IN THE INCOME TAX APPELLATE TRIBUNAL
JABALPUR BENCH, JABALPUR
(through web-based video conferencing platform)

BEFORE SHRI SANJAY ARORA, HON'BLE ACCOUNTANT MEMBER&
SHRI MANOMOHAN DAS, HON'BLE JUDICIAL MEMBER

I.T.A. No. 252/JAB/2016
(Asst. Year: 2012-13)

Asst. CIT, Circle, Katni	vs.	Shankarlal Vishwakarma, New Minerals, Jalpa Devi Ward, Katni (MP) [PAN: ABOPV 0281 B]
(Appellant)		(Respondent)

C.O.No. 01/JAB/2017
(Arising out of I.T.A. No. 252/JAB/2016)
(Asst. Year: 2012-13)

Shankarlal Vishwakarma, New Minerals, Jalpa Devi Ward, Katni (MP) [PAN :ABOPV 0281 B]	vs.	Asst. CIT, Circle, Katni
(Appellant)		(Respondent)

I.T.A. Nos. 96 & 129/JAB/2018
(Asst. Years: 2013-14 & 2014-15)

Asst. CIT,Circle, Katni	vs.	ShankarlalVishwakarma, New Minerals, Jalpa Devi Ward, Katni (MP) [PAN :ABOPV 0281 B]
(Appellant)		(Respondent)

C.O.Nos. 10 & 11/JAB/2018
(Arising out of I.T.A. Nos. 96 & 129/JAB/2018)
(Asst. Years: 2013-14 & 2014-15)

Shankarlal Vishwakarma, New Minerals, Jalpa Devi Ward, Katni (MP)	vs.	Asst. CIT, Circle, Katni

[PAN : ABOPV 0281 B]		
(Appellant)		(Respondent)

Revenue by	:	Smt. Maya Maheshwari, CIT-DR
Assessee by	:	Shri Dhiraj Ghai, FCA
Date of hearing	:	01/11/2022
Date of pronouncement	:	27/01/2023

O R D E R

Per Bench:

This is a set of three Appeals and three Cross Objections (COs) by the Revenue and Assessee respectively, for three consecutive years, being assessment years (AYs.) 2012-13 to 2014-15, upon the assessee's appeals contesting his assessments for all the years having being partly allowed by the Commissioner of Income Tax (Appeals)-1/2, Jabalpur ('CIT(A)' for short).The issues arising in these appeals being common, the same were heard together, and are being disposed of per a common, consolidated order.

2.1 It would in order to recount to background facts of the case. The assessee is in mining business, through his proprietary concern, M/s. New Minerals, mining Bauxite at four different places, located at varying (18 kilometers (Tikeriya) to 38 kms. (Amoch) from Niwar railway siding, whereat supplies are made to Hindalco Industrial Ltd. (HIL), producing Almunium). For AYs. 2009-10 and 2010-11, assessments were made u/s. 143(3) at Rs.8.65 lacs (PB pgs. 93 - 96) and Rs.16.73 lacs (PB pgs.97 - 99) respectively, on a turnover of Rs.328.40 lacs and Rs.621.67 lacs (PB pgs. 100 - 105) respectively. The return for AY 2011-12 was not subject to the verification procedure under the Act, i.e., as were the returns for AYs. 2007-08 and 2008-09 were furnished u/s. 44AF of the Act as 'no account' cases.

2.2 For AY 2012-13, the Assessing Officer (AO) found the assessee to have claimed transportation expenditure at Rs.1054.87 lacs (on a turnover of Rs. 21.11 cr.), of which Rs.389.35 lacs outstood for payment (to 41 parties) as at the year-end (31.3.2012). Confirmations, as well as addresses and Permanent Account Numbers (PAN), were called for from all whose balance exceeded Rs.3 lacs, of which the assessee could furnish only for six (6). For the balance 30 cases, *qua* which expenditure in the aggregate sum of Rs.592.87 lacs had been booked and claimed, notices u/s. 133(6) also could not be served, which were sought to be through the Inspector, even as the assessee's books reflected payments for Rs.391.46 lacs thereto during the year. Further, in all cases the payments were made through self-cheques, liable for disallowance u/s. 40A(3). On the basis of the information furnished by the assessee during assessment proceedings, the transportation cost worked to an average of Rs.125/- per metric tonne (PMT), which, on the basis of the quantity shipped (254956 MT), worked to Rs.318.70 lacs, suggesting, thus, an excess claim of Rs.736.17 lacs (Rs.1054.87 lacs – Rs.318.70 lacs). The AO further found that vouchers for payments, in excess of Rs.20,000 each, were missing for a total of Rs.85.93 lacs. The payments in sums less than 20,000 each, i.e., Rs. 291.81 lacs, were through vouchers which were not verifiable and, thus, liable for disallowance, at least in part. The AO accordingly made disallowance for Rs.654.87 lacs (i.e., Rs.592.87 lacs + Rs.62.00 lacs) u/s. 37(1) of the Act. No separate disallowance was made u/s. 40A(3), which as per him worked to Rs.391.46 lacs, inasmuch as that would amount to a double disallowance. The only other disallowance was for Rs.20 lakhs in respect of labour expenditure, i.e., on breaking, sorting and screening of raw stock, claimed at Rs.361.19 lakhs, on account of the same being not properly vouched and, thus, unverifiable, with the wages register, finally produced only on 24/3/2015, i.e., days prior to the assessment becoming time-barred, being only for a part period (reference be made to pages 1-10 of the assessment order). Income was

accordingly assessed, as against the returned income of Rs.20.98 lacs, at Rs.697.70 lacs, vide order u/s. 143(3) dtd. 30/3/2015. It may also be noted that the disallowances in assessment for AYs. 2009-10 and 2010-11, though not appealed against, being nominal, were *qua* the same expenditure, i.e., transportation and labour expenditure and, further, for the same reason/s.

