category- "C" mines should not commend for acceptance of this Court. 32. In Bandhua Mukti Morcha Vs. Union of India &Ors. (1984) 3 SCC 161, this Court had the occasion to consider the nature of a proceeding under Article 32 of the Constitution which is in the following terms :- "32. Remedies for enforcement of rights conferred by this Part. (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed. (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part. (3) Without prejudice to the powers conferred on the Supreme Court by clause (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2). (4)The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution." 33. In M.C. Mehta Vs. Union of India &Ors. (1987) 1 SCC 395, this Court not only reiterated the view adopted in Bandhua Mukti Morcha (supra) but also held that the power under Article 32 would be both injunctive as well as remedial and the power to grant remedial relief, naturally, would extend to a wide range of situations and cannot be put in a straight jacket formula.

8.12.9. In the case of M C Mehta vs. Union of India (2009)(6 SCC), it was contended that Hon'ble Supreme Court cannot exercise powers under Article 142 of the Constitution when specific provisions are made under various forest and environmental laws dealing with the manner and procedure for cancellation/determination of mining leases. This argument was rejected by Hon'ble Supreme Court with the following observations:-

"44. We find no merit in the above arguments. As stated above, in the past when mining leases were granted, requisite clearances for carrying out mining operations were not obtained which have resulted in land and environmental degradation. Despite such breaches, approvals had been granted for subsequent slots because in the past the authorities have not taken into account the macro effect of such wide-scale land and environmental degradation caused by the absence of remedial measures (including rehabilitation plan). Time has now come, therefore, to suspend mining in the above area till statutory provisions for restoration and reclamation are duly complied with, particularly in cases where pits/quarries have been left abandoned. 45. Environment and ecology are national assets. They are subject to intergenerational equity. Time has now come to suspend all mining in the above area on sustainable development principle which is part of Articles 21, 48-A and 51-A(g) of the Constitution of India. In

fact, these articles have been extensively discussed in the judgment in [M.C. Mehta case (2004) 12 SCC 118] which keeps the option of imposing a ban in future open."

8.12.10. After considering all these judgments rendered by earlier bench, Hon'ble Supreme Court, observed as under:-

"35. The issue is not one of application of the above principles to a case of cancellation as distinguished from one of suspension. The issue is more fundamental, namely, the wisdom of the exercise of the powers under Article 32 read with Article 142 to prevent environmental degradation and thereby effectuate the Fundamental Rights under Article 21.

36. We may now take up the decisions cited on behalf of the leaseholders to contend that the power under Articles 32 and 142 ought not to be exercised in the present case and instead remedies should be sought within the relevant statutes. The sheet anchor is the case of Supreme Court Bar Association Vs. Union of India and Another reported in (1998) 4 SCC 409. We do not see how or why we should lie entrapped within the confines of any of the relevant Statutes on the strength of the views expressed in Supreme Court Bar Association (supra). The observations made in para 48 of the judgment and the use of words "ordinarily" and "are directly in conflict" as appearing in the said paragraph (underlined by us) directly militates against the view that the lease holders would like us to adopt in the present case. "48. The Supreme Court in exercise of its jurisdiction under Article 142 has the power to make such order as is necessary for doing complete justice "between the parties in any cause or matter pending before it". The very nature of the power must lead the Court to set limits for itself within which to exercise those powers and ordinarily it cannot disregard a statutory provision governing a subject, except perhaps to balance the equities between the conflicting claims of the litigating parties by "ironing out the creases" in a cause or matter before it. Indeed this Court is not a court of restricted jurisdiction of only dispute-settling. It is well recognised and established that this Court has always been a law-maker and its role travels beyond merely disputesettling. It is a "problem-solver in the nebulous areas" [see K. Veeraswami v. Union of India (1991) 3 SCC 55)] but the substantive statutory provisions dealing with the subject-matter of a given case cannot be altogether ignored by this Court, while making an order under Article 142. Indeed, these constitutional powers cannot, in any way, be controlled by any statutory provisions but at the same time these powers are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in a statute dealing expressly with the subject." (Emphasis supplied)

37. Even if the above observations is understood to be laying down a note of caution, the same would be a qualified one and can have no application in a case of mass tort as has been occasioned in the present case. The mechanism provided by any of the Statutes in question would neither be effective nor efficacious to deal with the extraordinary situation that has arisen on account of the large scale illegalities committed in the operation of the mines in question resulting in grave and irreparable loss to the forest wealth of the country besides the colossal loss caused to the national exchequer. The situation being extraordinary the remedy, indeed, must also be extraordinary. Considered against the backdrop of the Statutory schemes in question, we do not see how

any of the recommendations of the CEC, if accepted, would come into conflict with any law enacted by the legislature. It is only in the above situation that the Court may consider the necessity of placing the recommendations made by the CEC on a finer balancing scale before accepting the same. We, therefore, feel uninhibited to proceed to exercise our constitutional jurisdiction to remedy the enormous wrong that has happened and to provide adequate protection for the future, as may be required."

