Sarda Mines Pvt. Limited, Kolkata vs Dcit, Circle-05(2), Kolkata, Kolkata on 14 December, 2017

IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH 'B', KOLKATA

[Before Shri P.M. Jagtap, AM and Shri S.S. Viswanethra Ravi, JM]
I.T.A. No. 867/Kol/2017
Assessment Year: 2007-08

Sarda Mines Pvt. Ltd.....
6th Floor, Circular Court,
8, AJC Bose Road,
Kolkata - 700017.
[PAN : AAHCS 2419 R]

D.C.I.T., Cir 5(2) Kolkata.....
Aayakar Bhawan, P-7, Chowringhee Square,
Kolkata - 69

Appearances by:
Shri A.K. Gupta, FCA appearing on behalf of the Assessee.
Md. Usman, CIT DR appearing on behalf of the Revenue.
Date of concluding the hearing : November 21, 2017
Date of pronouncing the order : December 14, 2017

ORDER

Per P.M. Jagtap, AM

This appeal filed by the assessee is directed against the order of Ld. Principal CIT - 2, Kolkata dated 28.03.2017 passed under section 263 of the Income Tax Act, 1961 and the grounds raised by the assessee therein read as under:

> "1. For that the order passed under section 263 of the Income Tax Act, 1961 (in short 'the Act') by the Principal Commissioner of Income Tax -2, Kolkata (in short 'CIT') dated 28.03.2017 is without jurisdiction and illegal as none of the condition precedent for exercise of the power under section 263 of the Act exists and/or has been satisfied and as such the said order is erroneous and without jurisdiction and liable to be cancelled.
>
> 2. For that the order passed by the Assessing Officer was not in any way erroneous or prejudicial to the interest of revenue and as such the CIT would not exercise any power under section 263 of the Act. The CIT erred in holding that the order of assessment is erroneous and prejudicial to the interest of revenue.
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3. For that the order under section 263 of the Act is time barred in so far as the directions of the CIT in respect of adoption of sale price of ROM as per the M.B. Shah Commission Report, disallowance of depreciation on assets purchased from SLML Sarda AOP and disallowance of Rs. 50 lacs under section 35AC of the Act in respect of donation made to OP Jindal Kalyan Gramin Sansthan for the reason that the aforesaid 3 grounds were never considered and decided in the reassessment proceedings and the limitation will start from the original assessment order which was passed on 24.12.2009.

4. For that the CIT erred in holding that all the 3 grounds were considered in reassessment proceeding and erred in not following the judgement of the Hon'ble Supreme Court in the case of CIT vs Alagendran Finance Ltd. reported in 293 ITR 1. The CIT should have held that no order under section 263 of the Act could not passed in respect of the 3 grounds mentioned hereinabove as the reassessment proceedings was not initiated for the said 3 grounds and they were not considered and discussed in the reassessment order.

5. For that the CIT erred in setting aside the order of assessment on the ground of disallowance of additional operational and incidental expenses as against 50% disallowed on estimate on the reassessment order in as much as the allowance of operational and incidental expenses was gone into in detail in the reassessment order and after a detailed discussion contained in page 5 to 7 of the reassessment order the A.O. disallowed 50% of the total operational and incidental expenses.

6. For that the CIT wrongly stated that the A.O. has not considered various facts whereas all the facts as mentioned by the CIT in its order passed under section 263 of the Act are discussed and mentioned in the order of reassessment.

7. For that full and complete enquiry was made in respect of the allowance/disallowance of operational and incidental expenses as admittedly 50% of the same was disallowed and as such the CIT was precluded from setting aside the assessment on this ground in view of the judgement of the Hon'ble Supreme Court of India reported in the case of Malabar Industries Co. Ltd. vs CIT reported in 243 ITR 83.

8. For that further and in any event and without prejudice to the above:

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A. The CIT erred in not considering the submission of the appellant in respect of not adopting the sale price of ROM as per M.B. Shah Commission Report in as much as the said report was only indicative, not relating to the appellant and was a general report indicating the average sale price of a different commodity for the entire State of Orissa and was not applicable to the facts of the appellant.

B. There is no allegation in the M.B. Shah Commission Report in the order of CIT that the appellant had received anything more than what has been stated in its profit and loss account and as such the question of substituting undisputed and admitted actual sale price with some indicative average price of a different commodity is illegal, erroneous and perverse.

C. For that further and in any event the CIT failed to appreciated the fact that the product produced and sold by the appellant was entirely different from the finished products for which the indicative price was given in the M.B. Shah Commission Report. The CIT failed to appreciate the fact that substantial expenditure was required to be incurred by the purchaser of the ROMs the commodity produced by the appellant to bring the same to saleable condition for which the price was indicated in the M.B. Shah Commission report and there was also a production loss also in doing so.

D. For that the CIT erred in holding that the appellant was not entitled to the depreciation in respect of the various plant and machineries purchased during the relevant previous year from SLML Sarda AOP in view of the proposed disallowance of the entire operational and incidental expenses. The said finding of the CIT is without any basis and/or material and ignoring the fact that the said machineries were used for the purpose of the business of the appellant and as such the order passed under section 263 of the Act on this point is erroneous, illegal and perverse.

E. For that the CIT erred in holding that the donation under section 35AC of the Act was allowed on a wrong basis as Form 35AC was contradictory in nature. The CIT failed to appreciate the fact that there was a clerical mistake while filling up the form and the said I.T.A. No. 867/Kol/2017 Assessment Year: 2007-08 Sarda Mines Pvt. Ltd.

form clearly indicated that the appellant had donated Rs. 50 lacs during the relevant previous year and it also gave full details in respect of the payment made and as such no order under section 263 of the Act should have been passed in respect of the same and the same is erroneous, illegal and perverse.

2. The relevant facts of the case giving rise to this appeal are as follows. The assessee in the present case is a company which is engaged in mining business. The return of income for the year under consideration was originally filed by it on 30.11.2007 declaring a total income of Rs. 3,97,89,438/- under the normal provisions of the Act and book profit of Rs. 5,78,57,816/- under section 115JB of the Act. In the assessment originally completed under section 143(3) vide an order dated 24.12.2009, the total income as declared by the assessee company in its return of income was accepted by the A.O. Subsequently, the assessment was reopened by the A.O. on the basis of information received from ACIT (TDS) - II, Bhubaneshwar and a notice under section 148 was issued by him to the assessee on 17.02.2014 after recording the following

reasons:

"During the assessment proceeding u/s 201(1)(1A) of the Income Tax Act, 1961, it has been come to the notice of the ACIT (TDS)-II, Bhubaneswar that the assessee company had made certain payments on account of Rent during the F.Y. 2006-07 to various parties amounting to Rs. 11,33,85,160/- but no tax was deducted on the sum u/s 1941 of the Income Tax Act. The assessee company has claimed the sum as business expenditure. According to section 40(a)(ia) of the Income Tax Act, the said expenditure is not allowable.

On the basis of above, it appears that the sum of Rs. 11,33,85,160/- has escaped assessment for the A.Y. 2007-08.

In view of the above, I have reason to believe that there is escaped assessment and this is a fit case for assessment under section 147 of the I.T. Act, 1961 to reopen the case for the A.Y. 2007-08."

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3. In reply, a letter dated 14.03.2014 was filed by the assessee requesting the A.O. to treat the return of income originally filed by it on 30.10.2007 as the return filed in response to the notice under section 148. Thereafter assessment under section 147/144/143(3) was completed by the A.O. vide an order dated 30.03.2015 wherein he made the addition of Rs. 10,15,49,516/- to the total income of the assessee on the issue raised in the reasons recorded relating to disallowance under section 40(a)(ia) of the Act. He also made further two additions of Rs. 20,93,87,900/- and Rs. 15,76,41,906/- to the total income of the assessee on account of understatement of production and overstatement of expenses respectively and completed the reassessment determining the total income of the assessee at Rs. 50,83,68,762/-.

4. The records of the assessment in the case of the assessee for the year under consideration was examined by the Principal CIT and on such examination, he found the following errors in the order of the A.O. passed under section 147/144/143(3) which according to him, were prejudicial to the interest of the revenue:

"The total quantity of understatement of Iron Ore produced during the year vis-a-vis reporting to Indian of Bureau of Mines (IMB) had been determined at at 8,76,100/- Mt. The total sales value as per note 16 has been calculated at Rs. 1070,54,67,000/-. Considering the sale price of Dump as negligible, the sale price per MT of Iron Ore comes to Rs. 1625/- per MT (Rs. 1070,54,67,000/- / 6589740 MT).

The average sale price per MT of Iron Ore as per the Hon'ble M.B. Shah Commission report (page no. 103) for the F.Y. 2006-07 has been assigned at Rs. 1371.45. As such, the undervaluation of sale comes to Rs. 1132.45 per MT (1371.45-239). Hence, considering the total sale of Iron Ore by I.T.A. No. 867/Kol/2017 Assessment Year:

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your company consists of 2919095 MT of Iron Ore (ROM) as per the Tax Audit Report of your company the total undervaluation of sales comes to nearly Rs. 331 crores, resulting in substantial loss of revenue.