2.3 For AY 2013-14, notice u/s. 143(2) for which was issued and served during the course of assessment proceedings for AY 2012-13. The assessee, though attended the assessment proceedings, did not, despite being required to, and on more than one occasion, produce the books of account. *On the basis of the assessed income for AY 2012-13*, the profit for the said year worked to 33.05% of the turnover (i.e., Rs. 697.70/2110.83 x 100). The disclosed results for a comparable case, with the turnover in the range of Rs.17-18 crores for AY 2012-13 and 2013-14, reflected a gross profit and net profit rate of 35% & 32% and 44% and 40% for the said two AYs. respectively. The AO, accordingly, applied the net profit rate of 32%, being the lowest of:

a) assessed net profit rate of 33% for AY 2012-13 in the assessee's case;
b) disclosed net profit rate of 32% for AY 2012-13 in the comparable case;
c) disclosed net profit rate of 40% for AY 2013-14 in the comparable case.

This was, however, applied by him only to the bauxite sale (Rs.843.67 lacs), even as the turnover reckoned for working the net profit rate of 33% for AY 2012-13 was with reference to gross receipt, i.e., inclusive of transport receipt. A profit rate of 8% was applied on transport and loading charges, amounting to Rs. 451.38 lacs, i.e., at Rs.36.11 lacs (refer pgs. 1-4 of the assessment order). Income was accordingly, as against a returned income of Rs.23.75 lacs, assessed u/s. 144 at Rs. 306.74 lacs vide order dated 19/3/2016.

2.4 For AY 2014-15, the AO effected disallowances, at 5% each, in respect of the following expenditure:

- Labour expenditure (on breaking, sorting and screening of raw stock):Rs.133.91 lakhs;
- Poclain expenses: Rs.124.72 lakhs; and
- Loader expenses: Rs. 100.43 lacs,

principally on account of the expenditure being unverifiable. Further, the creditor level had increased from Rs.389.35 lacs (as on 31/3/2012) to Rs.695.28 lacs (as on 31/3/2014), even as sales has declined from Rs.21.11 crores (for fy 2011-12) to Rs.12.06 crores (for fy 2013-14). Notices u/s. 133(6) were accordingly issued and sent to 10 parties, against which the audited accounts reflected an aggregate liability of Rs.189.62 lacs. Only two, i.e., Sh. Hetram Kol (Proprietor, Earth Movers Construction) & Sh. Dujiya Kol (Prop., Premier Consimation), with outstanding balances at Rs.10.82 lacs and 20.67 lacs respectively, responded, while others were not found at the stated addresses. Their statements were recorded u/s. 131 (PB pgs. 92 to 95), wherein they confirmed having not done any transportation work for the assessee (or M/s. New Minerals). The entire credit balance of Rs.189.62 lacs was accordingly added to income, even as the total expenditure claimed for the year in respect of these creditors was at Rs.197.37 lacs. Further, two creditors, namely Mangalam Engg. Works (Prop. Sh. Rajesh Tipa) & Mandal Construction (Prop. Smt. Jyoti Tipa), with balances outstanding for long, were summoned u/s. 131, in response whereof Shri Rajesh Tipa appeared. He, though confirmed to be in transportation business, as was his wife, Smt. Jyoti Tipa, yet denied having done any work for the assessee, and neither was any amount due to them. The amounts reflected due to them, i.e., Rs.8.59 lacs and Rs.7.23 lacs respectively, were added u/s. 41(1)(b) (refer pages 1 – 8 of the assessment order). That apart, some other adjustments were also made by him, assessing the income at Rs. 255.48 lacs, as against a returned income of Rs.26.67 lacs, vide order u/s. 143(3) dtd.30/12/2016.

2.5 In appeal, the ld. CIT(A), noted that the AO had adopted the derived results of AY 2012-13 for AY 2013-14, inasmuch as the factual matrix of the two years was comparable. The disallowance of the transportation expenses (at Rs.654.87 lacs) for AY 2012-13 was accordingly regarded by him as estimation of income from transportation business, on the turnover of which, comprising transportation and loading charges, at Rs.802.91 lacs and Rs.85.43 lacs, i.e., at a total of Rs.888.34 lacs, a profit rate of 8% was applied. The disallowance of Rs.20.00 lacs for labour expenditure was, in view of non-verifiability thereof, restricted to Rs.2 lacs; it being trite law that no disallowance could follow on the basis that a thumb impression of labour had been obtained on the muster roll, even as held in *LeeladharKhodiyar vs. Asst. CIT* [2013] 22 ITJ 601 (Jbp). The disallowance of Rs.73,674 on vehicle repair and maintenance expenditure, made at 15% of the expenditure claimed to account for personal user of vehicles, was confirmed, partly allowing the assessee's appeal AY 2012-13 vide order dated 27/9/2016.