8.12.11. Ld.Counsel, during his arguments, pointed out that the CEC used the expression "Compensation/penalty" in its recommendations. But Hon'ble Supreme Court, while accepting such recommendations used the expression "Compensation" for such payments. From the observations reproduced herein above, it can be noticed that Hon'ble Supreme Court exercised its power under Article 32 and Article 142 to protect fundamental rights of public in order to prevent environmental degradation, i.e., the cost imposed on leaseholders to remedy the enormous wrong that has happened and to provide adequate protection for the future.

8.12.12. We note that Hyderabad bench of Tribunal in case of NMDC held that the above payment is not penal in nature, but a payment made for compensation. For the sake of convenience, we extract below the final decision rendered by Hyderabad bench of Tribunal:-

The fact that the compensation is proportionate to area of illegal mining outside the leased area and that the assessee has paid the proportionate compensation for mining in the areas outside the sanctioned area allotted to it and that 10% of sum is to be transferred to SPV and the balance 10% is to be reimbursed to the respective lessees, according to us, proves that it is a payment made as 'compensation' for extra mining, without which the assessee could not have resumed its activities. Therefore, we are inclined to accept the contention of the assessee that it is compensatory in nature and is a 'business expenditure' and is allowable u/s 37(1) of the Act. Thus, Grounds No.2 and 3 raised by the assessee are allowed."

8.12.13. We notice that, Hyderabad bench held the compensation paid @ Rs.5 crores and Rs.1.00 crores for illegal mining and illegal overburden dumps to be in construed in the nature of compensation. The Ld.CIT.DR placed reliance on the letter issued by Department of Mines and Geology, wherein these payments have been referred to as "penalty". However going by the observations of Hon'ble Supreme Court, these were payments formimg part of SPV to be used for developing ecology in the mining affected areas.

8.12.14. We note that Hon'ble Supreme Court directed that the funds so collected to be transferred to SPV. These funds were to be used for R & R Plans, which inter alia, would include following measures:- (Page 171 of Hon'ble Supreme Court's order)

"E) SOIL AND MOISTURE CONSERVATIONS, AFFORESTATION AND OTHER MEASURES 26. The R&R plan would inter alia provide for: i) broad design/specification for: b) retaining walls c) check dams d) gully plugs and/or culverts (if required) e) geo textile/geo matting of dumps f) afforestation in the safety zones g) afforestation in peripheral area, road side, over burden dumps and other areas ii) dust suppression measures at/for loading, unloading and

transfer points, internal roads, mineral stacks etc. iii) covered conveyor belts (if feasible) – such as down hill conveyor, pipe conveyor etc. iv) specification of internal roads, v) details of existing transport system and proposed improvements vi) railways siding (if feasible) vii) capacity building of personnel involved in the mining and environmental management viii) rain water harvesting"

8.12.15. We note that co-ordinate bench of Tribunal considered an identical issue in the case of Mysore Minerals Ltd vs. ACIT (ITA No.679/Bang/2010 dated 2.11.2012). In this case, the assessee was engaged in the business of mining of iron ore, other minerals and granite. In consequence to the order passed by Hon'ble Supreme Court in the case of T.N Godavarman Tirumalpad vs. UOI, the assessee was liable to pay to Compensatory afforestation fund equal to net present value for diversion of forest land for non-forest purposes. The assessee paid a sum of Rs.5,02,59,000/- to the fund and claimed the same as expenditure. The question that arose before the Tribunal was whether the amount so paid by the assessee is deductible as expenses are not? Tribunal therein noticed that an identical issue was examined in case of M/s Ramgad Minerals & Mining P Ltd (ITA No.1012/Bang/08 dated 9.4.2009) and was decided in favour of the assessee. Accordingly, the Tribunal decided this issue, with the following observations, in favour of the assessee:-

"5.4 We have heard both parties and carefully perused the material on record and the judicial decisions cited and placed reliance upon. We have perused the decision of the co- ordinate bench of this Tribunal in the case of Ramgad Minerals & Mining Pvt Ltd Vs.ACIT in ITA No.1012/Bang/08 dt.9.4.2009 and find that in the cited case too a similar / identical issue was considered on the payments made towards contribution for compensatory afforestation as per the direction of the Hon'ble Apex Court when the mines are exploited on forest land. The Hon'ble Tribunal in para 5 of its order held that the amount expended on this count was incurred as a revenue expenditure and was directed to be allowed in the year in which it was incurred. The operative part of the order in para 5 at pages 7 and 8 is extracted and reproduced here under : " We find force in the submission of the learned counsel that payments to the government are to be paid once the mining lease is obtained and such payments are governed by various Acts along with the Apex Court making a ruling for State Governments to participate in the granting of mining lease by recovering compensation when their forests are uprooted. Therefore for this purpose, the funds are used for a natural regeneration which the assessee participates indirectly. Therefore at no point of time could it be said that the assessee had incurred a capital expenditure giving the assessee a benefit of enduring nature for the purpose of earning segmented income to render the same to income tax. In other words, the authorities below have not pointed out the income generated against the purported deferred Revenue expenditure so proposed by them in their impugned orders. The amount was incurred as a Revenue expenditure and is directed tobe allowed in the year it has been incurred." Respectfully following the decision of the co-ordinate bench of the Bangalore Tribunal, in the case of Ramgad Minerals & Mining P. Ltd. (supra), we hold that the entire expenditure of Rs.5,02,59,000 incurred by the assessee of net present value to CAMPA in the relevant period are to be allowed as revenue expenditure for Assessment Year 2004-05."