From the above commission report, it was also noted that you appear to have a hidden understanding between itself and Ms. Jindal Steel & Power Ltd. (JSPL). You were selling all run of mines to JSPL who have established two big plants in its area. All other supporting infrastructure, like employees colony, working pets and others, were created to use for the crushing and sizing plants of JSPL in your leased area. The expenses claimed you ought to be disallowed as it did not require these infrastructures when the entire set-up is owned and managed by JSPL. However, only 50% of the total operational and incidental expenses was disallowed on estimate, resulting in substantial loss of revenue.

In the assessment order, a sum of Rs. 10,15,49,516/- was disallowed u/s 40(a)(ia), the same consisted of payments to M/s. SLML Sarda and others of Rs. 9,45,43,340/-. The latter in turn consists of purchase of assets and reimbursements of capitalized mining lease expenditure of Rs. 7,36,91,121/- and Rs. 2,08,52,219/-. You had claimed depreciation on purchase of the assets. Considering the nexus between your company and JSPL, no depreciation on such assets should be allowed. However, this was not done, resulting in substantial loss of revenue.

You have claimed Rs. 50 lakhs under 35AC in the order u/s 143(3) dated 24.12.2009. From the assessment record it is found in Form 58A amount received from you have been stated as NIL, although you have claimed to have paid Rs. 50 lakhs to OP Jindal Gramin Jan Kalyan Santhan. No enquiry in respect thereof has been made on found from the assessment records. The same therefore results in the order being prejudicial to the interest of revenue."

5. The Principal CIT accordingly issued a notice under section 263 on 10.03.2017 pointing out the above errors to the assessee and seeking the explanation of the assessee in the matter. In reply, a written submission was filed by the assessee on 24th March, 2017 wherein the validity of initiation of proceedings under section 263 by I.T.A. No. 867/Kol/2017 Assessment Year: 2007-08 Sarda Mines Pvt. Ltd.

the Ld. Principal CIT was challenged by the assessee by raising the following contentions:

At the outset we state and submit that the p:roceeding initiated under section 263 of the Act is without jurisdiction and illegal as none of the condition prescribed under section 263 of the Act for revision of the assessment are satisfied and/or are fulfilled. The reassessment order passed by the A.O. cannot be considered and termed as erroneous in so far as it is prejudicial to the interest of the revenue. The order passed

by the A.O. was in accordance with the law after making due enquiry in respect of various matters arising in the assessment and as such the same cannot be revised under section 263 of the Act.

Submission on effect of Re-opening:

1. (a) Further the assessment order dated 30.03.2015 which is sought / proposed to be revised by the Notice was passed in a reassessment proceeding under section 147 of the Act. The notice of reopening was issued after a period of 4 years from the end of the relevant assessment year and the original order of assessment made under section 143(3) of the Act was passed on 24.12.2009. The said re-opening has been objected by our client and the appeal against the reassessment order dated 30th March 2015 including on the ground of re-opening is pending before the Commissioner of Income Tax (Appeals) 2, Kolkata for which the hearing is underway and no order has yet been passed in respect of the same. It is submitted that if the appeal filed by our client is successful on the round of re-opening, then the reassessment order passed on 30.03.2015 proposed to be revised by the Notice, will automatically get cancelled and as a consequence thereof any order passed under section 263 of the Act will also be infructuous.

1.(b) Further and in any event we wish to point out that the original assessment was reopened on the following reasons:

'During the assessment proceedings u/s 20.1(1)/(1A) of the Income Tax Act, 1961, it has come to the notice of ACIT (TDS)-ll, Bhubaneshwar that the assessee company had made certain payments on account of Rent during F.Y. 2006'07 to various parties amounting to Rs.17,33,85,150/- but no tax was deducted on the sum u/s 194I of the Income Tax Act. The assessee company had claimed the sum as business expenditure. Accordingly to Section 40(a)(ia) of the Income Tax Act, the sold expenditure is not allowable.

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On the basis of the above, it appears that the sum of Rs. 77,33,85,760/- has escaped assessment for the A.Y. 2007-08 In view of the above, ! hove reason to believe that there is escaped assessment and this is a fit case for assessment under section 147 of the IT Act, 1961 to reopen the case for the A.Y.2007-08' A perusal of the aforesaid reasons will show that the same was only in respect of disallowance of certain payments due to non deduction of tax at source. It is evident that the points/grounds taken in the notice under reply are entirely unrelated to the points/grounds on which the reassessment proceeding was initiated. The notice seeks to revise only those parts of the order of assessment which do not pertain to disallowance of expenses on the ground of non deduction of tax at source and the proceedings for reassessment had nothing to do with the various items of addition and disallowance for which the

notice has been issued.

The doctrine of merger does not apply to any cases of this nature and the period of limitation will commence from the date of the original assessment order and not from the date of reassessment order since the reassessment order had nothing to do with the items mentioned in the Notice. This is not a case where the subject matter of 'reassessment' and the subject matter of the 'assessment' are the same. We rely on the judgement of the Hon'ble Supreme Court in the case of CIT vs Alagendran Finance Ltd. reported in 293 ITR 1. The same view has also been taken following the aforesaid judgement of the Hon'ble Supreme Court by the Bombay High Court in the case Ashok Buildcon Ltd. vs ACIT reported in 325 ITR 547. We also rely on the judgement of the Bombay High Court in the case of CIT vs Lark Chemicals Ltd. reported in 368 ITR 655. Copies of the above judgements are annexed and marked as Annexure 1, 2 and 3 respectively.

1.(c). It is therefore, submitted that the proceedings initiated vide the notice are barred by limitation as the original order of assessment was passed on 24.12.2009. This is clearly held by the Hon'ble Supreme Court of India and Bombay High Court as above and the proceedings should be dropped.

1.(d). Further and in any event without prejudice to the above, even if it is contended that the points which had been discussed or decided in the reassessment order can be gone into in a proceeding under section 263 of the Act, we submit that the increase in the sale price referred to in para 4 of the notice under reply, disallowance of depreciation on user of assets I.T.A. No. 867/Kol/2017 Assessment Year: 2007-08 Sarda Mines Pvt. Ltd.

purchased during the year referred to in para 8 of the notice under reply and disallowance of Rs. 50 lacs under section 35AC of the Act referred to in para 7 of the notice under reply were never discussed or dealt with in the reassessment proceedings. Accordingly, as far as the above 3 proposed items of addition/disallowance are concerned the same are clearly hit by the judgement of the Hon'ble Supreme Court of India referred to above which is binding on you and no order under section 263 of the Act can be passed in respect of the said 3 items referred to para 4, 6 and 7 of your notice under reply.

Enquiry in Reassessment Proceedings

2.(a). Dealing with the jurisdictional issue we further wish to state n behalf of our client above named and without prejudice to the above submissions that the notice proposes to disallow in entirely the total operational and incidental expenses against 50% disallowed by the A.O. in the reassessment proceeding. IN this connection, we wish to point out that the allowance of expenditure was gone into by the A.O. in detail in the reassessment proceedings. The same will be evident from the order of reassessment itself wherein the said point has been discussed in detail at pages 5 to 7 of the reassessment order. After going through the details of the expenses filed by the client above

named and after consideration of all the aspects of the matter including the alleged understanding with Jindal Steel & Powers Ltd. (JSPL) as also alleged in your notice under reply, the A.O. disallowed 50% of the total expenditure claimed by our client. Accordingly, the A.O. has applied his mind fully in respect of allowability of the operational and incidental expenses and it cannot be said that the order of reassessment in so far as it relates to the disallowance of expenditure was not enquired and gone into in the reassessment proceedings.

2(b). It has been repeatedly held by the Hon'ble Supreme Court of India and the jurisdictional High Court as well as various other High Courts that where the A.O. in course of assessment proceedings applies his mind to the relevant point and comes to a decision and that decision is not palpably illegal and where two views are possible the same cannot be revised under section 263 of the Act. In this connection, we rely on the judgement of the Hon'ble Supreme Court of India in the case of Malabar Industrial Co. Ltd. vs CIT reported in 243 ITR 83. Reliance is also placed on the decision of Calcutta High Court in the case of CIT vs Philips India Ltd. reported in 2015 237 Taxman 538 and latest judgement of Supreme I.T.A. No. 867/Kol/2017 Assessment Year: 2007-08 Sarda Mines Pvt. Ltd.

Court in the case of CIT vs Reliance Communication Ltd. reported in 2016 76 Taxmann.com 276.

In addition of this there are innumerable judgement of various High Court laying down the same principle of law. Copies of the above judgements are annexed hereto and marked as Annexure 4, 5 and 6 respectively.

2(c). It is therefore, submitted that the legal position is well settled that where an issue has been gone into detail by the A.O. in course of the assessment proceeding and the decision taken by him is a possible view the same cannot be revised under section 263 of the Act."