For AY 2013-14, the ld. CIT(A) proceeded by applying the net profit rate in the assessee's own case for the preceding years. The estimation of mining business income for AY 2012-13, made by the AO at 32% of the mining turnover, was reworked by him on the basis of the income confirmed by him in appeal for that year, i.e., at 1.8%. The net profit for the preceding two years, i.e., AYs. 2009-10 and 2010-11, being at 2% and 3.91% respectively, the three year average worked to 2.57%, which was applied to the bauxite sale (Rs.843.67 lacs). The transportation income was confirmed at 8% of the transportation turnover of Rs.451.38 lacs, comprising transportation and loading receipts at Rs.386.05 lacs and Rs.65.33 lacs respectively. Reliance was placed by him on the decisions in *Vrajlal Manilal& Co. v. CIT* [1973] 92 ITR 287 (MP); *Joseph Thomas & Bros. v. CIT* [1968] 68 ITR 796 (Ker); and *T.O. Abraham & Co. v. Dy. CIT* [2010] 325 ITR 201 (Ker), partly allowing the assessee's appeal vide order dated 13/2/2018.

For AY 2014-15, the ld. CIT(A), vide order dated 23/3/2018, confirmed the addition in respect of unconfirmed transport credits for the two who deposed in assessment proceedings, i.e., at a total of Rs.31.49 lacs, while deleting the addition for the balance Rs.158.13 lacs (Rs.189.62 lacs – Rs.31.49 lacs), on the ground that confirmations had been filed by the assessee during the course of the assessment proceedings, discharging the onus on him. The retraction by the two deponents, being by way of their affidavits, sought to be submitted as additional evidence, was not admitted by him as they were not covered under any of the clauses (a) to (d) of rule 46A(1). The disallowance of various expenses was deleted by him as being adhoc, following the decision in *Ganesh Pratap Singh v. Asst. CIT* (ITA 214/Jab/2013, dated 23/6/2016). The addition of Rs.15.82 lacs in respect of two transport creditors, i.e., Rajesh Tipa and Jyoti Tipa, being husband and wife, was found unsubstantiated as the same represented the opening balance as on 1/4/2013, u/s. 41, as held in *CIT vs. Parmeshwar Bohra* [2008] 301 ITR 404 (Raj). Reliance was also placed on *Bhogilal Ramjibhai Atara* [2014] 88 CCH 49 (Guj).

3. We have heard the parties, and perused the material on record.

3.1 The principal additions/disallowances in these appeals, being directly for the first and third year, i.e., assessment years 2012-13 and 2014-15, with the results of the first and second year (AY 2013-14) being applied across one another, is in respect of transportation expenditure. We shall therefore proceed by first examining the same, and for the first year, being also the base year, i.e., AY 2012-13. The said expenditure, as explained during assessment proceedings, is incurred for transportation of material:

(a) from deep mine to surface (mine-head)
(b) from mine to railway siding.

Further, this was incurred in cash (albeit within the prescribed limit), through local transporters, who deploy tractor, trolly, truck, hywa, dumper, etc., for the purpose. The assessee also stated the cost at Rs.125 PMT (refer para 3/pg. 3 of the

assessment order). In appellate proceedings, it was further explained that the expenditure is in fact also for transportation to the plot reserved for storing the stock inasmuch as it could not be so at the railway siding. Also, that transportation cost is also incurred for removal of overburden (waste) from the mine-head to the dumping place. The AO noted that the sum arrived at on the basis of the stated cost was lower by far than the expenditure debited in accounts. This, coupled with the fact that the assessee's balance-sheet (as at the year-end/31.3.2012) disclosed an aggregate outstanding at Rs.3.89 cr. toward transport creditors, on a total expenditure of Rs.10.55 cr. for the year, led him to doubt the veracity thereof, impelling him to make further verification. Confirmations (from the creditors), called for, were not produced, with the assessee expressing his inability to produce the same (pg. 7 of the assessment order). Notices u/s. 133(6) also could not be served on the creditors as they were not available at the stated addresses. All this led the AO to state that the assessee, having failed to state the name, PAN, or furnish confirmations from the creditors, had failed to establish their identity, with payments to them being per self cheques, even as they were not traceable at the stated addresses! *What further proof, one may ask, could there be of the assessee's claim being bogus*, at least *qua* these creditors, who had raised transportation bills for Rs.592.87 lacs for the year (AY 2012-13).