8.12.16. Above decision of this Tribunal in case of M/s.Mysore Minerals(supra) was upheld by Hon'ble Karnataka High Court in the appeal filed by revenue against order of this Tribunal. Relevant extract of the view taken by Hon'ble High Court in CIT vs. M/s Mysore Minerals Ltd in ITA No.144/2013 dated 08/03/2017 is as undere:-

"2. As such, in our view, the only question of law which may arise is, whether the payment made by way of compensation of Rs.5,02,59,000/- by the assessee as per the direction of the Apex Court for mining lease to the Forest Department can be said as a revenue expenditure or a capital expenditure?

3. We have heard Mr.Sanmathi, learned counsel for the appellant-revenue and Mr.A.Shankar, learned counsel for the respondent-assessee.

4. As such, the Tribunal in the impugned order has relied upon its earlier decision in case of M/s.Ramgad Minerals and Mining Pvt.Ltd., vs. ACIT in ITA 1012(BNG)/2008 dated 9.4.2009. It has been brought to our notice by the learned counsel for respondent-assessee that the very decision of the Tribunal in case of Ramgad Minerals (supra) was carried before this Court in ITA 5021/09 and this Court has dismissed the appeal of the Revenue and it has been further stated that SLP was preferred against the aforesaid decision of this Court in case of Ramgad supra and the said SLP has also been dismissed.

5. We may record that in view of aforesaid decision as such, no substantial questions of law would arise for consideration. But even if it is to be examined, in view of the aforesaid decision that the decision of the Tribunal has been not interfered with by this Court and SLP is dismissed, the question has to be answered against the Revenue and in favour of Assessee."

8.12.17. In the present fact of case, Hon'ble Supreme Court observed large scale encroachment in forest areas and illegal mining. Hon'ble Court directed collection of such amount to be used for public purposes listed above, which includes afforestation etc. Further we note that these amounts have not been collected for violation under any specific Acts applicable to Mining. It for these reasons that Hon'ble Supreme Court used the term 'Compensation' as against the term 'Penalties' recommended by CEC. However it is also noticed that subsequent to the order passed by Hon'ble Supreme Court, State Act, controlling mining activity were amended. We further notice that assessee could not have commenced its operations without paying these amounts. Hence there is commercial expediency in incurring these expenses.

8.12.18. Ld.AO invoked Explanation-1 u/s 37(1) of the Act in support of the disallowance made him. As per the provisions of Explanation 1 to sec.37(1) refers to any expenditure incurred by the assessee for any purposes 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. A careful perusal of the above said provision would show that the "purpose of expenditure" should be an offence or prohibited by law. In the instant cases, the purpose of payments is for "R & R plans" and the same cannot be considered as payment for the purposes, which is an offence or which is prohibited by law. Hence Explanation 1 to section 37 is not applicable to these payments.

8.12.19. Respectfully following Hyderabad bench of Tribunal in case of NMDC Ltd (supra) and Bangalore Tribunal M/s Mysore Minerals Ltd (supra) which has been upheld by Hon'ble Karnataka High Court, the payment of Rs.9,69,00,000/- is compensatory in nature only as these funds are meant to be used for public purposes and the assessee could not have commenced its operations without paying the same, the same is allowable as revenue expenditure. We are therefore of the view that payment made as compensation is not hit by Explanation 1 to Section 37(1) and is an allowable expenditure.

Accordingly this ground raised by assessee stands allowed."

4.2 In view of the Co-ordinate Bench order of the Tribunal, we hold that the amount retained towards SPV for mining and dumping sub-grade material outside the leased area is an allowable expenditure. It is ordered accordingly.

4.3 In the result, ground Nos.3.1 to 3.3 for assessment years 2013-2014 and 2014-2015 are allowed.

5. Sales accounted in Asst.Year 2014-2015, but added as income of the year.

5.1 The learned AR fairly submitted that the above issue is decided against the assessee by the Tribunal in the case of M/s.Veerabhadrappa Sangappa & Co. (supra), wherein it was held that income in respect of sales did accrue in the subject assessment year itself, and therefore, the recognition of income cannot be deferred to the subsequent assessment year. However, the learned AR submitted that the Tribunal was pleased to direct to the authorities below to exclude the sale proceeds in the subsequent assessment year, wherein it is offered to tax.

