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IN THE INCOME TAX APPELLATE TRIBUNAL, 'E' BENCH MUMBAI

BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER
&
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No.1021/Mum/2018
(**Assessment Year :2010-11**)
&
ITA No.1023/Mum/2018
(**Assessment Year :2009-10**)

M/s. Essel Mining & Industries Limited Industry House 18th Floor, 10, Camac Street Kolkata, West Bengal- 700 017	Vs.	Deputy Commissioner of Income Tax Central Circle 1(4) 9th Floor, Old CGO Building M.K.Road, Mumbai- 400 020
PAN/GIR No.AAACE6607L		
(Appellant)	..	**(Respondent)**

ITA No.1551/Mum/2018
(**Assessment Year :2010-11**)
&
ITA No.1554/Mum/2018
(**Assessment Year :2009-10**)

Joint Commissioner of Income Tax Central Circle 1(4) Room No.902, 9th Floor, Old CGO Building M.K.Road, Mumbai- 400 020	Vs.	M/s. Essel Mining & Industries Limited Industry House 18th Floor, 10, Camac Street Kolkata, West Bengal- 700 017
PAN/GIR No.AAACE6607L		
(Appellant)	..	**(Respondent)**

Assessee by	Shri Yogesh Thar & Ms. Sukanya Jayaram
Revenue by	Shri Manoj Kumar
Date of Hearing	**03/11/2022**
Date of Pronouncement	**15/11/2022**

आदेश / O R D E R

***PER BENCH*:**

ITA No. 1023/Mum/2018 – Assessee Appeal – Asst Year 2009-10
ITA No. 1554/Mum/2018 – Revenue Appeal – Asst Year 2009-10

These cross appeals in ITA Nos.1023/Mum/2018 & 1554/Mum/2018 for A.Y.2009-10 arise out of the order by the ld. Commissioner of Income Tax (Appeals)-47, Mumbai in appeal No.CIT(A)-47/10120/16-17 dated 26/12/2017 (ld. CIT(A) in short) against the order of assessment passed u/s.153C r.w.s. 143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 29/03/2016 by the ld. Dy. Commissioner of Income Tax, Central Circle 1(4), Mumbai (hereinafter referred to as ld. AO).

Common issues are involved in all these appeals and hence they are taken up together and disposed of by this common order for the sake of convenience.

2. The assessee has raised the following grounds of appeal before us:-

> *1.That on the facts and in the circumstances of the case and in law, the Commissioner of Income Tax (Appeals) (hereinafter referred to as the CIT(A)) erred in holding that the proceedings u/s 153C r.w.s. 153A of the Income Tax Act 1961 (hereinafter referred to as the Act) has been validly initiated by the Assessing Officer (hereinafter referred to as AO).*
>
> *2. That on the facts and in the circumstances of the case and in law, the CIT(A) erred in dismissing appellant's claim that re-examination of issues/genuine claims, which had obtained finality as per Order u/s 143(3) of the Act, are beyond the scope of assessment u/s 153C of the Act.*

3. That on the facts and in the circumstances of the case and in law, the CIT(A) erred in not considering and dismissing the appellant's main Ground of Appeal No. 2 {before the CIT(A)} which was a question of law as to whether AO can re-examine the claims which had obtained finality as per Order u/s 143(3) of the Act and did not abate as per the provisions of section 153C r.w.s. 153A of the Act.

3.1. That on the facts and in the circumstances of the case and in law, the CIT(A) erred in not considering and dismissing the appellant's main Ground of Appeal No. 2 {before the CIT(A)} without appreciating the fact that in the case of assessments which do abate, the addition / disallowances can solely be made on the basis of only incriminating materials which admittedly, in the case of appellant, is not available.

3.2. That the CIT(A) erred in deciding Alternate Grounds {Ground Nos. 5 to 7 before CIT(A)} without considering and hence dismissing the Main Ground {Ground No. 2. before CIT(A)}.

4.That on the facts and in the circumstances of the case and in law, the CIT(A) erred in confirming the addition of Rs.20,04,07,521/- on account of alleged illegal mining without appreciating the fact that the issue of mining production was fully verified in course of assessment proceeding u/s 143(3) of the Act.

5. That on the facts and in the circumstances of the case and in law, and without prejudice to Ground No. 4, the CIT(A) erred in not considering the appellant's Ground No. 6 {before the CIT(A)} which was against the action of the AO in valuing the closing stock of sub-grade Iron Ore after including Royalty.

5.1 That the CIT(A) failed to appreciate that Royalty cannot be included in the valuation of closing stock of sub-grade Iron Ore which was lying in the premises of the appellant. Royalty is applicable only on actual despatches from the mines.

6. That on the facts and in the circumstances of the case and in law, and without prejudice to Ground No. 4, the CIT(A) erred in not considering the appellant's Ground No. 7 {before the CIT(A)} in which appellant had claimed that in case of addition on account of non-reporting of sub-grade production in particular assessment year, than impact of the same should be given in successive assessment years till the assessment in which such production was reported as saleable production due to available market.

7. That the appellant craves leave to add, alter or withdraw any ground or grounds of Appeal at or before the hearing of the Appeal."

2.1. We find that assessee had raised an additional ground vide letter dated 13/08/2021.

3. We deem it fit to address the original ground Nos. 3 and 3.1. raised by the assessee before us wherein the assessee had challenged the validity of assessment framed u/s.153C of the Act for A.Y.2009-10 by making certain disallowances and additions without the existence of incriminating material for the year under consideration received from the Assessing Officer of the searched person.