3.2 The assessee, we observe, has not met or rebutted any of the factual findings by the AO, and on the basis of which the disallowance stands effected by him, at any stage. Rather, he confirms the cost of Rs.125 PMT vide his reply (to the AO's show cause letter dated 19.3.2015) dated 24.3.2015 (reproduced at pg. 6 of the assessment order), wherein he clarifies (at para-2 thereof) that the actual transportation cost works to Rs.3,47,95,609 (and not Rs.3,18,69,500) inasmuch as the total quantity works to 278364.870 MT (and not 254956 MT, as worked out by the AO). Though this difference of Rs.29.26 lacs (as per the assessee's working) is, in context, neither material nor relevant as the claim allowed by the AO is at an

even higher figure of Rs.400 lacs (1054.87 lacs – 654.87 lacs), it needs to be clarified that the assessee's working is wrong, even as was found during hearing with reference to the stock tally (at PB pg. 132); the opening and closing stock also including bauxite at the mine, which therefore is not transported. Further, the assessee also includes the quantity purchased (bought-out), in addition to that produced, in his cost estimate of Rs.125 PMT, which though does not suffer cost toward internal transportation, i.e., from deep mine to surface, as perhaps also from the mine to the storage, i.e., where the delivery is taken by the assessee directly at the siding or at the storage site. The AO has in any case not restricted the disallowance to that claimed in excess of Rs.318.70 lacs, but only in excess of Rs.400 lacs, allowing, thus, another sum of Rs.81.30 lacs. This amount, when reckoned with respect to the quantity mined shipped, i.e., excluding that purchased (36,322 MT), or 2,18,634 MT, works to Rs.37.2 PMT, amounting to a total cost of Rs.162 PMT. The sample transport bills placed on record disclose a transportation cost of Rs.153 PMT during the year 2011 and at Rs.173 PMT during the period January to March, 2012 (PB pgs. 114 - 118). A pro-rata allocation, i.e., on time basis, works to a cost of Rs.158 PMT. In fact, a transportation chart, adduced by the assessee during hearing, shows the quantity for the first nine months and the last three months of the year (fy 2011-12) at 2,09,865 MT and 40,311 MT respectively (PB pg. 248), yielding a weighted average cost of Rs.156 PMT.

3.3 We may at this stage examine the assessee's claim from the standpoint of the evidences led, i.e., the (sample) bills provided by the assessee for shipping of bauxite from mine/s to rail-siding (PB pgs. 114-118/AY 2012-13). We are conscious that this may not necessary as the transportation cost as allowed in assessment is, as afore-noted, in agreement with the assessee's cost as per the bills produced (see para 3.2). We do so, nevertheless, by way of abundant caution, considering, further, one, the fact that this forms the principal disallowance, with it having a bearing on the assessment for other years as well; the extent of

disallowance and, thirdly and most importantly, is indicative of the manner and state of the book/record keeping by the assessee, on which he places reliance.

The bills are, to begin with, not numbered, as well as not properly signed, indicating the name & designation of the person signing, both of which seriously undermine their credibility. All of them are, in fact, on computer stationery, in almost identical format, which is same as that for the bills issued by the assessee for supply of Bauxite. Juxtapose this with the fact that the notices u/s. 133(6) could not be served on the creditors, nor their confirmations, much less their names, PAN, ITRs, etc., despite being called for, furnished. The bills, surprisingly, do not bear any address or any registration number, viz. TIN (Taxpayer Identification Number), TAN, under Service Tax, etc. nor in fact even the name of any trade association; transporters being normally organized thus, or even bank account particulars. The AO under the circumstances stating that even their identity is not proved, cannot but have our approval. Further, the bills, in the range of Rs.7 lacs each, are for quantities transported over a period of one month to three months. This itself raises serious doubt inasmuch as a transporter would normally insist on immediate payment, as he has to incur expenditure, on daily basis, on fuel, labour, as indeed on repair and maintenance of the vehicle/s, all of which require availability of cash or, in any case, liquidity. This quizzical behaviour has not been explained at any stage, much less the capacity of the creditors to extend credit.

Further, the bills could be prepared only on the basis of underlying records, aggregating the quantity transported each day, and which itself could be in one or more consignments, each of which would in turn be supported by Goods Receipts (GR)/Consignment Note (CN), as well as weighment slips. No such record stands produced at any stage despite the genuineness of expenditure being in serious doubt. Further, each bill is for transportation from mine head to siding. It may be noted that the assessee has been allowed a base rate of Rs.125 PMT, i.e., *as per his own statement*, including on bauxite purchased. It is therefore the additional cost,

being on internal transfers, i.e., from deep mine to surface, and from mine to the plot (storage), and for removal of overburden (waste), assuming the same as not included in the base rate, that needs to be established, *and which has not been*. As afore-noted, an additional cost of Rs.37 PMT has been allowed for the same, magnitude of which can be gauged from the fact that the total expenditure claimed by C.R. Mittal & Co., the comparable case, is at a rate below Rs.35 per MT. The average credit (*qua* the 30 parties identified by the AO) is at Rs.7.76 lacs each. That is, at Rs.8 lacs approx. *How and why would they, we wonder, extend credit in such high sums, representing 2-3 months of work done, to the assessee*?, who nowhere explains this phenomena, which is not limited to 1-2 creditors, who may have the financial capacity to do so – which, again, where required, being integral to the aspect of genuineness, would need to be demonstrated, but across the board. The corresponding figure for C.R. Mittal &Co., worked on an aggregate basis (i.e., total credit/total expenditure) works to nil, as against at 4.44 *months* (Rs.389.35/Rs.1054.87 x 12 months) in the assessee's case. This in fact also explains the extraordinary large number of creditors in the assessee's case, i.e., 41, even as, considering the consignments shipped each day, 2 to 3 or even 4 creditors should normally suffice. The credit spread over a fewer parties would increase the outstanding per creditor to even a higher sum, raising further doubt in the matter. For example, the outstanding (Rs.389.35 lacs) spread over 10/5 creditors (say) would imply on average outstanding of Rs.39/Rs.78 lacs per creditor (transporter). In fact, while arguing the case *qua* sec.40 A(3), Sh. Ghai, the ld. counsel for the assessee, was at pains to emphasize the urgent need for remitting funds to the creditors, being small transporters who could not afford being not paid immediately and, thus, by cheque inasmuch as the same entails a clearing period of 2-3 days. So much for the emergent need to remit monies; the credit extending to 4½ months and 4.7 months *qua* the total and impugned credits respectively.