5.2 The learned Departmental Representative present was duly heard.

5.3 We have heard rival submissions and perused the material on record. The Tribunal in the case of M/s.Veerabhadrappa Sangappa & Co. (supra), had decided that the sale proceeds from disclosed stock accrued to the assessee during the year under consideration and has to be considered for determining income under the head profits and gains of business for the year under consideration. In other words, the Tribunal held that the income accrued in the relevant assessment year and the taxability cannot be deferred to the subsequent assessment year. The Tribunal also held that the same income cannot be taxed twice and the assessee if moves an appropriate petition, the A.O. shall consider such an application. The relevant finding of the Tribunal in the case of M/s.Veerabhadrappa Sangappa & Co. (supra), reads as follow:-

> *"A. Recognition of sale proceeds from declared stock received by assessee*
>
> *Ld.Counsel impugned sale proceeds from sale of declared stock were accounted by assessee in subsequent assessment years, when it was received. He submitted that, Hon'ble Supreme Court in case of Samaj Parivartana Samudaya vs State of Karnataka, (supra) authorised MC to take control of stock, and sell the same through E-auction, depending on demand in the market. Subsequently, sale proceeds received by MC are to be deposited in nationalised bank account, after adjusting towards royalty, taxes and expenditure. Ld.Counsel submitted that, in instant case, right and control over stock was with MC, and till such time MC parts with sale proceeds, assessee had no right to receive the same. He submitted that, sale of stock by MC cannot be regarded as sale of stock by assessee. He submitted that assessee thus accounted the sale proceeds from declared stock in subsequent assessment year, when it was actually received.*
>
> *A.1. Ld.Counsel submitted that, though assessee followed mercantile system of accounting, revenue on sale proceeds of stock by MC, could be recognised and assessed to tax only on actual receipt, as assessee did not possess right to receive such income during the year under consideration. He submitted that, MC could not be considered as agent of assessee as there was no agreement between assessee and MC, for principle agent relationship to exist. Ld.Counsel submitted that, MC was acting in accordance with direction of Hon'ble Supreme Court vis-à-vis assessee. He also submitted that, assessee had not appointed MC to act on its behalf in order to constitute an 'Agent' under section 182 of Indian Contract Act, 1872. He thus submitted that, it is settled rule that, contract is not*

assignable without consent of both parties thereto, where, personal acts and qualities of one of the parties, form material and ingredient part of the contract.

A.2. Ld.Counsel argued that, revenue from declared stock was not recognised during the year under consideration due to existence of uncertainty in realisation of said amount. It has been submitted that, Section 5 of the Act, manifests that, an income can be said to have accrued, only when a person has legal right to receive such income, and its recognition is on such accrual, which is tempered by section 145 read with AS-9 of ICAI. Ld.Counsel submitted that, in order to charge an income to tax, it is necessary that such income should fall within the scope of total income, as defined under section 2(45) of the Act, and that, such income shall be charged to tax under section 5, if such income shall be received or deemed to have been received or accrue or arises or deemed to accrue or arise to a person in India, during the previous year. Ld.Counsel, thus submitted that, assessee had not derived any legal right to receive sale proceeds during previous year relevant to assessment year under consideration, and therefore, the sale proceeds cannot be construed as income in the hands of assessee for year under consideration.

A.3. Ld.Counsel submitted that, to constitute an 'income ', assessee should have absolute command, control and right of disposition of such receipts. He submitted that, in the present facts of the case, assessee has no control over the stock and sale proceeds, as sale was carried out by MC through E auction. He submitted that, revenue from sale of declared stock therefore was uncertain.

A.4. Ld.Counsel thus contended that, assessee had not acquire any right to receive income, in as much as, such right was dependent on MC disbursing such payments. He thus submitted that, sale proceeds therefore, had not received, or even deemed to have been received or accrued or arisen, or deemed to have arisen to assessee. It has been contended by Ld.Counsel that, necessary requirement under Section 5 of the Act, stands unsatisfied for recognising sale proceeds during year under consideration.

A.5. In support of his contentions he placed reliance upon following decisions: • ED.Sasoon & CO Ltd vs CIT reported in (1954) 26 ITR 27 (SC) • CIT vs Balbir Singh Maini reported in (2017) 398 ITR 531 (SC) • CIT vs Excel industries Ltd reported in (2013) 358 ITR 295 • Prakashan leasing Ltd vs DCIT reported in (2012) 208 Taxmann 464 (Kar)

A.6. Ld.Counsel also relied on CBDT Notification No.9949 (F.NO.132/7/95-TPL)/SO 69(E), Dated 25/01/1996, superseded by Notification No.32/2015 (F.N.134/48/2010-TPL)/S0 892 (E), Dated 31/03/2015, regarding AS-I, relating to disclosure of accounting policies.