6. In the written submission dated 24th March, 2017, the assessee also made a detailed submission on merit in reply to each & every point raised by the Ld. Principal CIT in the notice issued under section 263 as under:

> 5(a) At the outset we on behalf of our client state and submit that the points relating to item no. A, B and C of para 4 are not based on any facts and/or material and no material has been mentioned in the notice under reply based on which it could be stated that the assessment order passed by the AO is erroneous and as such prejudicial to the interest of the revenue.
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> 5. (b) The notice refers to and/or solely relies on the M B Shah Commission Report as far as substitution of value of sale price of ROM is concerned. You have also stated in para 5 of your notice under reply that there appears to be a hidden understanding between our client and M/s. Jindal Steel & Power Ltd. The details of the understanding, allegedly if any, has not been spelt out and the same is totally vague. lt is also difficult to comprehend that how the alleged understanding affects the allowance of expenditure. No material or evidence has been referred to in the notice

under reply to substantiate the said allegation. Various other erroneous facts and adverse inferences based on surmises and conjectures have also been mentioned in para 5 of the notice under reply.

Similar is the observation regarding allowance of depreciation in para 6 of your notice under reply. The proposed disallowance of the additional expenditure in addition to the 50% already disallowed in the reassessment and the disallowance of the entire depreciation is based on I.T.A. No. 867/Kol/2017 Assessment Year: 2007-08 Sarda Mines Pvt. Ltd.

certain alleged nexus and/or understanding between our client and JSPL though none has been furnished or explained in your notice under reply. ln this connection, reliance is placed on the judgement of the Gauhati High Court in the case of CIT vs. George Williamson (Assam) Ltd. reported in 250lTR 747 in which it has been held that there must be some material either intrinsic in the order of assessment itself or otherwise before the CIT to order reassessment or enquiry into the matter. The Commissioner of Income Tax must have some material on the file which may compel him to pass an order under section 263 of the Act that the matter needs to be further enquired into. For this reasons it was held by the Gauhati High Court that the order passed by the Commissioner of Income Tax nowhere mentioned as to what was the material with him to order enquiry into the matter by the Assessing Authority and as such the quashing of 263 order by the tribunal was justified. A copy of the above judgement is annexed hereto and marked as Annexure 7.

6. Now we deal with the various points mentioned in the notice serially.

6A. It has been stated in para 4 of your notice under reply that average sale price per MT of iron ore as per Hon'ble M.B. Shah Commission Report (page 103) for the financial year 2006-07 has been assigned at Rs. 1371.45 and the sale price declared by our client of Rs. 239 per MT. Thus, there is under valuation of sale at 1132.45 per MT and the total undervaluation of sale comes to nearly 331 crores resulting in substantial loss of revenue. A perusal of the notice as stated above will show that the undervaluation of sale of Rs. 331 crores is based on M.B. Shah Commission Report (page 103). Copy of pages 102 and 103 of the M.B. Shah Commission Report are annexed hereto and marked as Annexure 8. The heading of the said page is 'Corporate Social Responsibility'. It states that the total approximate production and the sale value of iron ore extracted from the years 2005-06 to 2011-12 in the State of Orissa is summarised as under:

Year	Average sale price of iron ore in Rs./Tonne	Total production of iron ore (in thousand MT)	Total sale value (in crores)
2006-07	1371.45	64178	8801.692

A perusal of the aforesaid report will show that it is not regarding our client both for the production as well as the sale price. In the context of Corporate Social Responsibility, the Shah Commission has given the I.T.A. No. 867/Kol/2017 Assessment Year: 2007-08 Sarda Mines Pvt. Ltd.

average sale price of iron ore and the total production of iron ore in the whole state of Orissa and nothing more. The said report does not state that the sale price at which the production of our client was sold or that there was understatement of sale value. The addition as suggested does not have any leg to stand upon as there is no allegation in the said report at all, as regards the value at which our client has actually sold. It also does not contain any allegation undervaluation as alleged as to our client having undervalued its sale. The undervaluation as alleged by you is only based on page 103 of the M.B. Shah Commission Report which cannot be relied upon for making the said alleged addition on the ground of undervaluation of sale, in as much as nothing of this nature is stated or provided in the said report on the said page.

(ii) Further and in any event and without prejudice to the above to understand the issues better, it is pertinent to give a little background of the business being done by our client:

> (a) The Mines were earlier run by SLML Sarda Association of Persons (AOP) which was subsequently transferred to Sarda Mines Pvt Ltd. (our client) in June 2006 as per due process and permission of the State Govt.

of Odisha. The SLML Sarda AOP was in the business of excavation of lron Ore ROM (Run of Mines) as well as in the business of crushing the aforesaid iron ore to make calibrated Lumps which is sold in the market. The aforesaid crushing was earlier done on a job-work basis by JSPL. Because SLML Sarda AOP did not have appropriate capital and expertise to run the integrated business and a lot of mining lease area was being occupied by accumulated fines which at that time had limited market, SMPL decided to sell ROM and Lumpy lron ore (which is not calibrated and is in the raw state) to JSPL at a fixed price to minimise the business risk. By doing this SLML Sarda AOP reduced its operating expenses by cutting down on marketing costs and considerably reduced their market risk by having an assured buyer. Also, the fact that, iron ore fines could be utilised by JSPL in its integrated steel plant, led to movement of the stored fines thus giving more area for mining operations- A copy of the letter requesting Dy. Director Mines (DDM) for permission to sell ROM to JSPL and the permission duly granted on 05.04.2004 are annexed hereto and marked as Annexure - 9. Thus, SLML Sarda AOP received permission from the State Government of Orissa to sell ROM/lron Ore Lump (which is not calibrated and is in the raw state) to JSPL which was contingent upon various conditions, notable amongst which was payment of royalty at the highest rate prescribed for FE 65% iron ore lumps.

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(b) It may be noted that when the mining lease was transferred from SLML Sarda AOP to our client, they accepted all the liabilities and conditions of the transferor (clause 2.4 of the transfer deed). Thus, our client continued with the business model of selling ROM to JSPL to take full benefit of the scientific & systematic mining practices, better and efficient utilisation of economic resources and minimise its risk as far as possible. This was also one of the binding conditions for transfer of mining lease based on which the transfer was allowed by the State Government.

(c) To further elaborate the difference, a detailed write up of the various terms is as under:

(i) ROM As per Mineral Concession Rule, 2015, Rule 2 (f), ROM (run-of- mine) means the row unprocessed or uncrushed iron ore in its natural state obtained after blasting or digging, from the mineral zone of the leased area".

It is normally a mix of finer particles as well as bouldery material. Contents may vary in size from 1 mm to 1500 mm (geological classification basis of size of material). Finer particle percentage in the ROM at Odisha may vary from 30-40% to even 60-70% in volume.

(ii) lron Ore Lump(ROM) lron ore Lump as per definition of ROM contains boulders, lumps, fines etc. Classified on the basis of size and used as a terminology, wherein lumpy ore percentage is more, may be in range of 7O-8O% but in raw form. This category of Iron Ore ROM is well recognised by the IBM, Govt of India. This fact is clear and evident from the Mineral Conservation & Development CD Rule, 1988. Under Rule 45(3)(b)(i), every lessee must submit Annual return in Form 1. In part V (General geology & Mining) of the Annual return in H1. IBM has specially mentioned different types of ore as,

(i) Lump

(ii) Fines

(iii) Frible

(iv) Granular

(v) Platy

(vi) Fibrous

(vii) Powdery etc. I.T.A. No. 867/Kol/2017 Assessment Year: 2007-08 Sarda Mines Pvt. Ltd.

These are unprocessed or uncrushed ore, which cannot be used directly for steel making. It requires further crushing & processing to convert it to calibrated lump ore (CLO) and fines to be used in the steel industry which involves substantial capital input.

This terminology of iron ore Lump (types of ROM) has also been recognised in the Mineral Year Book being published by IBM every year, wherein grade wise reserves/resources of iron ore (Hematite) in India is estimated.

(iii) Calibrated Lump Ore (CLO) This category of lump ore is obtained after processing/crushing of ROM iron ore into crusher plant and ranges in size from 5 mm to 40 mm, which has commercial value and is the raw material for DRI plant for Steel making.

(iv) Fines Fines are produced during drilling and blasting operations and are a part of ROM. Further fines are produced when ROM is processed to produce CLO by the process of crushing and

screening (together termed as processing). Fines serve as raw material for Sinter plant or pellet plant used for steel making.