3.1. We find that assessee company is engaged in the business of raising Iron ore, manufacturing of Nitrogen Gas, Ferro Alloys, Trading of Iron Ore and Ferro Alloys, generation of electricity (Windmill) and Railway Siding for captive use. The original return of income was filed by the assessee company for the A.Y.2009-10 on 30/09/2009 declaring total income of Rs.1345,80,61,460/-. This return was revised by the assessee on 31/03/2011. The assessment was completed u/s.143(3) of the Act on 30/12/2011 determining total income at Rs.1374,99,31,150/-. This assessment was framed on the assessee company by the Assessing Officer in Kolkata as the registered office of the assessee company was situated in 10, Camac Street, Kolkata – 700 017 at that point in time. Later the case of the assessee was transferred from Kolkata to Mumbai jurisdiction vide order u/s.127(2) of the Act dated 30/09/2014 by the Administrative Commissioner of Income Tax of Kolkata. Strangely yet another notice u/s.148 of the Act was issued by the Kolkata Officer on 13/10/2014 seeking to reopen the assessment of the assessee.

3.2. A limited search and seizure action was conducted by the Investigation Wing, New Delhi on the basis of information passed on by the CBI on 15/10/2013. The information received from the CBI on 15/10/2013 over phone was that during a search action being carried out by CBI at the premises of Aditya Birla group at 4th Floor, UCO Bank building, Parliament Street, New Delhi, the CBI team had found huge cash at the said premises of M/s. Aditya Birla Management Corporation Pvt. Ltd., (ABMCPL in short). On the basis of this, a survey u/s.133A of the Act was conducted in the said premises in the case of ABMCPL on 15/10/2013 which was converted into search and seizure operation by issuance of search warrant u/s.132 of the Act in the name of ABMCPL and in the case of its group Executive President Shri Shubhendu Amitabh at his residential premises on 16/10/2013. The search and seizure action resulted into seizure of unaccounted cash of Rs.25,13,41,000/-; jewellery and billion worth of Rs.44,82,394/- besides incriminating documents from the office of the ABMCPL and from the residence of Shri Shubhendu Amitabh. Several books of accounts, documents etc., were found seized and inventorised as Annexure-1 to Annexure-23. Also various computer hard discs and laptops were seized which were inventorised as Annexure-24 to Annexure-40.

3.3. The Annexure A-8 seized from the premises of ABMCPL which was subjected to search u/s.132 of the Act was a petty cash book of M/s. Essel Mining & Industries Ltd., i.e. the assessee before us. This petty cash book belonging to Essel Mining and Industries Ltd., was found and seized from the said premises of ABMCPL and since the said entries suggest that the ownership of unaccounted cash lies in the hands of M/s. Essel Mining & Industries Ltd., and therefore, it has direct bearing on the determination of its total income. Accordingly, the Assessing Officer of the

searched person i.e. ABMCPL recorded due satisfaction that the said document Annexure A-8 being the petty cash book belongs to assessee herein before us and handed over the said seized documents to the Assessing Officer of the assessee before us. Later notice u/s.153C of the Act was issued on the assessee company on 26/11/2014 to file the returns for A.Yrs. 2008-09 to 2013-14. In response to this notice, the assessee filed a fresh return of income on 31/12/2014 declaring total income of Rs.1348,00,75,711/- which was same as the returned income filed in the revised return on 31/03/2011. The assessment was completed u/s.153C r.w.s. 143(3) of the Act by the ld. AO on 29/03/2016 for the A.Y.2009-10 by determining the total income at Rs.1513,83,22,160/- under normal provisions of the Act and book profits of Rs.1446,88,86,081/- u/s.115JB of the Act. Under normal provisions of the Act, the following disallowances / additions were made:-

i) Disallowance u/s.14A of the Act	- Rs.23,26,88,361/-
ii) Disallowance of prior period expenses	-Rs. 89,78,073/-
iii) Disallowance of Penalty expenses	- Rs 9,36,000/-
iv) Carbon Credit treated as revenue income	- Rs 7,94,64,467/-
v) Addition made on account of illegal Unaccounted provision(illegal mining)	-Rs.20,04,07,521/-
vi) Denial of deduction u/s.80IA of the Act	-Rs.112,12,25,027/-
vii) Expenses related to exempt income u/s 80IA and 10B having impact in their Respective computations	-Rs 2,62,53,000/-

3.4. The ld. AR before us submitted that none of the aforesaid additions were made based on the incriminating material in the form of petty cash book vide Annexure-A-8 received from the Assessing Officer of

ABMCPL(being the searched person u/s.132 of the Act). The ld. AR submitted that the A.Y.2009-10 was a concluded assessment as on the date of assumption of jurisdiction u/s 153C of the Act by the ld. AO and hence, no addition or disallowance could be made in the search assessments framed either u/s.153C of the Act without existence of any incriminating material relatable to such assessment year. To address this aspect of the issue, it is pertinent to get into the fact as to whether the ld. AO had relied upon any incriminating material received from the Assessing Officer of the search person to make additions, disallowances in the assessment framed u/s.153C of the Act for A.Y.2009-10 in the hands of the assessee. Let us examine the same in respect of each disallowance / addition made in the assessment as under:-

A. <u>Disallowance u/s.14A of the Act - Rs.23,26,88,361/-</u>

We find that this disallowance was made already in the regular assessment framed u/s. 143(3) of the Act for the A.Y.2009-10 on 30/12/2011. Hence, there cannot be any reliance that could be placed on any search material.

B. <u>Disallowance of Prior Period Expenses – Rs. 89,78,073/-</u>

We find that this disallowance was made already in the regular assessment framed u/s. 143(3) of the Act for the A.Y.2009-10 on 30/12/2011. Hence, there cannot be any reliance that could be placed on any search material.

C. <u>Disallowance of Penalty Charges – Rs 9,36,000/-</u>

We find that this disallowance was made already in the regular assessment order u/s.143(3) of the Act on 30/12/2011 for the

A.Y.2009-10. Hence, there cannot be any reliance that could be placed on any search material.

D. <u>Carbon Credit treated as revenue receipt- Rs 7,94,64,467/-</u>

We find that this addition was newly made in the search assessment framed u/s 153C r.w.s. 143(3) of the Act for the A.Y. 2009-10 by the ld. AO vide his order dated 29.03.2016. We find that there is absolutely no incriminating material found during the course of search relatable to this issue and hence being a concluded assessment, the ld. AO would not be empowered to travel beyond what has been stated in the original assessment order. Hence, there cannot be any reliance that could be placed on any search material for framing this addition.

E. <u>Addition made on account of illegal unaccounted provision Rs.20,04,07,521/-</u>

We find that the ld. AO in page 19 para 14.1 had addressed this issue wherein he had made this addition by placing reliance on Justice M.B.Shah Commission report submitted before the Hon'ble Supreme Court pointing out discrepancy in production data of the assessee. It is pertinent to note that Justice M B Shah Commission was setup on illegal mining of Iron Ore and Manganese Ore in the states of Orissa, Jharkhand and Goa. The ld. AO had observed in para 14.3 of his order that as per the said report, the assessee was found to be involved in illegal mining activity of Iron ore. After calculating discrepancy in the production data, the ld. AO worked out the addition on account of suppressed production of Rs.20,04,07,521/- (490522 MTS x Rs.408.56 per MT) and made an

addition for the same in the search assessment concluded u/s.153C of the Act.

From the aforesaid narration of facts and the manner in which this addition has been made by the ld. AO, it could be safely concluded that the ld. AO had not relied upon any search material that has been handed over by the Assessing Officer of ABMCPL (being the searched person u/s.132 of the Act) and that this addition had been made by merely placing reliance on the Justice M B Shah commission report. The only incriminating material which was handed over to the Assessing Officer of the assessee herein was Annexure A-8 containing petty cash book. No additions have been made for A.Y.2009-10 in the impugned search assessment u/s.153C of the Act by placing reliance on the said petty cash book. Hence, it could be safely concluded that the addition made on account of illegal unaccounted production does not come out of any seized material received from the Assessing Officer of the searched person relatable to A.Y.2009-10. In fact the ld. AR even took us to the said petty cash book Annexure A-8, wherein it is seen that the entries found thereon relate only to A.Y. 2011-12 for which a separate addition has been made in the sum of Rs.1.35 Crores by the ld. AO for A.Y.2011-12. This itself categorically goes to prove that no reliance has been placed by the ld. AO on the said petty cash book Annexure A-8 for making this addition for A.Y.2009-10.

F. <u>Denial of deduction u/s 80IA of the Act with respect to Rail System – Rs 112,12,25,027/-</u>

We find that this disallowance was made based on the Mumbai Tribunal decision rendered in the case of Ultratech Cement Ltd,

which cannot be construed as incriminating material found during the course of search. In any case, this decision of tribunal has been reversed and in later decisions, the Mumbai Tribunal had granted deduction u/s 80IA of the Act for the rail system itself. Hence, there cannot be any reliance that could be placed on any search material for denying this deduction u/s 80IA of the Act.

G. <u>Apportionment of common expenses and its impact on claim of deduction u/s 80IA and u/s 10B of the Act – Rs 2,62,53,000/-</u>

We find that this is only concerned with workings for allowability of deduction u/s 80IA and u/s 10B of the Act with regard to apportionment of common expenses. It is only a computational issue. There cannot be obviously any reference to incriminating material found during search regarding this issue. Hence there cannot be any reliance that could be placed on any search material for reworking the claim of deduction u/s 80IA and u/s 10B of the Act.

3.5. We find that the ld. DR vehemently argued that there was yet another notice u/s.148 of the Act which was issued by the Kolkata Assessing Officer dated 13/10/2014. The date of issuance of notice u/s.153C of the Act was 26/11/2014. Hence, as on the date of the assumption of jurisdiction by the ld. AO u/s.153C of the Act, proceedings u/s.148 of the Act dated 13/10/2014 was pending which gets abated pursuant to search assessment to be framed in the hands of the assessee u/s.153C of the Act. Hence, he argued that there is no need for the existence of any search material for making any disallowance or additions

in the assessment framed u/s.153C of the Act in the hands of the assessee. We have already stated supra that the jurisdiction of the assessee has been changed from Kolkata to Mumbai vide order u/s.127(2) of the Act dated 30/09/2014 by the Administrative Commissioner of Income Tax. When the jurisdiction of the case has already been shifted from Kolkata to Mumbai on 30/09/2014, we are unable to understand as to how the Kolkata Assessing Officer could have issued notice u/s. 148 of the Act on 13/10/2014 for A.Y.2009-10. Hence, we hold that the said notice is without jurisdiction and accordingly null and void. When the primary notice u/s.148 of the Act dated 13/10/2014 becomes null and void, there cannot be any pending proceedings on the date of assumption of jurisdiction u/s.153C of the Act by the ld. AO i.e. 26/11/2014. Hence, the argument advanced by the ld. DR in this regard is dismissed as legally not tenable.

3.5.1. The ld. DR further argued that the term 'evidence' is to be used as per the Indian Evidence Act, 1872. He argued that the expressions 'incriminating material' and 'evidence' cannot be used interchangeably as the term 'evidence' has got a wider amplitude and meaning and confined only to seized material , whereas the expression 'incriminating material' has got a very narrow scope confined to search proceedings. He vehemently argued that the expression 'incriminating material' is not found in the provisions of the Act and it is only the Hon'ble Higher Courts which had given the said interpretation while deciding the appeals in respect of concluded assessments. Per Contra , the ld.AR in this regard argued that evidence should also emanate from the seized materials found during the course of search. In respect of Justice M B Shah Commission Report, the Hon'ble Jurisdictional High Court in the case of Sesa Sterlite Ltd vs ACIT reported in 417 ITR 334 (Bom) had categorically

held that in the absence of any independent material on record, assessment could not be reopened merely on the basis of opinion formed by Commission appointed by Central Government that there was under invoicing of exports by assessee, as conclusion drawn by the Commission was only its opinion and cannot be treated as primary facts.