A.7. Ld.Counsel submitted that, disclosure standards applicable for computation of income chargeable to tax are to be considered for recognition of revenue, arising during relevant year. He submitted that, as per disclosure standards, revenue shall be recognised when there is reasonable uncertainty of its ultimate collection. Referring to AS 9, Ld.Counsel submitted that, recognition of revenue requires that it is measurable, and that at the time of sale or rendering of services, it would not be unreasonable to expect ultimate collection. He relied on AS-9, paragraph 9.1 and 9.2, where ability to assess ultimate collection with reasonable uncertainty is lacking at the time of raising any claim. He thus

submitted that revenue recognition is to be postponed to the extent of uncertainty involved. In such circumstances, it was appropriate to recognise such revenue, only when it is reasonably certain that ultimate collection will be made. He referred to decision of Hon'ble Supreme Court in case of CIT vs Woodward Governor India Pvt.Ltd., reported in (2009) 312 ITR 254, wherein, Hon'ble Court held that, profits and gains of previous year are required to be computed in accordance with relevant accounting standard. Referring to decision of Hon'ble Supreme Court in case of JK industries Ltd vs UOI, reported in (2008) 297 ITR 176, Ld.Counsel submitted that, rules by which inventories are to be valued are laid down in accounting standards , and are to be followed in determination of accounting income mandatorily. He submitted that Hon'ble Court also held that; "8. Finally, adoption of accounting standards and of accounting income as 'taxable income' would avoid distortion of accounting income which is the real income."

A.8. He thus submitted that it is therefore appropriate to recognise revenue only when there is a reasonable certainty, that, ultimate realisation will be made. Ld.Counsel submitted that, there is no denial by authorities below that sale proceeds were received by assessee in subsequent financial years i.e; financial year 2013-14 to 2015-16, has been offered to tax by assessee. Ld.Counsel also submitted that, assessee received following amount in subsequent financial years which has been offered to tax as and when they were received:

Particulars	*Amount*	*Offered to tax in FY*
Payment advice dated 8.02.2014	*13,60,77,524*	*2013-14*
Payment advice dated 2.05.2014	*22,48,13,763*	*2014-15*
Release of 10% material value retained by the MC	*2,50,81,553*	*2015-16*
Total	*38,59,72,840*	

A.9. Ld.Counsel submitted that, entire amount of Rs.38,59,72,840/- includes Rs.25,59,99,429/-being sale proceeds from declared stock considered by Ld.AO as income of assessee for year under consideration. Taking support from assessment order, referring to para 4.1.b.,Ld.Counsel submitted that, Ld.AO himself records that, sum of Rs.25,59,99,429/- received in subsequent assessment years being assessment years 2014-15 and 2015-16, was offered to tax, during relevant assessment year. He submitted that having noted the fact that revenue received from declared stock has been offered to tax in subsequent years, making addition during the year under consideration would amount to double taxation in the hands of assessee. It has been submitted by Ld.Counsel that, right to receive sale proceeds, accrued to assessee by virtue of directions of Hon'ble Supreme Court by order dated 18/04/2013 (supra), which was in succeeding financial year, relevant to year under consideration, and has also been offered to tax on receipt basis.

A.10. Alternatively, Ld.Counsel submitted that, entire exercise is revenue neutral as assessee is assessed at uniform rate of tax over the years.

A.10.1 Ld.Counsel submitted that, principle of matching between revenue receipt and expenditure to be incurred is to be applied. Reference was made to decision of Hon'ble Supreme Court in CIT vs. Bilahari Investment (P) Ltd. reported in (2008) 299 ITR 1, wherein referring to concept of matching Hon'ble Court observed that: "82. Matching Concept is based on the accounting period concept. The paramount object of running a business is to earn profit. In order to ascertain the profit made by the business during a period, it is necessary that "revenues" of the period should be matched with the costs (expenses) of that period. In other words, income made by the business during a period can be measured only with the revenue earned during a period is compared with the expenditure incurred for earning that revenue. However, in cases of mergers and acquisitions, companies sometimes undertake to defer revenue expenditure over future years which brings in the concept of Deferred Tax Accounting. Therefore, today it cannot be said that the concept of accrual is limited to one year. 83. It is a principle of recognizing costs (expenses) against revenues or against the relevant time period in order to determine the periodic income. This principle is an important component of accrual basis of accounting. As stated above, the object of AS 22 is to reconcile the matching principle with the Fair Valuation Principles. It may be noted that recognition, measurement and disclosure of various items of income, expenses, assets and liabilities is done only by Accounting Standards and not by provisions of the Companies Act."