(d) Your attention is also invited to a letter issued by the Government of India, Ministry of Mines, Indian Bureau of Mines dated 26.11.2OO9 addressed to our client relating to the filing of the return of production. A copy of the said letter dated 26.17.2009 is annexed hereto and marked as Annexure - 10. Para 1 and 2 of the said letter are very relevant and important for our present purpose which are set out hereunder:

> "1. The ROM ore quoted by you in the return with grades cannot be accepted as a MCDR grade ore. There is no provision for ROM ore as separate MCDR grade in Rule 45. Hence this ROM data cannot be published.
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> 2. You have stated that you have got separate crusher plant within the mine site operated by M/s. JSPL to whom you are selling the ROM ore. But from our MCDR return point of view the graded ore processed in the crusher plant should only be reported in the Part ll and Part V of MR & AR respectively. The PMV should invariably quoted for these graded ore only.
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> Hence, you should procure the data on PMV from the JSPL for the purpose of reporting in the returns. On similar lines, the consignee-wise despatches of processed grades and sale value has to be furnished in the returns (monthly and annual)".

(e) The letter is issued by Government of India, Ministry of Mines which is a nodal authority as far as the mining matters are concerned. It states that the ROM excavated by our client is not MCDR grade ore as per the Rule. It also accepts the fact that the separate crusher plant within the mine site is operated by JSPL to whom our client is selling the ROM. It also directs our client that only the graded ore processed in the crusher plant is required to be reported and the PMV (Pit Mouth Value| should be quoted for these graded ores" Thus, it is clear that the Government of India, Ministry of Mines itself considers that the ROM produced by our client is clearly distinct from the MCDR grade ore which is required to be reported to the Government and which is sold in the market. The PMV of the said ROM cannot be the value of the finished product obtained after series of processes of crushing and screening. This will also be clear from Form F1 and Form H1, copy of which are annexed hereto and marked as Annexure 11, required to be filed under Rule 45 of MCDR, 1988 referred to in the said letter.

(f) A perusal of the said para will show that the production by our client is not what is sold in the market which is produced by JSPL. The price given in the M B Shah Commission Report is of the finished product /processed ore and not the product which is mined by our client and which undergoes a series of processes before the same can be brought to the stage in which it is sold. For using the said ROM produced by our client JSPL has to make substantial value addition and suffer production loss in converting the ROM to the saleable product. In Odisha ROM processing yields

only about 30-35% lumps and balance is fines of various quality based on level of impurities. Accordingly, there cannot be any basis for increasing the sale price as has been proposed in as much as the figure taken by the Shah Commission report is entirely of different material altogether which is neither produced by our client nor sold. Accordingly, there is a basic mistake in adopting the said figure given in the M B Shah Commission report. Further it is submitted that the addition based on average rates of Orissa without any finding that our client has received anything more than what has been disclosed is illegal, perverse and arbitrary. There cannot be one rate for all types of Iron Ores in Orissa and the report itself suggests that the rates are not actual and clearly uses the word I.T.A. No. 867/Kol/2017 Assessment Year: 2007-08 Sarda Mines Pvt. Ltd.

"approximate" Further as stated above, the M B Shah Commission is not questioning the rates charged by our client and as such question of adopting the said rates for making the proposed addition is illegal, erroneous and perverse. No discrepancy has been found in the value disclosed by our client and even your notice under reply does not allege that the price charged by our client is not correct or that there is discrepancy in the same or that anything more has been received by our client that what is disclosed. The law does not permit any addition on surmises and conjectures which are not substantiated with any evidence or material.

D B (i) As regards increase in the disallowance of entire operational and incidental expenses from 50% made by the AO in the reassessment order, we submit on behalf of our client above-named that there is no basis or material given in your notice under reply to justify any further disallowance. The disallowance made in the reassessment proceedings of 50% is already under appeal pending adjudication before CIT(A)-2, Kolkata. It is an admitted fact that crusher plant was installed by JSPL in the area with the consent of the State Government. The proposed additional disallowance is simply based on the assumption that certain supporting infrastructure were created to use for the crushing and sizing plant of JSPL and the expenses claimed by our client ought to be disallowed as it will not require these infrastructures when the entire set up is owned and managed by JSPL. No material or evidence has been brought on record in respect of various erroneous assumption of facts made as stated above. Our client is not claiming any expenditure on crushing or any subsequent process. The expenses being claimed by our client is only in respect of extraction of ROM from earth. For this purpose, our client requires various machineries, equipment and infrastructure in addition to labour and other materials. A detailed procedure involved in extraction of ROM is annexed hereto as Annexure -L2for your ready reference.

(ii) A perusal of the said process involved in extraction of ROM from earth will show that huge infrastructure and use of machines and equipment in addition to labour are required for doing the same by our client Details of all the operational and other expenses were filed in course of the assessment proceeding with the AO and he has gone through the same.

The factor of excavation of ROM is not denied by AO or by any other authorities such as CEC or Shah Commission or even by you in your notice under reply. It is submitted that it is inconceivable to excavate such huge I.T.A. No. 867/Kol/2017 Assessment Year: 2007-08 Sarda Mines Pvt. Ltd.

quantity of ROM without incurring any cost at all. Further the fact that the mine was being operated by our client and all the activities except crushing was done by them has also been taken note of by the M.B. Shah Commission. The relevant finding is at pages 157 to 170 of the said report and are annexed hereto and marked as Annexure - 13. tt will show that there was inspection by senior level committee made by the State Government who witnessed that all the mining related activities were being done by our client. The Director of Mines visited the mines of our client and verified the working of our client. It was reported by the Director of Mines that our client has undertaken the mining operation and have employed technical personnel and installed adequate machineries and tools for systematic and scientific mining. The report also notes the creation of various infrastructure and maintenance of ledgers and records and also held that the running activities are carried out by development of mine faces, by removing the over burden and raising of ROM. The most significant part of the said finding is that "except involvement of JSPL in crushing and sizing of ore on job contract basis, all other mining activities are being undertaken by our client".

(iii) It is further submitted that as stated in para 6.4(ii)(a) the Mines were earlier run by SLML Sarda AOP which were transferred to our client in June 2006 after obtaining the approval of the State Government. Prior to June 2005 the said SLML Sarda AOP was running the Mines and the entire expenses incurred by them in extraction of ROM was allowed in their hand and there was no disallowance. Even the expenses incurred by them during the period April to June 20O6 relevant for assessment year 2OO7- O8 was allowed in their assessment. The fact of JSPL installing and working the crusher plant inside the Mine was also existing during that period also. There is no change in the fact. lt is therefore, submitted how the same expenses which were being allowed earlier and which has also been allowed :or a period of 3 months for the relevant previous year in a scrutiny assessment can be disallowed for subsequent period of 9 months of the same previous year on surmises and conjectures and without any material and/or basis. The entire set up of Mines including plant, machinery, equipment, infrastructure and labour was taken over by our client from SLM Sarda AOP and there cannot be any basis and none has been shown for disallowing any part of the expenditure as proposed.

(iv) It is therefore, submitted that there is no basis or material and none has been brought on record which could justify any additional disallowance.

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5.(C) (i) You have also proposed to disallow the depreciation on the entire plant and machinery purchased by our client from SLML Sarda AOP during the relevant previous year. As stated in our submissions on proposed disallowance of additional expenditure, the entire plant & machinery was used by our client for the purpose of extraction of ROM and there cannot be any basis for disallowance of depreciation. The nexus alleged in your notice under reply is not spelt out nor proved by any evidence or material. Further and in any event and without prejudice, even if there is

a nexus, the question arises as to whether it will lead to the disallowance of depreciation if the assets have been used by our client. You are not alleging that the assets are not being used, but only stating that because of the nexus the depreciation proposed to be disallowed which is clearly illegal and perverse.

(ii) The State Government has found as a fact on inspection that the said mines are being worked by our client with necessary machines, equipment, infrastructure, materials and labour. We also wish to further point out that that the lease was transferred to our client during the relevant previous year from June 2006. The same machinery which we have purchased from SLML Sarda AOP, the erstwhile lessee, was used by them for the purpose of working the mines and excavation and depreciation has been allowed in their hands in all the earlier assessment years on the user of the said machines. A question therefore, arises as to how and on what basis the depreciation is being proposed to be disallowed in the hands of the transferee i.e. our client when the same were allowed earlier on the same facts. The report of M B Shah Commission at pages 167 to 170 attached with this reply deals with the period of year 2002 onwards- Accordingly, the same facts were appearing from the year 2002 onwards and the question of disallowance of depreciation in the hands of our client is illegal, erroneous and perverse.

6.(D) (i) You also propose to disallow a sum of Rs. 50 lacs paid to OP Jindal Gramin Jan Kalyan Santhan (Donee). Necessary certificate under section 35AC of the Act was filed in course of the assessment proceedings and the same is also attached and marked as Annexure - 14.