3.6. We find that the ld DR argued that the expression 'incriminating material' is not found in the provisions of the Act and it is only the Hon'ble Courts which had imported those words while rendering the decisions. He stated that the Hon'ble Courts are divided on this issue and argued that the Special Leave Petition (SLP) preferred by the revenue against this issue is pending before the Hon'ble Supreme Court.

3.7. The ld DR argued that the basic foundation for conducting the search is governed by the provisions of section 132 of the Act which has to be read harmoniously with section 153A of the Act. There are three conditions based on which a search action could be initiated u/s 132 of the Act on an assessee. They are :-

Section 132(1) - If the concerned authority has in consequence of information in his possession, has reason to believe that -

(a) where a person fails to produce the books of accounts and other documents in response to notice u/s 142(1) or summons issued u/s 131(1) of the Act ; or

(b) where a person fails to comply with the requirements of summons issued u/s 131(1) of the Act ; or

(c) where a person is in possession of any money, bullion, jewellery or other valuable article or thing and such assets represents either wholly or partly income or property which has not been , or would

not be, disclosed for the purposes of the Act (hereinafter referred to as the undisclosed income or property) ;

then the officer , so authorized could conduct a search and proceed as per the requirements laid down in the said section. He argued that the aforesaid three primary conditions for invoking search proceedings cannot be given a go by while framing section 153A assessments and the instant case falls under section 132(1)(c) of the Act.

3.8. The ld. DR vehemently argued that the provisions of section 153A of the Act use the expression 'assess or reassess total income' and hence the search assessment could be framed u/s 153A of the Act irrespective of any incriminating materials.

3.9. We find that it would be necessary to address the preliminary issue of whether the addition could be framed u/s 153A of the Act in respect of a concluded proceeding without the existence of any incriminating materials found in the course of search. The scheme of the Act provides for abatement of pending proceedings as on the date of search. It is not in dispute that the assessment for the Asst Year 2009-10 was originally completed u/s 143(3) of the Act and hence it falls under concluded proceeding , as on the date of search. We hold that the legislature does not differentiate whether the assessments originally were framed u/s 143(1) or 143(3) or 147 of the Act. Hence unless there is any incriminating material found during the course of search relatable to such concluded year, the statute does not confer any power on the ld AO to disturb the findings given thereon and income determined thereon, as finality had already been reached thereon, and such proceeding was not pending on the date of search to get itself abated. It is not in dispute that both the ld AO and the ld CITA had admittedly not made any

reference to any seized material found during the course of search in their orders relatable to the completed assessment years with regard to the items of expenses that were subject matter of disallowances and additions. Every assessee would be having its regular books of accounts (where books are maintained) and would be filing his regular returns of income and assessments framed accordingly. If such person is subjected to search and the very same regular books of accounts were found at the time of search and if the ld AO tries to take a different view on the already recorded transactions in the said regular books of accounts in the search assessment u/s 153A of the Act which is contrary to the view taken by him in the original scrutiny assessments u/s 143(3) or intimation u/s 143(1) of the Act, then it would only result in giving another innings to the ld AO to review his own earlier decision on the very same set of facts and figures. This would make the entire scheme of the Act meaningless and the ld AO would be conferred with unfettered powers to review the earlier decisions taken either by him or by his predecessor on the very same issue , which in our considered opinion, cannot be the intention of the statute. That's why the legislature had duly drawn a distinction between the completed and abated assessments. The provisions of section 153A of the Act are reproduced hereunder for the sake of convenience :-

> ***"[Assessment in case of search or requisition***
>
> *153A. [(1)] Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall—*
>
> *(a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act*

shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139;

(b) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made :

Provided that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years:"

3.10. We find that the Co-ordinate Bench of Kolkata Tribunal in the case of *ACIT vs Kanchan Oil Industries Ltd in ITA No. 725/Kol/2011 dated 9.12.2015 reported in 2016-TIOL-167-ITAT-KOL* had explained the aforesaid provisions as below:-

"6.4 In our opinion, the scheme of assessment proceedings should be understood in the following manner pursuant to the search conducted u/s. 132 of the Act :-

(a) Notice u/s. 153A of the Act would be issued on the person on whom the warrant of authorization u/s. 132 of the Act was issued for the six assessment years preceding the year of search and assessments thereon would be completed u/s. 153A of the Act for those six assessment years.

(b) In respect of the year of search, notice u/s. 143(2) of the Act would be issued and assessment thereon would be completed u/s. 143(3) of the Act.

(c) In respect of concluded assessments prior to the year of search, no addition could be made in the relevant assessment year unless any incriminating material is found during the course of search with respect to the relevant assessment year.

(d) Pursuant to the search u/s. 132 of the Act, the pending proceedings would get abated. In respect of abated assessments, the total income needs to be determined afresh in accordance with the provisions of section 153A and other provisions of the Act.

6.4.1. The concluded assessments for the purpose of section 153A of the Act shall be -

(i) assessment years where assessments are already completed u/s. 143(1) and time limit for issuance of notice u/s. 143(2) of the Act has expired or;

(ii) assessment years where assessments are already completed u/s. 143(3) of

the Act ;

unless they are reopened u/s. 147 of the Act for some other purpose in both the scenarios stated above.

6.4.2. The scheme of assessment proceedings contemplated u/s. 153A of the Act are totally different and distinct from the proceedings contemplated u/s. 147 of the Act and these procedures of assessment operate in different fields and have different purposes to be fulfilled altogether.

6.4.3. The expression 'assess or reassess' stated in section 153A(1)(b) has to be understood as below:-

'assess' means assessments to be framed in respect of abated assessment years irrespective of the fact whether there are any incriminating materials found during the course of search with respect to relevant assessment years ;

'reassess' means assessments to be framed in respect of concluded assessment years where incriminating materials were found during the course of search in respect of the relevant assessment year."