A.10.2 Ld.Counsel submitted that, Ld.AO in subsequent year has not undone levy of tax of such sale proceeds. It was also been submitted that entire exercise is revenue neutral as applicable rate of tax remain the same in the relevant year and the subsequent years.

A.11. On the contrary, Ld.CIT.DR submitted that, assessee follows mercantile system of accounting. He submitted that as per mercantile system, income accrued to assessee in the year of sale. He submitted that right to receive sale proceeds, accrued to assessee by virtue of directions of Hon'ble Supreme Court in case of Samaj Parivartana Samudaya vs State of Karnataka, (supra), though subsequently received. He submitted that, amount to be disbursed by MC was ascertained during relevant year, being 80% of total sale proceeds. Ld.Counsel further submitted that, assessee claimed Rs.50,24,48,441/- as expenditure being total of declared and undeclared stock in IBM returns, which in any event assessee could not do, had the sale not taken place. He submitted that, sale of stock was effectuated during the year under consideration, and entire sale proceeds were received by MC during financial year relevant to assessment year under consideration. Ld.CIT.DR submitted that, assessee had given undertaking for deducting Royalty and other expenses payable to MC from such sale proceeds and the net amount that was payable to assessee by MC, which was very well ascertainable during financial year relevant to year under consideration. He thus submitted that, assessee was well within the knowledge of amount that accrued from sale of stock. Ld.CIT.DR thus submitted that, assessee was required to reflect these sales as trading receipts in the books of account in view of mercantile system consistently followed for disclosing income. Referring to observations of Ld.AO in para 4.1.d to 4.1.f, Ld.CIT.DR submitted that, auction of declared stock took place during the year under consideration, and assessee had right to receive 80% of total sale proceeds as on the date of sale by virtue of directions of Hon'ble Supreme Court in case of Samaj Parivartana Samudaya vs State of Karnataka, (supra). Merely because MC disbursed payments in subsequent financial year, would not postpone revenue recognition

in the hands of assessee to subsequent years. He vehemently opposed argument of Ld.Counsel that, income received by assessee was un-ascertainable and hypothetical. Ld.CIT.DR submitted that, accrual of income must be judged on 'Principle of real income theory', and that, what is necessary to be considered is the true nature of transaction. Ld.CIT.DR submitted that, what has really accrued to assessee has to be found out and what has accrued must be considered from the point of view of real income, taking the probability or improbability of realisation in a realistic manner. He also submitted that, merely because receipt takes place of such accrued income by conduct of parties in subsequent year, income which has accrued for year under consideration, cannot be made as 'no income'.

A.12. Ld.CIT.DR emphasised that, admittedly, in subsequent years, assessee received 80% of total sale proceeds from E auction carried out by MC. It has been contended that income has arisen/accrued to assessee during the year under consideration, and therefore has been rightly taxed in the hands of assessee for year under consideration.

A.13. We have perused submissions advanced by both sides in light of records placed before us. We also have perused various decisions relied upon by Ld.Counsel referred to herein above, as well as in the paper book filed before.

A.13.1. The issue that arises before us, is in respect of accrual of sale proceeds from declared stock, during the year under consideration. Following is the summary of what has been proposed by Ld.Counsel.

A.13.2. Ld.Counsel opposed for treatment of sale proceeds from disclosed stock as income in the hands of assessee for year under consideration on the ground that, it never had the 'right to accrue', due to uncertainty of the amount. It was contended that in view of uncertinity, assessee need not account for the same even under mercantile system of accounting. It was submitted that sales revenue accrued to assessee only in the year in which payment advice was issued by MC.

A.13.3. Income tax is a levy on income. It takes into account the point of time at which liability to tax is attracted, i.e; accrual of income or its receipt. Hon'ble Supreme Court in case of CIT vs Shoorji Vallabhdas & Co reported in (1962) 46 ITR 144 held that: "……. If income does not result at all, there cannot be a tax, even though in book keeping and entries made about a 'hypothetical income', which does not materialise. Where income has, in fact, been received and subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable. Where, however the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of the income, even though an entry to that effect might, in certain circumstances, have been made in the books of account."

A.13.4. In CIT vs Kerala State Drugs & Pharmaceuticals Ltd., reported in (1991) 192 ITR 1, Hon'ble Kerala High Court observed and held as under: "In order to tax on income, one has to see whether it is the real income or whether the income has materialised. What is necessary to be considered is the true nature of the transaction and whether in fact the transaction has resulted in profit or loss to the assessee. Once accrual takes place and income accrues, the same cannot be defeated. Even under the mercantile system of accounting, it is only the accrual of real income which is chargeable to tax. The income should

not be hypothetical income, but real income. If income is given up unilaterally by the assessee after it had accrued, it could not escape liability to tax. When income is in fact received but subsequently given up it remains the income of the recipient and taxes payable. When income is not resulted at all, there is neither accrual nor receipt of income even if there is an entry to that effect in the books of account. Mere postponing of an entry in the account books would not always supply conclusive evidence on the question whether the disputed amount has accrued to the assessee or not. Mere effort on the part of the assessee to realise the amount by sending a bill or making a claim or filing a suit for recovery would not in law make it an income which has accrued in the year in question. The transfer of the amount to the profit and loss account is bereft of any significance."