(ii) The ground on which you propose to disallow is that Form 58A issued by the said Donee state that the amount received from our client is Nil. A perusal of the Form will clearly show that the certificate issued by the Donee clearly states that they have received a sum of Rs. 50 lacs from our I.T.A. No. 867/Kol/2017 Assessment Year: 2007-08 Sarda Mines Pvt. Ltd.

client. The date of demand draft and the number is also stated in the said certificate. lt appears that there was a clerical mistake in filling up column 2 of the said form which has created this confusion. Col. 2 as given in the said form is set out herein below:

> Amount received till date as donation from others Prior to this donation: Rs. 8,46,00,000/-
>
> Amount received from donor name in paragraph 1 Rs. Nil Total amount received for the project/scheme Including the amount covered this certificate Rs. 8,96,00,000/-
>
> lf you only look at this, then it will show that the amount received from our client is Nil. However, the form must be seen as a whole and clerical mistake cannot lead to the denial of the relief to our client. Even column 2 shows that the amount received till date as donation from others prior to this donation was Rs. 8.46 crores. It also shows that the total amount received including the amoount covered in this certificate is Rs. 8.96 crores. The difference is of Rs. 5O lacs which has been paid by our client and has been certified in Column No.1.

> We would therefore, submit that the relief as claimed was fully allowable and the necessary form was also filed with the A.O. in course of the assessment proceedings. The said Form duly certifies the details of payment received from our client including draft number and date and as such the said claim should not be disallowed and the order on this point passed by the AO is not erroneous in so far as it is prejudicial to the interest of the Revenue and cannot be revised.)

7. The submissions made by the assessee challenging the validity of the initiation of proceedings under section 263 were not accepted by the Principal CIT by observing merely that all the 4 points raised by him in the notice issued under section 263 were considered in the reassessment proceedings and the decision of Hon'ble Supreme Court in the case of CIT vs Alagendran Finance Ltd. 293 ITR 1 relied upon by the assessee was not applicable to the facts of the case. As regards the I.T.A. No. 867/Kol/2017 Assessment Year: 2007-08 Sarda Mines Pvt. Ltd.

detailed written submission filed by the assessee raising various contentions on merit on each and every point raised in the notice under section 263, the Ld. Principal CIT summarised the same in brief in his impugned order and proceeded to set aside the order of reassessment dated 30.03.2015 passed by the A.O. by exercising his powers under section 263 after recording his observations as under:

> "As regards adopting the sale price of ROM, as per M.B. Shah Commission Report, it was contended that the price indicated in the M.B. Shah Commission Report cannot be adopted blindly, as the same is not relating to the assessee and is the average sale price of the entire state of Orissa. It was also submitted that the assessee is selling the Run of Mines (ROM) only and the value addition of crushing, sizing the same and other process to make it into a calibrated lumps ore is done by JSPL. It was submitted that substantial expenditure has to be incurred by JSPL for the value addition and only 30 to 35% of ROM yields in calibrated lump ore and as such the price indicated by M.B. Shah Commission Report cannot be applied. It was also submitted that the product sold by assessee is different than the product for which indicated sale price is given in the report and that the same was given in a different context. It was argued that there is no allegation in the notice also that the assessee has received anything more than disclosed in the accounts.
>
> I have considered the submissions and the written objections filed. In my view the Assessing Officer failed to consider various aspects as well as M.B. Shah Commission Report and accepted the price disclosed by the assessee without any enquiry. Thus, the assessment order is erroneous and prejudice to the interest of revenue in this respect.
>
> Next point is regarding the disallowance of the operational and incidental expenses. The A.O. while passing the order of assessment did not consider that the JSPL had established crushing plant in the mining area and all the supporting infrastructure were created to use for the crushing and sizing plant owned by them. He should have

therefore, enquired about this and disallow the expenses when the entire set up was owned and managed by JSPL. It was submitted in course of hearing as well as in written objection that the assessee is not claiming any expenditure in respect of any activities after the ROMs are brought up to the pit head. Only the expenses in mining are incurred and claimed by the assessee. It I.T.A. No. 867/Kol/2017 Assessment Year: 2007-08 Sarda Mines Pvt. Ltd.

was also submitted that even on inspection the Government of Orissa has found that the assessee was running the mines on its own with its staff, equipment, machinery etc. and the same has been also noted in the M.B. Shah Commission Report which was also filed. It was therefore, stated that full enquiry was made by the Assessing Officer in course of assessment proceeding and he had asked various queries in respect of the operational and incidental expenses which was duly replied along with full details from time to time in course of the assessment proceeding. A detailed note on the expenses incurred by the assessee and the procedure involved in extraction of ROM undertaken by it was also annexed with the object and explained.

It was also submitted that after considering the details and discussing all the aspects of the matter the Assessing Officer considered the expenses incurred by the assessee and disallowed 50% of the same. The matter was gone into in detail and it cannot be said that the enquiry was not made by the A.O. in course of the reassessment proceedings. It was contended that appeal against the disallowance on estimate basis on 50% of the total expenses as made in the reassessment order is pending before the CIT(A)- 2 and no order has been passed.

I have considered the contentions and the papers filed with the written objection though, the A.O. disallowed part of the expenditure, he did not apply his mind fully to the facts that the entire expenditure were for and on account of JSPL in view of the hidden understanding the assessee had with them. Assessing Officer should have enquired and find out the details of the aforesaid aspect and whether the said expenditure were required to be incurred at all by the assessee. This resulted in substantial loss of revenue and the judgement of the Hon'ble Supreme Court referred to by the ARs in the case of Malabar Industrial Co. Ltd. vs CIT reported in 243 ITR 83 and other judgements will not apply to the facts of this case and the assessment can be revised on this ground.

The assessing Officer while framing the reassessment order did not enquire at all about allowance of depreciation and the same has allowed in full. In view of the hidden understanding between the assessee and JSPL and as discussed in detail in the previous paragraphs, I am of the view that the entire depreciation claimed should have been disallowed and in view of the no enquiry being made, substantial loss of revenue has occurred.

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As regards the allowance of 50% under section 35AC of the Act, the AR has filed a copy of Form 58A. It is contradictory in nature, as in one place it certifies that Rs/ 50lacs has been paid by the assessee and in other place it states as nil. The AR explained that it was a clerical mistake and the amount was actually paid by the assessee. However, this mistake was not enquired into by the A.O. and donation of Rs. 50 lacs was allowed without any enquiry.

I have gone through the submissions and arguments of the assessee and the various supporting documents filed along with dated 24.03.2017 in respect of all the above points.

I hold that the assessment order passed by the Assessing Officer in erroneous and as such prejudicial to the interest of the revenue as the Assessing Officer did not consider and adopt the high price indicated in the M.B. Shah Commission Report in respect of the sale of ROM and also did not consider the allowance of expenditure in the light of the hidden understanding between the assessee and the JSPL and whether the said expenditure were required to be incurred by the assessee resulting in a substantial loss to revenue. Similarly in respect of allowance of depreciation the A.O. should have enquired and verified whether the said machines were used by the assessee itself. As regards, the donation of Rs. 50 lacs the A.O. has to enquire and find out the correct facts which were not done earlier."

8. The Principal CIT accordingly set aside the order passed by the A.O. under section 147/144/143(3) dated 30.03.2015 on all the issues raised by him in the notice under section 263 and directed the A.O. to pass a fresh order of assessment on the said issues in accordance with law after making appropriate enquiries and after giving adequate opportunity of hearing to the assessee. Aggrieved by the order of the Ld. Principal CIT passed under section 263, the assessee has preferred this appeal before the Tribunal.

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9. The learned counsel for the assessee at the outset invited our attention to the copy of show cause notice issued by the Ld. Principal CIT placed at page no 1 and 2 of his Paper Book and submitted that there was no allegation made by the Principal CIT that there was any failure on the part of the Assessing Officer to make proper and sufficient enquiries on the points raised by him while completing the assessment. He submitted that the order of reassessment passed by the A.O. was alleged to be erroneous by the Ld. Principal CIT on merit of the said issues and accordingly a detailed submission was filed by the assessee in response to the notice under section 263 to show that the claim of the assessee on said issues was correct on merit and there was no error in the order of the A.O. in accepting the same. He invited our attention to the copy of written submission filed by the assessee in this regard before the Ld. Principal CIT and contended that the Ld. Principal CIT however has not given any specific finding or observations thereon in his impugned order for not accepting the same. He contended that the Ld. CIT has simply set aside the order of assessment passed by the A.O. on the ground of lack of enquiry by the A.O. without rejecting the submissions

made by the assessee on merit and without giving any more opportunity of being heard to the assessee, which is not permissible in law. In support of this contention, he relied on the decision of Hon'ble Delhi High Court in the case of ITO vs D.G. Housing Project Ltd. (343 ITR 329) as well as the decision of Co-ordinate Bench of this Tribunal in the case of Infinity Infotech Park Ltd. 58 ITR (Trib) 486.

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10. The learned counsel for the assessee also raised one more preliminary issue while challenging the jurisdiction of the Ld. Principal CIT to exercise his revisionary powers under section 263 in the facts of the assessee's case. He submitted that the assessment revised by the Ld. Principal CIT was passed by the A.O. under section 147 of the Act after reopening the assessment on only one point as raised in the reasons recorded relating to disallowance 40(a)(ia). He submitted that the Assessing Officer no doubt considered two more issues in the order of reassessment relating to understatement of production and overstatement of expenses and made additions thereon to the total income of the assessee but 3 of the 4 points raised by the Ld. Principal CIT in the notice issued under section 2363 were not involved either in the reasons recorded or even in the reassessment made by the A.O. He contended that the said 3 points thus were beyond the scope of reassessment made by the A.O. under section 147/143(3) of the Act and the Ld. Principal CIT therefore was not justified in holding the order of reassessment made by the A.O. as erroneous on the said issues by exercising the powers under section

263. He contended that if at all there was any error in the assessment on these issues, the same was in the order of assessment originally made by the A.O. under section 143(3) and since the doctrine of merger was not applicable, the period of limitation commenced from the date of the original assessment and the order passed by the Ld. Principal CIT under section 263 on these issues was barred by limitation. In support of this contention, he relied on the decision of Hon'ble Supreme Court in the case of CIT vs Alagendran Finance Ltd. (supra), Hon'ble Mumbai High Court in the case of Ashoka Buildcon I.T.A. No. 867/Kol/2017 Assessment Year: 2007-08 Sarda Mines Pvt. Ltd.

Ltd. vs CIT 325 ITR 574 and the Hyderabad Bench of this Tribunal in the case of Louis Berger Group Inc. vs ADIT (International Taxation) 152 ITD 587.

11. As regards the remaining 4th issue raised by the Ld. Principal CIT in the notice issued under section 263 which was also subject matter of reassessment relating to disallowance on account of operational and incidental expenses claimed by the assessee, the learned counsel for the assessee submitted that the operational and incidental expenses claimed by the assessee were disallowed by the A.O. to the extent of 50% after taking into consideration the relevant facts of the case as well as by applying his mind. In this regard, he invited our attention to the relevant portion of the order of reassessment passed by the A.O. to point out that the nexus between the assessee company and JSPL was taken into consideration by the A.O. and after keeping in view the fact that the trading results of the assessee company were rejected, the disallowance of 50% out of the total operational and incidental expenses claimed by the assessee was made by him on estimate basis. He contended that this issue thus was considered and decided by the Assessing Officer after taking into

consideration the relevant facts of the case and by application of mind, 50% of the operational and incidental expenses were disallowed by the A.O. on estimated basis. He contended a possible view thus was taken by the A.O. on this issue and it is not permissible for the Ld. Principal CIT to substitute his own view in place of the possible view taken by the A.O. after applying his mind to the relevant facts of the case. He contended that the order passed by the Ld. I.T.A. No. 867/Kol/2017 Assessment Year: 2007-08 Sarda Mines Pvt. Ltd.

Principal CIT under section 263 thus is not sustainable in law and the same is liable to be set aside.

12. The learned counsel for the assessee also raised arguments in support of the assessee's case on all the issues raised by the Ld. Principal CIT in the notice issued under section 263 in order to show that the claim of the assessee on the said issues was in accordance with law on merit and there was not error committed by the A.O. in allowing the said claims. In this regard, he mainly reiterated before us the submissions made on behalf of the assessee before the Ld. Principal CIT in writing during the course of proceedings under section 263. He emphasised that the main issue was raised by the Ld. Principal CIT in the notice under section 263 alleging the under charging of sale price by the assessee on the basis of M.B. Shah Commission report. He submitted that the said report was duly considered by the A.O. while completing the reassessment for the year under consideration but the issue relating to the under charging of sales price by the assessee to JSPL was not at all the subject matter of the enquiry conducted by the Shah Commission. In this regard, he invited our attention to the relevant portion of the commission report to point out that as per the terms of the reference to the commission, the issue of under pricing of sales price by any mining company was not at all referred to the commission for the enquiry. He also referred to the relevant details of total production and sales value of iron ore in the State of Orissa during the years 2005-06 to 2011-12 as given in the report and submitted that the same were summarised in the Shah Commission report while considering the issue of corporate social I.T.A. No. 867/Kol/2017 Assessment Year: 2007-08 Sarda Mines Pvt. Ltd.

responsibility of the mining companies. He submitted that the said details given approximately in the report thus were in different context and no conclusion as regards the under charging of sales price can be drawn on the basis of the same.

13. The Ld. Counsel for the assessee contended that the average sale price of Rs. 1371/- per ton given in the report for the entire State of Orissa was in respect of iron ore while the product sold by the assessee to JSPL was mother earth of iron ore called as "Runs Of Mines" (ROM) which is materially different from the iron ore. In this regard, he relied on the decision of Orissa High Court rendered in the case of the assessee in the context of value added tax [W.P. (C) No. 24421 of 2012 dated 26.04.2017] to submit that ROM which is otherwise called as mother earth of iron ore consisting of raw unprocessed ores in its natural state obtained after blasting or digging was excavated and handed over to M/s. JSPL. He submitted that the same consisting of large boulders, fragments and fines along with other contaminants/impurities then was crushed and downsized by JSPL in their crusher plant. After crushing and sizing in the screen, the Calibrated Lump Ore (CLO) is obtained and the same is further processed by way of washing and beneficiation so as to produce usable fines and slime material. He submitted that huge quantity of residuary mixed with low grade fines is

generated in this entire process and on an average only 25% to 30% CLO i.e. iron ore was produced, while the rest 70% to 75% representing low grade fines had no market at all. He contended that the material sold by the assessee to JSPL i.e. ROM thus was entirely different from the iron ore I.T.A. No. 867/Kol/2017 Assessment Year: 2007-08 Sarda Mines Pvt. Ltd.

i.e. CLO and the allegation made by the Ld. Principal CIT of under charging of sales price by the assessee to JSPL on the basis of average selling rate of iron ore was totally baseless. He contended that this position was accepted by the Hon'ble Orissa High Court while deciding the issue in the context of value added tax and relief was also given to the assessee on that basis. He also relied on the decision of Panaji Bench of this Tribunal in the case of M/s. Velingkar Bros. (ITA No. 18/Pnj/2014 dated 30.05.2014 wherein the difference between ROM and processed iron ore was highlighted by the Tribunal in paragraph no 2.5 of its order and the case made out by the A.O. of under invoicing or under pricing was rejected.

14. The learned counsel for the assessee contended that there was in any case no material whatsoever available on record to show that there was any actual suppression of sale price by the assessee and in the absence of the same, there was no provision in the Act permitting the Assessing Officer to enhance the sales price as held by Hon'ble Delhi High Court in the cases of CIT vs Discovery Estates Pvt. Ltd. 356 ITR 159. He contended that the errors in the order of the A.O. as allegedly pointed out by the Ld. CIT in the notice under section 263 thus were not in existence as explained and established by the assessee in the detailed written submission filed before the Ld. CIT during the course of proceedings under section 263 and the Ld. CIT was not justified in setting aside the order of reassessment made by the A.O. by exercising his revisionary powers on the ground of lack of enquiry without giving any finding or decision on the merits of the issues raised by him in the notice under section 263.

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15. The Ld. CIT DR, on the other hand, submitted that the order of reassessment was passed by the A.O. without making enquiries or verification which should have been made by him as found by the Ld. Principal CIT on examination of the relevant assessment records and the Ld. Principal CIT, therefore, was fully justified in revising the said order by exercising the powers under section 263. He contended that the order of assessment passed by the A.O. thus was found by the Principal CIT to be erroneous as well as prejudicial to the interest of the revenue on this specific ground calling for revision under section

263. In this regard, he relied on Explanation 2 to Section 263 inserted by the Finance Act 2015 with effect from 01.06.2015 which provides that for the purposes of Section 263, an order passed by the A.O. shall be deemed to be erroneous in so far as it is prejudicial to the interest of the revenue if the same, in the opinion of the Principal CIT or CIT, is passed without making enquiries or verifications which should have been made. As regards the contention raised by the learned counsel for the assessee that the scope of reassessment made by the A.O. being limited and most of the issues raised by the Principal CIT in the order under section 263 being beyond the said scope, errors if any on the said issues as allegedly pointed out by the Ld. Principal CIT were in the assessment originally

completed by the A.O. under section 143(3) and not in the assessment completed under section 147 and consequently the order passed by the Ld. CIT under section 263 was barred by limitation, the learned DR relied on the amendment made to section 147 by insertion of Explanation 3 by the Finance Act, 2009 with retrospective effect from 01.04.1989 to contend that the scope of I.T.A. No. 867/Kol/2017 Assessment Year: 2007-08 Sarda Mines Pvt. Ltd.

reassessment under section 147 has been enhanced to include such issues which come to the notice of the A.O. during the course of reassessment proceedings in addition to the issues included in the reasons recorded and therefore the errors as pointed out by the Principal CIT were in the reassessment made by the A.O. and the impugned order passed by him was within the time limit stipulated in the Act.