3.11. We find that the provisions of section 132 of the Act relied upon by the revenue would be relevant only for the purpose of conducting the search action and initiating proceedings u/s 153A of the Act. Once the proceedings u/s 153A of the Act are initiated, which are special proceedings, the legislature in its wisdom bifurcates differential treatments for abated assessments and unabated assessments. At the cost of repetition, we state that in respect of abated assessments (i.e pending proceedings on the date of search) , fresh assessments are to be framed by the ld AO u/s 153A of the Act which would have a bearing on the determination of total income by considering all the aspects, wherein the existence of incriminating materials does not have any relevance. However, in respect of unabated assessments, the legislature had conferred powers on the ld AO to just follow the assessments already concluded unless there is an incriminating material found in the search to disturb the said concluded assessment. In our considered opinion, this would be the correct understanding of the provisions of section 153A of

the Act , as otherwise, the necessity of bifurcation of abated and unabated assessments in section 153A of the Act would become redundant and would lose its relevance.

3.12. In view of the above, the arguments of the ld. DR deserves to be rejected herein.

3.13. From the aforesaid narration of each of the disallowances / additions made, it could be safely concluded that none of the additions that were made by the ld. AO were based on reliance placed on search materials received from the Assessing Officer of the searched person. We hold that assessment for A.Y.2009-10 had originally been completed u/s.143(3) of the Act dated 30/12/2011. Notice u/s.153C of the Act was issued to the assessee only on 26/11/2014. Hence, on the said date i.e. 26/11/2014, no proceedings of the assessee were pending. Hence, we hold that A.Y.2009-10 becomes an unabated / concluded assessment on the date of assumption of jurisdiction u/s.153C of the Act. The law is very well settled that in respect of concluded assessments, the earlier assessment completed should not be disturbed in the search assessments without existence of any incriminating material relatable to such assessment year. Reliance in this regard is placed on the decision of the Hon'ble Jurisdictional High Court in the case of Continental Warehousing Corporation reported in 374 ITR 645. There is yet another decision which was rendered by the Hon'ble Calcutta High Court in the context of section 153C proceedings in the case of CIT vs. Veer Prabhu Marketing Ltd., reported in 73 taxmann.com 149 laying down the similar proposition.

3.14. In view of the aforesaid observations and respectfully following the judicial precedents relied upon hereinabove, we direct the ld. AO to re-

compute the total income of the assessee by accepting the income declared in the return filed in response to notice u/s.153C of the Act without making any additions or disallowances thereon, both under normal provisions of the Act as well as in the computation of book profits u/s 115JB of the Act. We categorically hold that no additions / disallowance could be made in the search assessment u/s.153C of the Act for A.Y.2009-10 in view of the aforesaid detailed reasons. Accordingly, the ground Nos.3 & 3.1 raised by the assessee are allowed.

4. In view of the aforesaid direction, the adjudication of other grounds raised by the assessee in its original grounds; additional grounds raised by the assessee and grounds raised by the Revenue need not be gone into as they would become academic in nature. No opinion is given thereon by us and they are left open.

5. In the result, appeal of the assessee is allowed in ITA No. 1023/Mum/2018 for A.Y. 2009-10 and appeal of the Revenue in ITA No. 1554/Mum/2018 for A.Y. 2009-10 is dismissed.

ITA No. 1021/Mum/2018 – Assessee Appeal – Asst Year 2010-11
ITA No. 1551/Mum/2018 – Revenue Appeal – Asst Year 2010-11

6. These cross appeals in ITA Nos.1021/Mum/2018 & 1551/Mum/2018 for A.Y.2010-11 arise out of the order by the ld. Commissioner of Income Tax (Appeals)-47, Mumbai in appeal No.CIT(A)-47/10115/16-17 dated 27/04/2016 (ld. CIT(A) in short) against the order of assessment passed u/s.153C r.w.s. 143(3) of the Income Tax Act, 1961 (hereinafter referred

to as Act) dated 29/03/2016 by the ld. Dy. Commissioner of Income Tax, Central Circle 1(4), Mumbai (hereinafter referred to as ld. AO).

7. We find that the assessee had raised the same grounds that were raised by it in Asst Year 2009-10. Similarly the revenue has also raised the same grounds in Asst Year 2010-11 except the ground raised in respect of Carbon Credit which was present in Asst Year 2009-10. Hence except the ground raised on taxability of Carbon Credit , all grounds raised by the revenue for Asst Year 2010-11 are identical to Asst Year 2009-10.

7.1. We find that assessee had raised an additional ground vide letter dated 13/08/2021.

8. We deem it fit to address the original ground Nos. 3 and 3.1. raised by the assessee before us wherein the assessee had challenged the validity of assessment framed u/s.153C of the Act for A.Y.2010-11 by making certain disallowances and additions without the existence of incriminating material for the year under consideration received from the Assessing Officer of the searched person.

8.1. We find that assessee company is engaged in the business of raising Iron ore, manufacturing of Nitrogen Gas, Ferro Alloys, Trading of Iron Ore and Ferro Alloys, generation of electricity (Windmill) and Railway Siding for captive use. The original return of income was filed by the assessee company for the A.Y.2010-11 on 30/09/2010 declaring total income of Rs.748,52,82,000/-. This return was revised by the assessee on 31/03/2012. The assessment was completed u/s.143(3) of the Act on 28/03/2013 determining total income at Rs.669,23,15,280/-. This

assessment was framed on the assessee company by the Assessing Officer in Kolkata as the registered office of the assessee company was situated in 10, Camac Street, Kolkata – 700 017 at that point in time. Later the case of the assessee was transferred from Kolkata to Mumbai jurisdiction vide order u/s.127(2) of the Act dated 30/09/2014 by the Administrative Commissioner of Income Tax of Kolkata.