A.13.5. We also refer to decision by Hon'ble Bombay High Court on concept of real income, emphasised in case of Kashiparekh and Co Ltd (HM) vs. CIT, reported in (1960) 39 ITR 706. Hon'ble Court held that, surrender of income even after closure of accounting year may make no difference to the concept of real income. Hon'ble Bombay High Court, relied on view expressed by Hon'ble Supreme Court in case of CIT vs Birla Gwalior (P) Ltd reported in (1973) 89 ITR 266 as under: "The principle of real income is not to be subordinated as to amount virtually to a negation of it when a surrender or concession or rebate in respect of managing agency commission is made, agreed to or given on grounds of commercial expediency, simply because it takes place sometime after the close of an accounting year. In examining any transaction and situation of this nature the court would have more regard to the reality and speciality of the situation rather than the purely theoretical or doctrinaire aspect of it. It will lay greater emphasis on the business aspect of the matter viewed as a whole when that can be done without disk regarding statutory language." From the above ratios laid down by Hon'ble Supreme Court and many High Courts, it could be construed that, accrual of income must be judged, depending facts and circumstances of each case.

A.13.6. It has been vehemently contended by Ld.Counsel that, assessee did not have right to accrue such income, since its receipt was hypothetical in the year of sale. And, though assessee followed mercantile system of accounting, it had to postponed its accrual to subsequent years, when sale proceed were actually received. It was submitted by assessee that, income did not materialise during the year under consideration. It was contended that in view of uncertainty, assessee need not account for the same even under mercantile system of accounting. It was submitted that sales revenue accrued to assessee only in the year in which payment advice was issued by MC.

A.13.7. The present facts of the case, we note that, total sale proceeds as on the date of sale by virtue of directions of Hon'ble Supreme Court in case of Samaj Parivartana Samudaya vs State of A.Y:2013-14 Karnataka, (supra) approved sale of iron ore through e-auction conducted by MC. It is also observed that Hon'ble Court directed that, the quantity to be put for e-auction, its grade, lot sizes, its base/flow price and the period of delivery would be decided/provided by the respective leaseholders. It is also noted that, MC may permit the leaseholders to put up for e-auction the quantities of iron ore planned to be produced in subsequent months. Hence, we cannot agree that, assessee was unaware regarding total quantity of iron ore sold and total sale proceeds received towards total quantities sold during the year.

A.13.8. On perusal of documents placed on record, we are of the view that, assessee was aware of total quantity of iron ore sold and dispatched, total sale proceeds received towards total quantity sold during the year and value of stock that was not considered for release. This is evident from page 178, 180-181 of paper book, wherein, date of sale, for both mining leases and amount realised are placed. Under such circumstances, assessee cannot escape from incident of accrual of such income during financial year relevant to assessment year under consideration.

A.13.9. There is no dispute with regard to the fact that, declared stock belongs to assessee and assessee has to recognise revenue arising on sale of such stock. We have already noted that the role of MC was to carry out the e-auction of the stock and sell the stock on behalf of assessee as per the directions of total sale proceeds as on the date of sale by virtue of directions of Hon'ble Supreme Court in case of Samaj Parivartana Samudaya vs State of Karnataka, (supra). Therefore, the risk in such stock stood transferred from assessee to the buyer as on the date of sale. Further, assessee was vested with legal right to receive sale proceeds from stocks sold by MC. Therefore, income became due to assessee as on date of sale of stock, and it became due to assessee, when sale proceeds were received by MC. We also note that under VAT, the sales have been recognised for year under consideration by assessee which further strengthens our view. In our opinion, under such circumstances, date of payment does not affect accrual of income.

A.13.10. In support, we refer to decision of Hon'able Supreme Court in case of CIT vs Excel Industries Ltd (supra) . Hon'ble Court while deciding the case referred to its coordinate bench decision in case of Morvi Industries Ltd vs CIT reported in (1971) 82 ITR 835. It was observed that income can be said to accrue, the moment it becomes due. It was further held that date of payment does not affect the accrual of income. The moment income accrues, assessee gets vested with the right to claim it, even though it may not be made immediately. Hence, receipt of the sale consideration on a later date would not postpone the accrual of income. Under Sale of Goods Act, 1930, a key criterion for determining when to recognise revenue from a transaction involving the sale of goods is that the seller has transferred the property in the goods to the buyer for a consideration. The transfer of property in goods, in most cases, results in or coincides with the transfer of significant risks and rewards of ownership to the buyer. Also as per ICDS-IV relating to revenue recognition, sale is completed when property in the goods transferred from the buyer to the seller for a price and further the seller retains no effective control of the goods so transferred. In present facts, iron ore stood transferred to the buyers as on the date of sale through E auction by MC. We note that assessee was aware about the amount to be received as sale consideration and the details regarding deduction is towards SPV as per the directions of Hon'ble Supreme Court.