16. The Ld. CIT DR also submitted that although the Shah Commission report was apparently not available with the Assessing Officer when he recorded the reasons for reopening the assessment, the same was available and was also duly considered by the A.O. while completing the reassessment under section 147. He contended that addition on account of understatement of production was also made by the A.O. in the order of reassessment on the basis of Shah Commission report. He contended that other adverse findings of the Shah Commission report however were not taken into consideration by the A.O. while completing the order of the reassessment which made the said order erroneous as well as prejudicial to the interest of the revenue as rightly held by the Ld. Principal CIT. He submitted that even the disallowance out of expenses claimed by the assessee was made by the A.O. only to the extent of 50% arbitrarily without looking into the relevant facts of the case and without making any detailed enquiry. He contended that there was thus no application of mind on the part of the A.O. while passing the order of reassessment and the Ld. Principal CIT was fully justified in treating the same as erroneous as well as prejudicial to the interest of the revenue. He contended that I.T.A. No. 867/Kol/2017 Assessment Year: 2007-08 Sarda Mines Pvt. Ltd.

similarly the sales price of Rs. 239 per MT charged by the assessee company to JSPL was accepted by the A.O. without making any enquiry which he should have made keeping in view the average selling price given by the Shah Commission in its report.

17. The Ld. CIT DR contended that the A.O. is not only an adjudicator but also an investigator and it is, therefore, his duty to keep his eyes open and examine the relevant issues which are necessary for the purpose of assessment. He contended that the A.O. however had utterly failed to make the enquiries and verifications which were necessary for the purpose of assessment and passed the order of reassessment without application of mind. He contended that it was thus a case of lack of enquiry by the A.O. which made the order of reassessment passed by him erroneous as well as prejudicial to the interest of the revenue. He also contended that the Ld. Principal CIT by his impugned order passed under section 263 has not decided any issue on merit and has merely set aside the order of the A.O with a direction to him to conduct the necessary enquiries and pass fresh assessment. He submitted that the crusher plant and other assets installed in the mines of the assessee were owned and used by JSPL and the assessee therefore was not entitled to claim depreciation thereon. He contended that the Assessing Officer however allowed the claim of the assessee for such depreciation without making proper and adequate enquiries and verification and

without applying his mind. He contended that the order of reassessment passed by the A.O. thus contained several errors as pointed out by the Ld. Principal CIT which were prejudicial to the interest of the revenue and the I.T.A. No. 867/Kol/2017 Assessment Year: 2007-08 Sarda Mines Pvt. Ltd.

same therefore was rightly revised by the Ld. Principal CIT by his impugned order passed under section 263. He, therefore, strongly supported the order passed by the Ld. Principal CIT under section 263 and urged that the same may be upheld.

18. We have considered the rival submissions and also perused the relevant material available on record including the case laws and relevant statutory provisions referred to and relied upon by both the sides in support of their arguments. In the present case, the order of reassessment was completed by the A.O. under section 147/144/143(3) of the Act. On examination of the relevant assessment records, the Ld. Principal CIT however found the same to be erroneous on merits and accordingly a notice under section 263 was issued by him to the assessee pointing out the errors in the order of the A.O. The errors so pointed out by the Ld. Principal CIT in the notice issued under section 263 are already extracted by us in paragraph no 4 of this order and a perusal of the same shows that the order of reassessment passed by the A.O. was found to be erroneous by the Ld. Principal CIT on merit and in the reply filed to the notice issued under section 263, a detailed submission was made by the assessee to show that there were no such errors in the order of the reassessment made by the A.O. on merits. Although the Ld. Principal CIT in his impugned order passed under section 263 summarised the submissions made by the assessee in brief, he did not give any finding or observation thereon and without arriving at any conclusion to show how the order of the A.O. was erroneous on merit, he simply set I.T.A. No. 867/Kol/2017 Assessment Year: 2007-08 Sarda Mines Pvt. Ltd.

aside the same on the ground that the A.O. failed to consider various aspects and did not apply his mind fully to the facts of the case.

19. In the case of ITO vs D.G. Housing Project Ltd. 343 ITR 329 cited by the learned counsel for the assessee, Hon'ble Delhi High Court has held that in cases of wrong opinion or finding on merits, the CIT has to come to the conclusion and himself decide that the order is erroneous by conducting necessary enquiry, if required, before order under section 263 is passed. It was held that the CIT cannot remand the matter to the Assessing Officer to decide whether the findings recorded are erroneous. It was further held that in some cases, the CIT can also show and establish that the facts on record or inferences drawn from the facts on record per se justified and mandated further enquiry or investigation, but the Assessing Officer had erroneously not undertaken the same. However, the said finding must be clear, unambiguous and not debatable and the matter cannot be remitted for a fresh decision to the Assessing Officer to conduct further enquiries. It was held that in such matters, to remand the matter/issue to the Assessing Officer would imply and mean that the CIT has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide this aspect/question. In the case of Infinity Infotech Park Ltd. vs DCIT 58 ITR (Trib) 486 cited by the learned counsel for the assessee, there was no allegation in the show cause notice issued under section 263, like in the present case, that there was failure on the part of

the Assessing Officer to make proper and adequate enquiries before completing the assessment and the allegation was that the Assessing I.T.A. No. 867/Kol/2017 Assessment Year: 2007-08 Sarda Mines Pvt. Ltd.

Officer has formed a wrong opinion or finding on merits. In reply to the notice issued under section 263, the assessee filed a detailed reply on January 12, 2017. On the very same day, the commissioner passed an order under section 263 setting aside the order of the A.O. on the ground of lack of enquiry. In these facts and circumstances involved in the case of Infinity Infotech Park Ltd. (supra), the Coordinate Bench of this Tribunal held that the Ld. CIT before exercising jurisdiction under section 263 of the Act by setting aside the order of the Assessing Officer ought to have given his own specific findings on the submissions made by the assessee and without doing so, the CIT could not exercise jurisdiction under section 263. It was also held by the Tribunal that the Ld. CiT was not justified to invoke jurisdiction under section 263 of the Act on the ground of lack of enquiry by the Assessing Officer without putting the assessee on notice. Reliance in support of this conclusion was placed by the Tribunal on the decision of Hon'ble Delhi High Court in the case of ITO vs D.G. Housing Project Ltd. (supra) and the order passed by the CIT under section 263 was quashed.

20. In the present case, the relevant facts involved are materially similar to the case of Infinity Infotech Park Ltd. (supra) in as much as notice under section 263 pointing out the errors in the order of the A.O. was issued by the Ld. Principal CIT on 10.03.2017 and a detailed reply to the said notice was filed by the assessee on 24.03.2017 submitting that there were no errors as alleged in the notice under section 263 in the order of assessment passed by the A.O. on merits. Immediately thereafter i.e. on 28.03.2017, the Principal CIT passed I.T.A. No. 867/Kol/2017 Assessment Year: 2007-08 Sarda Mines Pvt. Ltd.

the impugned order under section 263 without giving any finding or conclusion as to how the order of the A.O. was erroneous on merits in respect of issues raised in the notice under section 263 and set aside the same on the ground of lack of enquiry by the A.O. without putting the assessee on notice. In our opinion, the ratio of the decision rendered by the coordinate bench of this Tribunal in the case of Infinity Infotech Park Ltd. (supra) thus is squarely applicable in the present case and applying the same, we hold that the impugned order passed by the Ld. Principal CIT under section 263 is liable to be quashed.

21. At the time of hearing before us, the Principal CIT DR in this context has relied on Explanation 2 to Section 263 inserted in the statute by the Finance Act, 2015 with effect from 01.06.2015 in support of the revenue's case. As per the said explanation, an order passed by the Assessing Officer shall be deemed to be erroneous in so far as prejudicial to the interest of the revenue for the purpose of section 263 if, in the opinion of the Principal CIT or CIT, the same is passed without making enquiries or verification which should have been made. The learned counsel for the assessee however has contended that there being no allegation made by the Ld. Principal CIT in the notice issued under section 263 about lack of enquiry by the A.O., Explanation 2 to Section 263 is not applicable in this case. It is observed that in the case of Sterling Biotech Ltd. vs Principal CIT (ITA No. 2750/M/2015 dated 29.06.2016), Mumbai Bench of this Tribunal has already considered the effect of Explanation 2 to Section

263. In the said case, the contention raised on behalf of the assessee I.T.A. No. 867/Kol/2017 Assessment Year: 2007-08 Sarda Mines Pvt. Ltd.

was that the Ld. Principal CIT, before holding an order to be erroneous, should have conducted necessary enquiries or verification in order to show that the finding given by the Assessing Officer is erroneous and the view taken by the A.O. is unsustainable in law and this contention of the assessee was found to be duly supported by the law interpreted by the various High Courts including Hon'ble Delhi High Court. Reliance in this regard was placed on behalf of the revenue on Explanation 2 to Section 263 inserted by Finance Act 2015 with effect from 01.04.2015. The Tribunal however did not find merit in the same by holding that the said explanation cannot be said to have overridden the law interpreted by Hon'ble Delhi High Court. It was observed by the Tribunal that if the revenue's contention is accepted, then the CIT can find fault with each and every assessment order without conducting any enquiry or verification in order to establish that the assessment order is not sustainable in law and order for revision. It was also observed that the Ld. CIT then can force the A.O. to conduct the enquiries in the manner preferred by him thus prejudicing the independent application of mind of the A.O. which could not be the intention of the legislature in inserting Explanation 2 to Section 263. It was held that it leads to unending litigation and there would not be any point of finality in the legal proceedings.