Why, expense vouchers for a sum aggregating to Rs.85.93 lacs were also found missing. How could that be, unless the vouchers pertain to a particular party, separately filed (which is not the case) or are over a particular period, so that the voucher file for a particular period is missing, which is again not the case; the payments spanning from 01/04/2011 to 27/03/2012 (refer page 4 of the assessment order). The AO has though not made, we may add, any separate disallowance in its respect, and this is stated only to bring forth the obtaining state of affairs, particularly *qua* this expenditure. That apart, the manner of payment, i.e., per self (bearer) cheques, also leaves much to be desired, besides being hit by s. 40A(3), which again would be a specific disallowance. The stated explanation, i.e., to expedite transfer of funds, is, apart from being of no moment in view of the statutory prescription of s. 40A(3) (r/w ss. 40A(3A) & 40A(4)), which could be violated only at the pain of disallowance – there being no estoppel against law, is proved *false* in view of the facts and circumstances delineated above. *In other words, there is no explanation*. That apart, there is nothing to show as to whom the payment/s is made, i.e., *the identity of the payee*. Nothing further has been either stated or placed on record. The other explanation advanced by Shri Ghai, i.e., of the place being not serviced by bank, again, only needs to be stated to be rejected; the payments, being per self (bearer) cheques, *having been, rather, made through bank*, with it being even not made clear if the same is through the bank located nearest to the assessee's mine/s. If not; the law entitling an adverse inference being drawn in absence of evidence expected to be in possession being adduced, what does that show except of course of a made-up claim and an exaggerated claim.

All these are tell tales signs of a bogus claim, even as the absence of any confirmation from the creditors, and the assessee's admitted inability to produce the confirmations, with they being not traceable at the stated addresses, was itself sufficient to rubbish the assessee's claim. It may also be clarified that though the AO states of the identity of the creditors being not proved – surely in order, the

disallowance made by him is u/s. 37(1) on the ground of the expenditure, to the extent disallowed, being not proved to have been incurred, i.e., the genuineness of expenditure being not established, of which the identity (of the payee) forms a part, though may obtain despite the identity been proved; genuineness having several aspects to it.

3.4 We may at this stage compare this cost with that incurred by the comparable case (i.e., C.R. Mittal & Co.), proprietor, Shri Lalit Mittal (per audited accounts, placed in the Department's paper-book (DPB pgs. 11-30), who also mines and sells Bauxite, from the same region, to HIL (also see para 11). A total cost of Rs.94.53 lacs has been claimed on a total bauxite sale (purchase and self-mined) of 2,76,738 MT, yielding an average cost of Rs.34.16 PMT, which would stand to fall further if the quantity of clay, laterite and coal sales are also included, which being insignificant in relation to bauxite sales, are ignored, as in the assessee's case. This is startling as, even though transportation cost depends on the distance from the railway siding, the same, as clarified by the assessee per his written submissions before the ld. CIT(A) (PB pgs. 1-17), is at 16 km from Tikeriya mines, from which almost the assessee's entire bauxite sale has originated. Now, this distance of 16 km is, to our mind, as small a distance as one could think of. Even assuming a lower distance, i.e., of 10-15 km. (which though is a matter of fact) in case of C.R. Mittal and Co., the comparable case, the cost in the assessee's case should not exceed Rs.40-45 PMT. It needs to borne in mind that the cost of internal transportation, i.e., for transfer of overburden to dump and for raw stock from deep mine to surface, would be fairly uniform/constant across different mines, with the transporters, being local, drawn from the same set thereof. This impels us to look at the assessee's own cost figures for the two preceding years for which the data has been made available, i.e., AY 2009-10 and AY 2010-11 (PB pgs. 35-40), which are as under:

Asst.Yr.	TC (Rs.)	Qty. (MT)	Cost Rs./PMT	Ratio
2009-10	10,63,648	2,22,371	4.78	1
2010-11	2,12,42,338	1,83,268	115.91	24.25 (1)
2012-13	10,54,86,870	2,54,957	413.74	86.56 (3.57)

TC ⟹ Transportation Cost; Ratio: Adopting Yr.1 (Yr. 2) as the base year.