8.2. A limited search and seizure action was conducted by the Investigation Wing, New Delhi on the basis of information passed on by the CBI on 15/10/2013. The information received from the CBI on 15/10/2013 over phone was that during a search action being carried out by CBI at the premises of Aditya Birla group atf 4th Floor, UCO Bank building, Parliament Street, New Delhi, the CBI team had found huge cash at the said premises of M/s. Aditya Birla Management Corporation Pvt. Ltd., (ABMCPL in short). On the basis of this, a survey u/s.133A of the Act was conducted in the said premises in the case of ABMCPL on 15/10/2013 which was converted into search and seizure operation by issuance of search warrant u/s.132 of the Act in the name of ABMCPL and in the case of its group Executive President Shri Shubhendu Amitabh at his residential premises on 16/10/2013. The search and seizure action resulted into seizure of unaccounted cash of Rs.25,13,41,000/-; jewellery and billion worth of Rs.44,82,394/- besides incriminating documents from the office of the ABMCPL and from the residence of Shri Shubhendu Amitabh. Several books of accounts, documents etc., were found seized and inventorised as Annexure-1 to Annexure-23. Also various computer hard discs and laptops were seized which were inventorised as Annexure-24 to Annexure-40.

8.3. The Annexure A-8 seized from the premises of ABMCPL which was subjected to search u/s.132 of the Act was a petty cash book of M/s. Essel Mining & Industries Ltd., i.e. the assessee before us. This petty cash book belonging to Essel Mining and Industries Ltd., was found and seized from the said premises of ABMCPL and since the said entries suggest that the ownership of unaccounted cash lies in the hands of M/s. Essel Mining & Industries Ltd., and therefore, it has direct bearing on the determination of its total income. Accordingly, the Assessing Officer of the searched person i.e. ABMCPL recorded due satisfaction that the said document Annexure A-8 being the petty cash book belongs to assessee herein before us and handed over the said seized documents to the Assessing Officer of the assessee before us. Later notice u/s.153C of the Act was issued on the assessee company on 26/11/2014 to file the returns for A.Yrs. 2008-09 to 2013-14. In response to this notice, the assessee filed a fresh return of income on 31/12/2014 declaring total income of Rs.640,53,02,488/-. The assessment was completed u/s.153C r.w.s. 143(3) of the Act by the ld. AO on 29/03/2016 for the A.Y.2010-11 by determining the total income at Rs.768,69,71,540/- under normal provisions of the Act and book profits of Rs.778,25,43,971/- u/s.115JB of the Act. Under normal provisions of the Act, the following disallowances / additions were made:-

i)	Disallowance u/s.14A of the Act	- Rs.21,74,09,077/-
ii)	Disallowance of Penalty expenses	- Rs 4,59,000/-
iii)	Disallowance of Club expenses	- Rs 37,152/-
iv)	Addition made on account of illegal Unaccounted provision(illegal mining)	-Rs.22,54,01,541/-
v)	Denial of deduction u/s.80IA of the Act	-Rs.78,43,89,265/-
vi)	Expenses related to exempt income u/s	

80IA and 10B having impact in their
Respective computations -Rs 5,39,65,517/-

8.4. The ld. AR before us submitted that none of the aforesaid additions were made based on the incriminating material in the form of petty cash book vide Annexure-A-8 received from the Assessing Officer of ABMCPL(being the searched person u/s.132 of the Act). The ld. AR submitted that the A.Y.2010-11 was a concluded assessment as on the date of assumption of jurisdiction u/s 153C of the Act by the ld. AO and hence, no addition or disallowance could be made in the search assessments framed either u/s.153C of the Act without existence of any incriminating material relatable to such assessment year. To address this aspect of the issue, it is pertinent to get into the fact as to whether the ld. AO had relied upon any incriminating material received from the Assessing Officer of the search person to make additions, disallowances in the assessment framed u/s.153C of the Act for A.Y.2010-11 in the hands of the assessee. Let us examine the same in respect of each disallowance / addition made in the assessment as under:-

Disallowance u/s.14A of the Act - Rs.21,74,09,077/-

We find that this disallowance was made already in the regular assessment framed u/s. 143(3) of the Act for the A.Y.2010-11 on 28/03/2013. Hence, there cannot be any reliance that could be placed on any search material.

Disallowance of Club expenses – Rs 37,152/-

We find that this disallowance was made already in the regular assessment framed u/s. 143(3) of the Act for the A.Y.2010-11 on

28/03/2013. Hence, there cannot be any reliance that could be placed on any search material.

Disallowance of Penalty Charges – Rs 4,59,000/-

We find that this disallowance was made already in the regular assessment order u/s.143(3) of the Act on 28/03/2013 for the A.Y.2010-11. Hence, there cannot be any reliance that could be placed on any search material.

Addition made on account of illegal unaccounted provision Rs.22,54,01,541/-

We find that the ld. AO in page 19 para 13.1 had addressed this issue wherein he had made this addition by placing reliance on Justice M.B.Shah Commission report submitted before the Hon'ble Supreme Court pointing out discrepancy in production data of the assessee. It is pertinent to note that Justice M B Shah Commission was setup on illegal mining of Iron Ore and Manganese Ore in the states of Orissa, Jharkhand and Goa. The ld. AO had observed in para 13.4 of his order that as per the said report, the assessee was found to be involved in illegal mining activity of Iron ore. After calculating discrepancy in the production data, the ld. AO worked out the addition on account of suppressed production of Rs.22,54,01,541/- (404620 MTS x Rs.557.07 per MT) and made an addition for the same in the search assessment concluded u/s.153C of the Act.

From the aforesaid narration of facts and the manner in which this addition has been made by the ld. AO, it could be safely concluded that the ld. AO had not relied upon any search material that has been handed over by the Assessing Officer of ABMCPL (being the searched person

u/s.132 of the Act) and that this addition had been made by merely placing reliance on the Justice M B Shah commission report. The only incriminating material which was handed over to the Assessing Officer of the assessee herein was Annexure A-8 containing petty cash book. No additions have been made for A.Y.2010-11 in the impugned search assessment u/s.153C of the Act by placing reliance on the said petty cash book. Hence, it could be safely concluded that the addition made on account of illegal unaccounted production does not come out of any seized material received from the Assessing Officer of the searched person relatable to A.Y.2010-11. In fact the ld. AR even took us to the said petty cash book Annexure A-8, wherein it is seen that the entries found thereon relate only to A.Y. 2011-12 for which a separate addition has been made in the sum of Rs.1.35 Crores by the ld. AO for A.Y.2011-12. This itself categorically goes to prove that no reliance has been placed by the ld. AO on the said petty cash book Annexure A-8 for making this addition for A.Y.2010-11.