22. As already noted, the assessment originally completed under section 143(3) for the year under consideration was subsequently reopened by the Assessing Officer only on the issue of disallowance under section 40(a)(ia). Although in the assessment finally completed under section 147/143(3), two more additions on account of I.T.A. No. 867/Kol/2017 Assessment Year: 2007-08 Sarda Mines Pvt. Ltd.

understatement of production and overstatement of expenses were made by the A.O. in addition to the disallowance made under section 40(a)(ia), a majority of the issues raised in the notice issued under section 263 were not the subject matter of the order of reassessment made by the A.O. under section 147/143(3) as the same were neither considered in the order nor dealt with in any manner by the A.O. in the said order.

23. In the case of Alagendran Finance Ltd. (supra) cited by the learned counsel for the assessee, similar fact situation was involved in as much as the claim made by the assessee under the head 'Lease Equalization Fund' was accepted by the Assessing Officer in the assessment originally completed under section 143(3) and the said assessment was subsequently reopened only in respect of three items, viz. (1) the expenses claimed for share issue; (2) bad and doubtful debts; and (3) excess depreciation on gas cylinder and good containers. Although the issue relating to assessee's claim in respect of Lease Equalization Fund was not the subject matter of the re- assessment proceedings, the learned Commissioner purported to invoke his revisional jurisdiction in terms of section 263 of the Act and directed the Assessing Officer by an order dated 29th March, 2004 to check and assess the lease rental from lease equalization fund, if any, and to bring to tax the same. In these facts and circumstances of the case, the Hon'ble Supreme Court after discussing elaborately the legal position on the issue of scope of reassessment proceedings and the doctrine of merger, held that the learned CIT having exercised his revisional jurisdiction to reopen the order of assessment

only in I.T.A. No. 867/Kol/2017 Assessment Year: 2007-08 Sarda Mines Pvt. Ltd.

relation to Lease Equalization Fund, which was not the subject matter of reassessment proceedings, the period of limitation provided for in sub-section (2) of section 263 of the Act would run from the date of order of original assessment and not from the date of order of reassessment. Accordingly the order passed by the CIT under section 263 was held to be invalid by the Hon'ble Supreme Court, having been passed beyond the period of limitation as provided in sub-section (2) of section 263 of the Act. To the similar effect is the decision of the Hon'ble Bombay High Court in the case of Ashoke Buildcon (supra) cited by the learned counsel for the assessee, wherein it was held that where an assessment has been reopened under section 147 in relation to particular grounds or in relation to certain specified ground and subsequent to the passing of the order of reassessment, jurisdiction under section 263 in sought to be exercised with reference to the issue which did not form the subject of reopening of the assessment or order of reassessment, the period of limitation provided in sub-section (2) of section 263 would commence from the date of the order of assessment and not from the date on which the order reopening the assessment has been passed.

24. At the time of hearing before us, the Learned Departmental Representative has relied on the amendment made to section 147 by the insertion of Explanation 3 by the Finance Act, 2009 with retrospective effect from 01.04.1989, in order to support the impugned order of the DIT on the issue of limitation. It is observed that a similar stand was taken on behalf of the Revenue in the case of ICICI Bank Ltd. (supra), before the Hon'ble Bombay High Court I.T.A. No. 867/Kol/2017 Assessment Year: 2007-08 Sarda Mines Pvt. Ltd.

relying on explanation (3) to section 147, as inserted by the Finance Act, 2009 with retrospective effect from 01.04.1989. It was contended that as a result of insertion of the said explanation, once assessment is reopened, the Assessing Officer is entitled to assess or reassess the income in respect of any issue which has escaped the assessment, though the reasons in respect of such issues have not been included in the reasons recorded under section 148(2). It was argued that when the Assessing Officer reopened the assessment, the entire assessment was at large, as per Explanation (3) and hence, he ought to have applied his mind to all the issues involved in the case of the assessee. This plea raised on behalf of the revenue relying on Explanation (3) to section 147 however was not accepted by the Hon'ble Bombay High Court by relying on its decision in the case of Ashoka Buildcon Ltd. (supra), wherein it was held after taking into consideration the effect of the said Explanation as under;-

> "Where a reassessment has been made pursuant to a notice under section 148 the order of reassessment prevails in respect of those items which form part of reassessment. On items which do not form part of the reassessment, the original assessment continues to hold the field. When the Assessing Officer reopens an assessment on a particular issue, it is open to him to make a reassessment on that issue as well as in respect of other issues which subsequently come to his notice during the course of the proceedings under section 147. The submission of the revenue is that by not passing an order of reassessment in respect of other independent issues. The order of the Assessing Officer can be construed to be

erroneous and to be prejudicial to the interests of the revenue within the meaning of section 263. The submission cannot be accepted in the facts of the present case. The substantive part of section 147 as well as Explanation enables the Assessing Officer to assess or reassess income chargeable to tax which he has reason to believe had escaped assessment and other income which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the section. There is nothing on the record of the present case to I.T.A. No. 867/Kol/2017 Assessment Year: 2007-08 Sarda Mines Pvt. Ltd.

indicate that there was any other income which had come to the notice of the Assessing Officer as having escaped assessment in the course of the proceedings under section 147 and when he passed the order of reassessment. The Commissioner, when he exercised his jurisdiction under section 263, in the facts of the present case, was under a bar of limitation since limitation would begin to run from the date on which the original order of assessment was passed. We must however clarify that the bar of limitation in this case arises because the revisional jurisdiction under section 263 is sought to be exercised in respect of issues which did not form the subject matter of the reassessment proceedings under section 143(3) read with 147. In respect of those issues, limitation would commence with reference to the original order of assessment. If the exercise of the revisional jurisdiction under section 263 was to be in respect of issues which formed the subject matter of the reassessment after the original assessment was reopened, the commencement of limitation would be with reference to the order of reassessment. The present case does not fall in that category"

25. Hon'ble Bombay High Court in the case of ICICI Bank Ltd. (supra) accordingly proceeded to hold that the order under section 143(3) passed originally cannot stand merged with the order of reassessment in respect of those issues which did not form the subject matter of reassessment and Explanation (3) of section 147 will not alter this position. It was held that Explanation (3) only enables the Assessing Officer, once an assessment is reopened, to assess or reassess the income in respect of an issue in respect of which no reasons were indicated in the notice under section 148(2), but this will not obviate the bar of limitation under section 263(2). It was held that where the jurisdiction under section 263(1) ought to be exercised with reference to an issue which is covered by the original order of assessment under section 143(3) and it does not form part of the reassessment, limitation must necessarily begin to run from the order under section 143(3).

I.T.A. No. 867/Kol/2017 Assessment Year: 2007-08 Sarda Mines Pvt. Ltd.

26. Keeping in view the legal position emanating from the judicial pronouncements discussed above, including the decision of the Hon'ble Supreme Court in the case of Alagendran Finance Ltd. (supra) and having regard to the facts of the case, we are of the view that the period of limitation as provided under section 263(2) has to be reckoned from the date of the original assessment passed under section 143(3) and not from the date of reassessment passed under section 143(3) read with section 147 of the Act, as the issues on which assessment was sought to be revised were not the subject

matter of reassessment made under section 143(3) read with section

147. Accordingly we hold that the impugned order passed by the DIT under section 263 revising the assessment qua the issues which were not the subject of assessment under section 147 but were the subject matter of assessment under section 143(3) is barred by limitation, having been passed after a period of two years from the end of the financial year in which the order under section 143(3) sought to be revised was passed. Keeping in view the foregoing discussion we hold that the impugned order passed by the Principal CIT under section 263 is not sustainable in law and cancelling the same, we allow this appeal of the assessee.

27. In view of our decision rendered above on the preliminary legal issues cancelling the impugned order passed by the Ld. Principal CIT under section 263, we do not consider it expedient to go into other grounds raised by the assessee on merits, as the issues involved therein have become academic in nature. In any case, the Ld. Principal I.T.A. No. 867/Kol/2017 Assessment Year: 2007-08 Sarda Mines Pvt. Ltd.

CIT, vide his impugned order has not decided any of the issues raised by him on merits.

28. In the result, the appeal of the assessee is allowed.

Order Pronounced in the Open Court on 14th December, 2017.

Sd/-	Sd/-
(S.S. Viswanethra Ravi)	(P.M. Jagtap)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 14/12/2017
Biswajit, Sr. PS

Copy of order forwarded to:

1. Sarda Mines Pvt. Ltd., 6th Floor, Circular Court, 8, AJC Bose Road, Kolkata - 17.

2. DCIT, Cir 5(2), Aayakar Bhawan, Kolkata - 69.

3. The CIT(A)

4. The CIT

5. DR True Copy, By order, Sr. P.S. / H.O.O. ITAT, Kolkata