The results are bizarre, particularly considering the location of the Mine and Siding, and the nature of operations, being constant, with the assessee himself pleading for consistency of operating results, which prevailed with the ld. CIT(A). Considering AY 2009-10 as the base year, the transportation cost jumps over 24 times for the next year, and by over 86 times for the year next to that following. This becomes more inexplicable as the quantity (volume) for all the three years, as indeed for C.R. Mittal & Co., are comparable. Sure, the assessee has before the first appellate authority also clarified about transfer of stock to plot, where it is stored in view of, as explained before us, space constraint at the siding, and which is understandable. This apparently also explains the increase in cost for AY 2010-11, with the operating statement for that year also bearing an expense of Rs.10.13 lacs towards 'Siding Plot Rent'. That, however, would not explain a cost increase of Rs.111.13 PMT (Rs.115.91 – Rs.4.78), or even by Rs.81.75 PMT, i.e., adopting a base cost of Rs.34.16 PMT (*obtaining for C.R. Mittal & Co.*). In fact, inasmuch as the assessee has to incur loading and unloading cost, as well as for rent of plot, he would choose a plot site as close to siding as possible, so as to minimize the transport cost as well as transit time. Why, the nomenclature used, i.e., 'siding plot rent' itself so suggests. The increase, therefore, should, considered whichever way, be nominal, while, as afore-noted, the cost claimed is at a *multiple of 12* (414.74/34.16) over the comparable cost and 3.57 times of that for two years ago. *Surprisingly, there is no plot rent in the balance-sheets as on 31.3.2012 to*

31.3.2014, nor a note in the accounts explaining the same. There is also no stock at the plot, i.e., at the beginning or the close of the year, being only at the Mine and Siding, which is highly improbable as some stock is bound to obtain at the storage site in the normal course of business.

3.5 The assessee having himself stated the cost at Rs.125 PMT, also, justifying it, rather than rebutting it and, further, been allowed at Rs. 162 PMT, we need not have, in considering the validity of the disallowance by the AO, travelled thus far. The exercise, also afore-explained, has however been done to apprise ourselves of the facts emanating from the material on record before issuing any final finding of fact and, equally, to avoid any miscarriage of justice. This becomes imperative in view of the varying and conflicting claims. The only thing that is clear is that the assessee's accounts are seriously manipulated, with no coherence and in complete disagreement with the stated facts. The assessee failing to furnish any reliable material, with his own accounts furnishing irreconcilable and incomprehensible data, the picture is improving, with each piece of information adding a dimension thereto. We may at this stage advert to the Minutes of the Meeting dated 18.6.2011 between the assessee and his principal buyer (HIL), whereby the assessee was allowed an increase of Rs.30 PMT, spread equally (at Rs.15 PMT) over material price and transportation cost. The relevant part of the minutes reads as under:

'Minutes of Meeting (PB pgs. 127-128)

A meeting was held with M/s. New Mineral to discuss the supplied from their mines in Katni area through Niwar siding.

Following were present in the meeting:

From M/s. Hindalco Industries Ltd:

1. Mr D.C. Kabra
2. Mr AM Srivastava
3. Mr Saurabh Shah

From M/s New Minerals:1. Mr. Ganesh Vishwakarma [the Assessee's brother]

Following points were discussed and agreed upon:

A. Considering various demands by M/s. New Minerals due to reasons quoted as enormous hike in minimum wages, additional liaison charges with railways & other departments, filling of Niwar siding, blending costly high-grade material to maintain good quality and market competition, following price hike has been agreed upon w.e.f. the dispatches of 01.05.2011. Present agreement will be valid till 31st March 2012 and these rates will be effective till then.

1. Up to six rakes per month:

Parameters	Present Rates	Revised Rates	Remarks
1. Basic Rates	373.00	388.00	Hike of Rs 30 per MT on basic negotiated (hike distributed @ Rs 15 on basic & transportation rates each)
2.Adhoc Royalty	100.00	100.00	
3. Quantity Bonus*	31.00	31.00	
4. Transportation	164.50	179.50	
5. Wagon Loading	25.00	25.00	
6. Total loaded into wagon	**693.50**	**723.50**	

* Quantity bonus will be as per old terms i.e. @ Rs 21 per MT for 4 rakes per month and @ Rs 31 per month on dispatches minimum 6 rakes per month.

2. Rates for 7th Rake: Rs. 735.50 loaded in to wagon inclusive of Rs.100 ad hoc royalty (billing of additional Rs 12.00 per MT will as quantity bonus for 7th rake only)

3. Rates for 8th Rake: Rs. 745.50 loaded in to wagon inclusive of Rs.100 ad hoc royalty (billing of additional Rs 22.00 per MT will as quantity bonus for 8 rake only)

4. Rates for 9th Rake: Rs. 755.50 loaded in to wagon inclusive of Rs.100 ad hoc royalty (billing of additional Rs 32.00 per MT will as quantity bonus for 9th rake only).'

An increase of Rs.15/- over the existing rate of Rs.164.50 was bargained w.e.f. 01.5.2011. The price of Rs.165 as against a cost of Rs.115 (see para 3.4/AY 2010-11), gives a margin of Rs.50 PMT (@ 30.30%). The price increase, allowed *qua* transportation as well, does not though mention of an increase in transportation cost/s as among the reasons for the same, much less as the sole reason. True, there is reference to liaison expenses incurred by the assessee with the Railways and other Departments. However, there is no claim *qua* such expenditure, and in fact at any stage, including before us. This is perhaps as the same would be unevidenced and, in any case, attract *Explanation* to s. 37(1), precluding its allowance. *Even assuming an expense*, the increase of Rs.15 would accordingly imply an additional cost of Rs.10, i.e., to Rs.125 PMT, resulting in a margin of Rs.55 (on Rs. 180 PMT), i.e., @ 30.56%. *The cost increase on a best case scenario can thus be regarded at Rs.10 PMT, as against as claimed at Rs.298 PMT (Rs.414 - Rs.116).* The profit margin is thus in line with that estimated and applied by the AO.

3.6 Now, sure, this brings us back to where we started from, i.e., Rs.125 PMT. So, however, it was considered necessary to, before arriving at any decision, visit the entirety of the facts and circumstances of the case with a view to make an informed decision on the basis of the material on record. That it agrees with the initial estimate, provided by the assessee himself, becomes corroborative. We may though clarify that we do not propose to restrict the assessee's claim to Rs.125 PMT, but only to that allowed by the AO who, as afore-stated, has allowed the assessee another Rs.81.30 lacs, working to a cost on shipment of self-mined bauxite at Rs.162 PMT. We, thus, see no reason not to confirm the disallowance of the assessee's claim for transport expenditure as made by the AO, i.e., at Rs.654.87 lacs. We state so in the conspectus of the case, considering, *inter alia*, the evidences led in substantiation of the expenditure claimed as well as *qua* the concomitant liability; the manner of payment; the cost data furnished to the

assessee's principal buyer; the cost incurred in the past (which the assessee itself pleaded for applicability); and that incurred in a comparable case.

3.7 *The foregoing marks our basic discussion on the principal disallowance in these appeals*.

4. We may, next, proceeding year-wise, consider each of the various disallowances/adjustments made in assessment/s by the AO, since modified by the first appellate authority.

AY 2012-13

5.1 The Revenue's Grounds are as under:

1. That on the facts and circumstances of the case, the ld. CIT(A) erred in facts and in law :
   - (i) The CIT(A) has erred in allowing relief of Rs.5,83,79,756/- out of total disallowance of transport expenses of Rs.6,54,86,556/-, when particularly, the rejection of books result is upheld and evidences were not admitted.
   - (ii) The CIT(A) has erred in applying net profit rate @8% on transport receipt and loading receipt, when particularly, the AO has made specific disallowance out of transport expenses in absence of documentary evidences as required under the provision of section 37 of IT Act 1961.
   - (iii) The CIT(A) has erred in allowing relief out of transport expenses when particularly, the AO had given finding that a sum of Rs.3,91,45,959/- was paid by self cheque and therefore, provisions of section 40A(3) are clearly applicable for disallowance.
   - (iv) The CIT(A) has erred in allowing relief out of transport expenses when particularly, a sum of Rs.2,91,81,025/- was claimed through unverifiable self-made vouchers.
   - (v) In the facts and circumstances the CIT(A) has erred in not appreciating the facts that the addition was made because the assessee could not furnish the confirmation & identity in respect of alleged creditors.
   - (vi) The ld. CIT(A) has erred in deleting the Addition under the head labour expenses amounting to Rs.18,00,000/-.

(vii) The ld. CIT(A) has erred in not appreciating the fact that the total payment to labourers were made through self-made vouchers.

(viii) That the appellant reserves the right to amend/alter any of the grounds of appeal/add other grounds of appeal at the time of hearing.

2. That the appellant reserves the right to amend/alter any of the grounds of appeal/add other grounds of appeal at the time of hearing.

5.2 The first issue agitated for this year, per Grounds 1(i) to 1(v), is *qua* the disallowance for Rs.654.87 lacs, which stands discussed at paras 3.1 to 3.6 of this order. The disallowance, it may be noted, and its, in effect, deletion by the ld. CIT(A), is u/s. 37(1) only. Further, two thing need to be clarified here. One, that the burden to prove his return of income, and the claims preferred thereby, is only on the assessee. Two, the Tribunal is to decide by issuing finding/s of fact based on the material on record. (case law in this respect find mention in the order)

5.3 We may at this stage discuss the adjudication by the first appellate authority, which has not entered our discussion thus far. The reason is simple: *there has been no examination of the facts of the case by him, so that his adjudication is de hors the facts of the case and the material on record*. While the AO disallowed the expenditure u/s. 37(1), the ld. CIT(A) regards it instead as a case of estimation of income consequent to rejection of accounts and, further, 'substitutes' it with his own estimate, disregarding the disallowance as made, both in principle and on merits. The AO found the assessee as having not satisfied the burden of proof cast on him u/s. 37(1), i.e., *qua* transport expenditure, claimed at Rs.10.54 cr., and effected a disallowance thereunder, which we have endorsed, finding the estimate of expenditure actually incurred and, thus, allowed by him, as reasonable. Neither of the two components of the disallowance made by him, i.e., Rs.592.87 lacs and Rs.62 lacs, we may add, contain any element of disallowance u/s. 40A(3) or s.40(a) (ia) or any other provision, which is only u/s. 37(1) of the Act, by regarding it as not genuine. Here it may also be relevant to state that when we speak of a