Denial of deduction u/s 80IA of the Act with respect to Rail System – Rs 78,43,89,265/-

We find that this disallowance was made based on the Mumbai Tribunal decision rendered in the case of Ultratech Cement Ltd, which cannot be construed as incriminating material found during the course of search. In any case, this decision of tribunal has been reversed and in later decisions, the Mumbai Tribunal had granted deduction u/s 80IA of the Act for the rail system itself. Hence, there cannot be any reliance that could be placed on any search material for denying this deduction u/s 80IA of the Act.

Apportionment of common expenses and its impact on claim of deduction u/s 80IA and u/s 10B of the Act – Rs 5,39,65,517/-

We find that this is only concerned with workings for allowability of deduction u/s 80IA and u/s 10B of the Act with regard to apportionment of common expenses. It is only a computational issue. There cannot be obviously any reference to incriminating material found during search regarding this issue. Hence there cannot be any reliance that could be placed on any search material for reworking the claim of deduction u/s 80IA and u/s 10B of the Act.

8.5. The ld. DR argued that the term 'evidence' is to be used as per the Indian Evidence Act, 1872. He argued that the expressions 'incriminating material' and 'evidence' cannot be used interchangeably as the term 'evidence' has got a wider amplitude and meaning and confined only to seized material , whereas the expression 'incriminating material' has got a very narrow scope confined to search proceedings. He vehemently argued that the expression 'incriminating material' is not found in the provisions of the Act and it is only the Hon'ble Higher Courts which had given the said interpretation while deciding the appeals in respect of concluded assessments. Per Contra , the ld.AR in this regard argued that evidence should also emanate from the seized materials found during the course of search. In respect of Justice M B Shah Commission Report, the Hon'ble Jurisdictional High Court in the case of Sesa Sterlite Ltd vs ACIT reported in 417 ITR 334 (Bom) had categorically held that in the absence of any independent material on record, assessment could not be reopened merely on the basis of opinion formed by Commission appointed by Central Government that there was under invoicing of exports by assessee, as conclusion drawn by the Commission was only its opinion and cannot be treated as primary facts.

8.6. We find that the ld DR argued that the expression 'incriminating material' is not found in the provisions of the Act and it is only the Hon'ble Courts which had imported those words while rendering the decisions. He stated that the Hon'ble Courts are divided on this issue and argued that the Special Leave Petition (SLP) preferred by the revenue against this issue is pending before the Hon'ble Supreme Court.

8.7. The ld DR argued that the basic foundation for conducting the search is governed by the provisions of section 132 of the Act which has to be read harmoniously with section 153A of the Act. There are three conditions based on which a search action could be initiated u/s 132 of the Act on an assessee. They are :-

Section 132(1) - If the concerned authority has in consequence of information in his possession, has reason to believe that -

(a) where a person fails to produce the books of accounts and other documents in response to notice u/s 142(1) or summons issued u/s 131(1) of the Act ; or

(b) where a person fails to comply with the requirements of summons issued u/s 131(1) of the Act ; or

(c) where a person is in possession of any money, bullion, jewellery or other valuable article or thing and such assets represents either wholly or partly income or property which has not been , or would not be, disclosed for the purposes of the Act (hereinafter referred to as the undisclosed income or property) ;

then the officer , so authorized could conduct a search and proceed as per the requirements laid down in the said section. He argued that the aforesaid three primary conditions for invoking search proceedings cannot

be given a go by while framing section 153A assessments and the instant case falls under section 132(1)(c) of the Act.

8.8. The ld. DR vehemently argued that the provisions of section 153A of the Act use the expression 'assess or reassess total income' and hence the search assessment could be framed u/s 153A of the Act irrespective of any incriminating materials.

8.9. We find that it would be necessary to address the preliminary issue of whether the addition could be framed u/s 153A of the Act in respect of a concluded proceeding without the existence of any incriminating materials found in the course of search. The scheme of the Act provides for abatement of pending proceedings as on the date of search. It is not in dispute that the assessment for the Asst Year 2010-11 was originally completed u/s 143(3) of the Act and hence it falls under concluded proceeding , as on the date of search. We hold that the legislature does not differentiate whether the assessments originally were framed u/s 143(1) or 143(3) or 147 of the Act. Hence unless there is any incriminating material found during the course of search relatable to such concluded year, the statute does not confer any power on the ld AO to disturb the findings given thereon and income determined thereon, as finality had already been reached thereon, and such proceeding was not pending on the date of search to get itself abated. It is not in dispute that both the ld AO and the ld CITA had admittedly not made any reference to any seized material found during the course of search in their orders relatable to the completed assessment years with regard to the items of expenses that were subject matter of disallowances and additions. Every assessee would be having its regular books of accounts (where books are maintained) and would be filing his regular returns of

income and assessments framed accordingly. If such person is subjected to search and the very same regular books of accounts were found at the time of search and if the ld AO tries to take a different view on the already recorded transactions in the said regular books of accounts in the search assessment u/s 153A of the Act which is contrary to the view taken by him in the original scrutiny assessments u/s 143(3) or intimation u/s 143(1) of the Act, then it would only result in giving another innings to the ld AO to review his own earlier decision on the very same set of facts and figures. This would make the entire scheme of the Act meaningless and the ld AO would be conferred with unfettered powers to review the earlier decisions taken either by him or by his predecessor on the very same issue , which in our considered opinion, cannot be the intention of the statute. That's why the legislature had duly drawn a distinction between the completed and abated assessments. The provisions of section 153A of the Act are reproduced hereunder for the sake of convenience :-

> ***"[Assessment in case of search or requisition***
>
> *153A. [(1)] Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall—*
>
> *(a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139;*
>
> *(b) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made :*

Provided that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years:"

8.10. We find that the Co-ordinate Bench of Kolkata Tribunal in the case of *ACIT vs Kanchan Oil Industries Ltd in ITA No. 725/Kol/2011 dated 9.12.2015 reported in 2016-TIOL-167-ITAT-KOL* had explained the aforesaid provisions as below:-

"6.4 In our opinion, the scheme of assessment proceedings should be understood in the following manner pursuant to the search conducted u/s. 132 of the Act :-

(a) Notice u/s. 153A of the Act would be issued on the person on whom the warrant of authorization u/s. 132 of the Act was issued for the six assessment years preceding the year of search and assessments thereon would be completed u/s. 153A of the Act for those six assessment years.

(b) In respect of the year of search, notice u/s. 143(2) of the Act would be issued and assessment thereon would be completed u/s. 143(3) of the Act.

(c) In respect of concluded assessments prior to the year of search, no addition could be made in the relevant assessment year unless any incriminating material is found during the course of search with respect to the relevant assessment year.

(d) Pursuant to the search u/s. 132 of the Act, the pending proceedings would get abated. In respect of abated assessments, the total income needs to be determined afresh in accordance with the provisions of section 153A and other provisions of the Act.

6.4.1. The concluded assessments for the purpose of section 153A of the Act shall be -

(i) assessment years where assessments are already completed u/s. 143(1) and time limit for issuance of notice u/s. 143(2) of the Act has expired or;

(ii) assessment years where assessments are already completed u/s. 143(3) of the Act ;

unless they are reopened u/s. 147 of the Act for some other purpose in both the scenarios stated above.

6.4.2. The scheme of assessment proceedings contemplated u/s. 153A of the Act are totally different and distinct from the proceedings contemplated u/s.

147 of the Act and these procedures of assessment operate in different fields and have different purposes to be fulfilled altogether.

6.4.3. The expression 'assess or reassess' stated in section 153A(1)(b) has to be understood as below:-

'assess' means assessments to be framed in respect of abated assessment years irrespective of the fact whether there are any incriminating materials found during the course of search with respect to relevant assessment years ;

'reassess' means assessments to be framed in respect of concluded assessment years where incriminating materials were found during the course of search in respect of the relevant assessment year."

8.11. We find that the provisions of section 132 of the Act relied upon by the revenue would be relevant only for the purpose of conducting the search action and initiating proceedings u/s 153A of the Act. Once the proceedings u/s 153A of the Act are initiated, which are special proceedings, the legislature in its wisdom bifurcates differential treatments for abated assessments and unabated assessments. At the cost of repetition, we state that in respect of abated assessments (i.e pending proceedings on the date of search) , fresh assessments are to be framed by the ld AO u/s 153A of the Act which would have a bearing on the determination of total income by considering all the aspects, wherein the existence of incriminating materials does not have any relevance. However, in respect of unabated assessments, the legislature had conferred powers on the ld AO to just follow the assessments already concluded unless there is an incriminating material found in the search to disturb the said concluded assessment. In our considered opinion, this would be the correct understanding of the provisions of section 153A of the Act , as otherwise, the necessity of bifurcation of abated and unabated assessments in section 153A of the Act would become redundant and would lose its relevance.

8.12. In view of the above, the arguments of the ld. DR deserves to be rejected herein.

8.13. From the aforesaid narration of each of the disallowances / additions made, it could be safely concluded that none of the additions that were made by the ld. AO were based on reliance placed on search materials received from the Assessing Officer of the searched person. We hold that assessment for A.Y.2010-11 had originally been completed u/s.143(3) of the Act dated 28/03/2013. Notice u/s.153C of the Act was issued to the assessee only on 26/11/2014. Hence, on the said date i.e. 26/11/2014, no proceedings of the assessee were pending. Hence, we hold that A.Y.2010-11 becomes an unabated / concluded assessment on the date of assumption of jurisdiction u/s.153C of the Act. The law is very well settled that in respect of concluded assessments, the earlier assessment completed should not be disturbed in the search assessments without existence of any incriminating material relatable to such assessment year. Reliance in this regard is placed on the decision of the Hon'ble Jurisdictional High Court in the case of Continental Warehousing Corporation reported in 374 ITR 645. There is yet another decision which was rendered by the Hon'ble Calcutta High Court in the context of section 153C proceedings in the case of CIT vs. Veer Prabhu Marketing Ltd., reported in 73 taxmann.com 149 laying down the similar proposition.

8.14. In view of the aforesaid observations and respectfully following the judicial precedents relied upon hereinabove, we direct the ld. AO to re-compute the total income of the assessee by accepting the income declared in the return filed in response to notice u/s.153C of the Act without making any additions or disallowances thereon, both under normal provisions of the Act as well as in the computation of book profits

u/s 115JB of the Act. We categorically hold that no additions / disallowance could be made in the search assessment u/s.153C of the Act for A.Y.2010-11 in view of the aforesaid detailed reasons. Accordingly, the ground Nos.3 & 3.1 raised by the assessee are allowed.

9. In view of the aforesaid direction, the adjudication of other grounds raised by the assessee in its original grounds; additional grounds raised by the assessee and grounds raised by the Revenue need not be gone into as they would become academic in nature. No opinion is given thereon by us and they are left open.

10. In the result, appeal of the assessee is allowed in ITA No. 1021/Mum/2018 for A.Y. 2010-11 and appeal of the Revenue in ITA No. 1551/Mum/2018 for A.Y. 2010-11 is dismissed.

11. To sum up, appeals of the assessee for both the years are allowed and appeals of the revenue for both the years are dismissed.

Order pronounced on 15/11/2022 by way of proper mentioning in the notice board.

Sd/-	**Sd/-**
(PAVAN KUMAR GADALE)	**(M.BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 15/11/2022
KARUNA, *sr.ps*

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Sr. Private Secretary / Asstt. Registrar)
ITAT, Mumbai