A.13.11. We therefore do not find any force in the submissions made by Ld.Counsel that there is no necessity to assess the impugned sale proceeds during the year since it has been already offered to tax in subsequent assessment year and the exercise is tax neutral. Under Income tax Act, total income of each year is to be determined separately and hence income has to be assessed in the right assessment year. Considering totality of facts in the present case, we are of the view that, sale proceeds of assessee's stock accrued to assessee during

financial year relevant to assessment year under consideration. Based on above discussions and observations, in our view, we are of opinion that, sale proceeds from disclosed stock accrued to assessee during the year under consideration and has to be considered for determining income under the head 'profits and gains from business for year under consideration. We have already noted that assessee has offered the above sale consideration on subsequent assessment years, and income tax act does not permit to assess same income twice. Hence in our view assessee may move appropriate petition before the authorities below for exclusion of above sale proceeds from declared stock in the relevant assessment year. Ld.AO is directed to consider such application liberally by granting proper opportunity of being heard to assessee."

5.4 In view of the above order of the Co-ordinate Bench of the Tribunal, we dispose of the above issue with similar directions.

5.5 In the result, ground No.3 raised by the assessee for assessment year 2013-2014 is rejected.

6. Difference in receipts as per 26AS treated as unaccounted receipts. (Asst.Year 2013-2014)

6.1 The Assessing Officer had added a sum of Rs.4,49,334 for the reason that there is a difference in receipt / sales account in the books of account and receipts as per Form No.26AS. The learned AR before the Tribunal submitted that M/s.MSPL had made TDS twice on the same payment, first time when paying the advance and subsequently in final payment. The TDS already made on the advance was omitted to be noticed while making the final payment on raising the invoice. It was submitted that the assessee had filed a reconciliation statement clearly explaining how TDS was made on the same amount twice.

6.2 The learned Departmental Representative present was duly heard.

6.3 We have heard rival submissions and perused the material on record. We direct the A.O. to consider the assessee's reconciliation statement, provided the assessee moves an application that there is no difference in the income disclosed and receipts as per Form No.26AS. With these directions, we dispose of ground No.4 for assessment year 2013-2014.

7. Contribution to the Deputy Commissioner, Government of Karnataka, for Hampi Utsav (Asst. Year 2015-2016)

7.1 The assessee had paid an amount of Rs.10,00,000 as contribution towards Humpi Utsav to the Deputy Commissioner, Government of Karnataka. This issue we noticed is covered in favour of the assessee in assessee's own case for assessment year 2009-2010 in ITA No.504/Bang/ 2014 (order dated 29.05.2020), wherein it was held that the contribution made towards Hampi Utsav is an allowable expenditure u/s 37(1) of the I.T.Act. The relevant finding of the Tribunal reads as follow:-

> *"6. We have considered the rival submissions. We find that in para 2 on page 4 of this order, it is noted by learned CIT(A) that in the present case, the payment is not only made by the assessee firm but similar payments have also been made by all the business / industrial houses situated in Bellary and nearby districts depending upon the scale of business. It is also noted by CIT(A) that the present payment has helped the firm in getting goodwill of local citizens, bureaucrats, politicians, press and others. In our considered opinion, when this is admitted by learned CIT(A) that this payment in question will help the firm in getting goodwill of local citizens, bureaucrats, politicians, press and others, this will definitely benefit the assessee firm's business also, may at a later date. Therefore, in our considered opinion, this expenditure is an allowable expenditure under section 37(1) of the Income Tax Act, 1961. We respectfully follow the judgment of Hon'ble Karnataka High Court rendered in the case of M/s. Kanhaiyalal Dudheria Vs. JCIT (supra) and decide the issue in favour of the assessee."*

7.2 Since facts of this assessment year is identical to the facts considered by the ITAT for Asst.Year 2009-2010, following the Co-ordinate Bench order of ITAT in assessee's own case for A.Y. 2009-2010, we direct the A.O. to allow a sum of Rs.10 lakh as an allowable business expenditure. It is ordered accordingly.

7.3 Therefore, ground No.3 raised for assessment year 2015-2016 is allowed.

8. In the result, the appeals filed by the assessee are partly allowed as indicated above.

Order pronounced on this 28th day of July, 2021.

Sd/-	**Sd/-**
(Chandra Poojari)	**(George George K)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Bangalore; Dated : 28th July, 2021.
Devadas G*

Copy to :
1. The Appellant.
2. The Respondent.
3. The CIT(A), Gulbarga
4. The Pr.CIT, Gulbarga.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore