IN THE INCOME TAX APPELLATE TRIBUNAL

'B' BENCH : BANGALORE

BEFORE SHRI. CHANDRA POOJARI, ACCOUNTANT MEMBER

AND

SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA No.522/Bang/2019
Assessment Year : 2013-14

Ashwathnarayana Singh and Co. Mine Owners, No.54, Beside Shakthi Nursing Home, 3rd Cross, Parvathi Nagar, Bellary-583 103. Karnataka **PAN – AACFA 3735A**	**Vs.**	The Asst. Commissioner of Income-tax, Circle-1, Bellary.
APPELLANT		**RESPONDENT**

Appellant by	:	Shri Laxminiwas Sharma, C.A
Respondent by	:	Smt. Muzaffar Hussain, CIT (DR)

Date of Hearing	:	18-01-2021
Date of Pronouncement	:	01-02-2021

O R D E R

PER BEENA PILLAI, JUDICIAL MEMBER:

Present appeal is filed by the assessee against order passed by Ld.CIT(A), Gulbarga dated 24.01.2019 on following grounds of appeal:

	Ground of appeal	Tax effect relating to each Ground of appeal
1	The order of the learned Commissioner of Income Tax (Appeals), Gulbarga [CIT(A)] is erroneous both on facts and in law to the extent it is prejudicial to the assessee.	
2	The learned CIT(A) erred in confirming the disallowance of Rs. 2,56,53,662/- (being 15% of sale proceeds retained by Monitoring Committee on the directions of Hon'ble Supreme Court) made by assessing officer by holding the same as **penal** in nature ignoring that it is compensatory in nature and incurred wholly and exclusively for the purpose of business and hence allowable as deduction u/s 37 of the Income Tax Act, 1961.	**Rs. 79,26,982/-**
3	The learned CIT(A) erred in confirming the disallowance of Rs. 20,55,00,000/- (being compensatory payment made by assessee/retained from the sale proceeds by monitoring committee on the directions of Supreme Court for mining and dumping outside lease area) made by assessing officer by holding it as penalty ignoring that Hon'ble Supreme Court itself has termed this as "Compensatory Payment".	**Rs. 6,34,99,500/-**
4	The learned CIT(A) erred in confirming that the payments are made for violation of law ignoring that such payment is made in order to fulfil the conditions recommended by CEC and accepted by Supreme Court for resuming and continuing the mining operations i.e. business of the assesse.	
5	The learned CIT(A) erred in ignoring that the hon'ble Supreme Court has held that "There is nothing in the preconditions or in the details of the R&R plans suggested which are contrary to or in conflict or inconsistent with any of the statutory provisions of the MMDR Act, EP Act and	

6	The learned CIT(A) and AO erred in applying the concept of corporate social responsibility, ignoring that appellant isa partnership firm and under no obligation to comply with the corporate social responsibility provisions which are applicable to companies and has made contribution to SPV	
7	The learned AO erred in holding the provision made by assessee towards amounts retained by Monitoring Committee on the directions of Hon'ble Supreme Court as contingent liability ignoring that the amounts have been correctly estimated and hence it is an ascertained liability which was	
8	For these and any other grounds which may be raised on or before hearing of the appeal.	
Total Tax effect		**Rs. 7,14,26,482/-**

Brief facts of the case are as under:

2. Assessee is a partnership firm and is into the business of extraction of iron ore processing and iron ore trading . For year under consideration assessee filed its return of income on 30/09/2013 declaring total loss of Rs.7,60,04,425/-. The case of assessee was selected for scrutiny and notices under section 143(2) and 142(1) were issued to assessee. In response to the statutory notices, representatives of assessee appeared before Ld.AO and filed details called for.

2.1. Ld.AO observed that the total income declared by assessee includes income from mining activity that is trading in iron ore, transportation and hire charges, loading charges, income and

sale of wind power. The return was selected for scrutiny and statutory notices were issued to assessee in response to which representative of assessee appeared before Ld. AO and furnished details as called for.

2.2. During the scrutiny proceedings, Ld.AO observed that, assessee reduced sum of Rs.2,56,53,662/- towards special purpose vehicle from the gross e-auction sale of iron ore. Upon calling for details in respect of the same Ld. AO noted that;

- Sum of Rs.2,56,53,662/- being 15% of the sale value towards SPV;
- Sum of Rs.20,55,00,000/- pertain to compensation towards mining pit and waste dump.

2.3. Assessee reflected gross sale of iron ore at Rs.17,10,24,410/- in the profit and loss account. Ld.AO noted that sum of Rs.2,56,53,662/- was debited to P&L account as SPV expenses. Ld.AO also noted that the said sum was deducted by monitoring committee and retained by the Central empowered committee as per the directions of *Hon'ble Supreme Court* out of sale proceeds for purpose of taking various ameliorative and mitigative measures as compensatory payment. Ld.AO after calling for various explanations/submissions from assessee held the said amount as not allowable as per *Explanation to section 37 (1)* of the Act.

3. Second grievance of the assessee is regarding disallowance of compensation of Rs.20,55,00,000/-. Assessee had debited to P &

L Account Rs. 20,55,00,000/- under the head deductions from e-Auction account(as per supreme Court order). The said amount was deducted by Monitoring Committee towards compensation for various irregularities found by CEC in mining area of assessee being illegal pits(Rs.17.15 crores) and illegal dumping waste(Rs.3.40Crores). The said amount was retained by monitoring committee as per the directions of *Hon'ble Supreme Court* out of sale proceeds. Ld.AO disallowed the same by holding that penalties paid for violating laws in course of conducting business cannot be regarded as deductible expenditure as assessee is expected to carry business in accordance with law.

4. Aggrieved by additions made by Ld.AO assessee preferred appeal before Ld.CIT(A), who upheld the disallowances so made.

Ld.CIT(A) gave similar observations as given by Ld.AO. He held that the amount contributed towards SPV is hit by *Explanation to section 37 (1)* of the Act. Ld.CIT(A) followed decisions of *Hon'ble Supreme Court* rendered in the case of *Haji Aziz & Abdul Shakoor Bros. vs. CIT, 41 ITR 350 (SC), Indian Aluminium Co. Ltd. Vs. CIT, 79 ITR 514 (SC)* and *Maddi Venkatraman & Co. (P) Ltd. Vs. CIT, 229 ITR 534 (SC)*.

4.1 On the second issue Ld.CIT(A) , upheld he addition by LD.AO. Ld.AIT(A) held that, no where in the Income Tax Act, particularly such nature of expenditure is allowable under section 37. The Ld.CIT(A) taking recourse under Explanation 1 to

Section 37, upheld the disallowance being penalty for breach of law.

6. Aggrieved by the order of Ld.CIT(A) assessee is in appeal before us now for both years under consideration.

7. At the outset, the Ld.AR submitted that Ground No.1 is general in nature and Grounds 4-8 are in relation to the disallowance made. The Ld.AR submitted that only two disallowance were made by the Ld.AO, pertaining to mining activity carried on by assessee for year under consideration. One is SPV contribution by the Monitoring Committee out of sale proceeds and Compensation paid as per direction of *Hon'ble Supreme Court*.

He submitted that contribution to SPV account are recurring in nature to assessee, and that the assessee has to contribute to SPV against every sale as per the scheme approved by *Hon'ble Supreme Court*. Ld.AR regarding Compensation, it was submitted that such payments has to be made by the assessee as quantified by the CEC as directed by Hon'ble Supreme Court.

SPV Contribution: - Ground No.2

In course of hearing of this appeal, arguments were raised by both sides on issues raised by assessee. Ld.AR submitted that, disallowance of SPV (Special Purpose Vehicle) Charges for year under consideration is Rs.2,56,53,662/-.

7.1. We note that, assessee is Category 'B' lease holder of mining lease no.2531, having sanctioned lease area of 50.50ha.

7.3. The Ld.AR submitted that assessee debited the above amount to P & L Account as SPV Expenses as, this amount was deducted by Monitoring Committee as per the directions of *Hon'ble Supreme Court,* out of the sale proceeds for the purpose of taking various ameliorative and mitigative measures. The Ld.AR submitted that, assessee filed reply before authorities below and submitted that *Hon'ble Supreme court* in 'A' Category Mines, directed contribution of 10% out of e auction sales towards SPV and in Category 'B' mines the contribution was to the extent of 15% of e auction sales. The Ld.AR submitted that, SPV expenses are for socio economic development of the mining area. He further submitted that the Ld.AO invoked *Explanation to section 37 (1)* of Act.

7.5. The Ld.AR relied on decision of *Hon'ble Hydrabad Tribunal* in case of *NMDC Ltd. Vs. ACIT* as reported in *175 ITD 332.* Our attention was drawn to paras 9 to 11 of the *Tribunal's order*. He pointed out that in Para 10 of order, *Hon'ble Hydrabad Tribunal* noted that assessee therein was classified as 'A' Category Mine and in para 11, it is held by the *Tribunal* that 10% of sale proceeds being SPV in 'A' category mine is was to be contributed without which, assessee therein could not have resumed its activities and therefore is a 'business expenditure' and is allowable u/s 37(1) of Income tax Act. He submitted that the only

difference in percentage of SPV contribution, which is 15% of sale proceeds in 'B' Category as against 10% of sale proceeds in 'A' Category. The Ld.AR submitted that, it does not change the nature/character of expenditure and therefore, in the present case, decision of *Hon'ble Hydrabad Tribunal* is squarely applicable to the facts of present case. He also placed reliance on decisions of coordinate bench of this *Tribunal* in case of *M/s.Ramgad Minerals & Mining Ltd Vs.ACIT in ITA No.1270&1271/Bang/2019 by order dsted 04/11/2020 and M/s.Veerabhadrappa Sangapa &Co. Vs. ACIT in ITA no.1054/Bang/2019 by order dated 08/12/2020.*

7.7. The Ld.CIT.DR supported orders of the lower authorities. About the decision of *Hon'ble Hydrabad Tribunal*, cited by Ld.AR in the case of *NMDC Ltd. Vs. ACIT (Supra)*, it was submitted that in that case, the assessee was in 'A' category and therefore, the decision is not applicable in the present facts of case. He placed reliance on various observations of *Hon'ble Supreme Court* emphasising that the SPV contributions are basically in the nature of penalty which are to be disallowed under explanation to section 37 (1) of the Act.

7.8. We have considered rival submissions of both sides in light of records placed before us.

We note that this issue stands squarely covered by decisions of coordinate bench of this *Tribunal* in case of *M/s.Ramgad*

Minerals & Mining Ltd Vs. ACIT in ITA No.1270&1271/Bang/2019 by order dated 04/11/2020 and M/s.Veerabhadrappa Sangapa &Co. Vs. ACIT in ITA no.1054/Bang/2019 by order dated 08/12/2020.

We refer to following observation by this *Tribunal* in case of *M/s.Veerabhadrappa Sangapa &Co. Vs. ACIT in ITA no.1054/Bang/2019 by order dated 08/12/2020.*

> ***"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.*
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> - *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:*
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> - *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. <u>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.</u>"

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:*

"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. <u>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.</u>"

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."*

Based on above discussions and analysis, we are of opinion that contribution to SPV being 15% of sale proceeds, under category B, is to be allowable expenditure for year under consideration.

Accordingly Ground No. 2 raised by assessee stands allowed.

8. Ground No.3 is in respect of disallowance of Rs.20,55,00,000/- by hold to be penal in nature**.**

Before us, the Ld.AR referred to breakup of Rs.20,55,00,000/- at page 109 of paper book:

Compensation (mining pit) 3.43Ha Rs.17,15,00,000

Compensation (dump, received etc, 3.43 Ha) Rs.3,40,00,000

Additional Other area(4.96 Ha) Rs.4,96,00,000

Other category (1.51 Ha) Rs.1,51,00,000

8.1. The Ld.AR submitted that, payment advises issued by Department of Mines and Geology, clearly mentions that, above amounts retained by the MC are towards R&R plan as compensation, and that, no where in the payment advise, the term, "penalty" is used. The Ld.AR, 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.

8.2. In respect of this issue, assessee relied on decision of coordinate bench of this *Tribunal* in case of *M/s.Veerabhadrappa Sangapa &Co. Vs. ACIT in ITA no.1054/Bang/2019 by order dated 08/12/2020,* wherein on identical facts it has been held as expenditure allowable under section 37 of the Act.

8.3 On the contrary the Ld.CIT(DR) relied observations of Hon'ble Supreme Court (Supra) and orders passed by the Ld.AO/CIT(A).

8.4 On this issue this *Tribunal* observed and held as under:

> ***"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 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 dispute-settling. 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."

Based on above discussions and analysis, we are of opinion that payment made as compensation is allowable expenditure for year under consideration.

Accordingly Ground No.3 raised by assessee stands allowed.

In the result appeal is filed by assessee for year under consideration stands allowed.

Order pronounced in the open court on 1st February, 2021

(CHANDRA POOJARI) (BEENA PILLAI)
Accountant Member Judicial Member
Bangalore,
Dated, the 1st February, 2021.

/Vms/

Copy to:

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

By order

Assistant Registrar, ITAT, Bangalore