non-genuine claim, the same may not necessarily imply non-existence of the transporter/payee. As we shall presently see, while some creditor/s who responded to the AO, stated to have nothing to do with the transport business, others confirmed to be in the said business, though had not undertaken any work for the assessee, or had no dues to be received from him. One may have undertaken the work, but at a different (lower) rate. That is, a false claim could be in different forms and fact settings, with no material difference though, being in *pari materia*. We may clarify that while the law provides for disallowance u/s. 37(1) even if an expenditure, though incurred, is not wholly and exclusively for the purpose of the assessee's business, the disallowance in the instant case is for the reason of it having not been incurred, i.e., to that extent. We may here also add that a disallowance would be sustainable on the assessee being unable to prove an expenditure, and it is not necessary for the Revenue to actually disprove the same. That we have found the same as, besides being unsubstantiated, grossly inflated and, further, in examining its genuineness, considered it from various angles, including its quantum, inasmuch the two were found inter-related, would not make it any less a disallowance s.37(1). And, further, not convert it into a case of estimation of income, i.e., merely because the same works to a tidy sum in relation to sales. The disallowance u/s. 37(1), as indeed an addition u/s. 41(1) or u/s. 68, is a specific adjustment/s (to the returned income), and would not for that reason make it a case of estimation of income. As explained by the Hon'ble Apex Court in *Kale Khan Mohd. Hanif vs. CIT* [1963] 50 ITR 1 (SC); *CIT v. (M.) Ganpathi Mudaliar* [1964] 53 ITR 623 (SC); and *CIT vs. Devi Prasad Vishwanath Prasad* [1969] 72 ITR 194 (SC), there is nothing in law that prevents the assessing authority in taxing both, the cash credit, the nature and source of which is not satisfactorily explained, and the business income estimated by him after rejecting the books of account as unreliable. It would be a different matter though where the cash credit is explained in terms of secreted profit of the business for the current or

a preceding year, so that relief is allowed on that basis, i.e., of the same income being subject to tax twice (also see: *Anantharam Veerasinghaiah & Co. v. CIT* [1980] 123 ITR 457 (SC)).

Further, that the income arising thus, i.e., upon effecting the disallowance/s u/s. 37(1), is considered as the actual operating result and, thus, for that reason, applied to another year, the income of which is to be estimated on account of non-production of books, is another matter, and would not, again, convert, as the ld. CIT(A) regards, the income for the first year as having been estimated. Though much was made before us – the Revenue emphasizing it to be a case of disallowance u/s. 37(1), which it indeed is, while the assessee would insist on it being a case of estimation of income, as presumed by the ld. CIT(A), we are not persuaded to see that as of any moment, or as a controversy arising in the instant case. *Estimation is integral to assessment*. Once, therefore, the income arrived at on effecting a disallowance/s is considered as the normative operative result of the assessee's business, the same is liable to be applied in estimating the income for another year in his own case, of course, subject to adjustment/s for differences, if any, obtaining between the two years. The fact that the result for the first year stands arrived on making specific disallowances, rather than on estimation of income, is of no consequence. It is for this reason that we clarified earlier that the expenditure disallowed bears no element of any artificial disallowance/s (as u/ss. 40A(3), 40(a)(ia)), and is only in respect of and impinges on the expenditure claimed as incurred. We are in this supported by the decision in *Vrajlal Manilal & Co. v. CIT* [1973] 92 ITR 287 (MP). The appellate order is thus flawed not for the reason that it regards, incorrectly though, the income for the year (AY 2012-13) being estimated, but for estimating it and, further, on the basis of the income of another (AY 2013-14), which stands itself estimated for non-production of accounts, and for which estimation no basis stands stated. That is, for the manner

in which the income for the first year is determined, including the validity of the underlying assumptions.

Now, it is one thing to say that the operating result as derived for one year, for which books stand properly scrutinised and income assessed making specific adjustment/s to the returned income, is, on the premise of the same representing a normative profit, applied to another, subsequent, year, for which the book-results, though similarly disclosed; the books of account having not been produced in assessment, income has to be estimated, and quite another to do just the opposite, i.e., applying the results for the second (subsequent) year, liable to be estimated, to the first year. *That would be putting the cart before the horse*. There has been clearly no adjudication by the ld. CIT(A) *qua* the disallowance of transport expenditure, made at Rs.654.87 lacs by the AO u/s. 37(1).

Yes, we do find him to state that the profit element upon disallowance of transportation works to 81.56%, i.e., too huge to be accepted. Without doubt, the disallowance being u/s. 37(1), inasmuch as the same bears no element of artificial disallowance (as u/ss. 40A(3), 40(a)(ia)), and is on account of genuineness of expenditure, the extent thereof, which is to be reasonable, is a relevant consideration. No basis for the said calculation (81.56%) has though been given, nor was argued/furnished before us. *The same is clearly incorrect*. The total transportation and loading charges is at Rs. 888.34 lacs, and the expenditure allowed, Rs. 400 lacs (see paras 2.5, 3.2), so that 'profit' works to Rs. 488.34 lacs, or at 55% (of the receipt). There is however no separate income corresponding to the transportation expenditure incurred other than for transporting bauxite from the mine head to the railway siding, viz.

- from deep mine to surface
- from mine head to storage site (for being subsequently transferred to siding)
- removal and disposal of over-burden

In fact, the same raise the question with regard to the two activities being separate businesses. The statement by the ld. CIT(A) of the profit on transportation receipt having been assessed @ 81.56% is, thus, wholly wrong and misleading, accepted by him without any inquiry. There has been clearly no examination of even the primary facts by him. The extent of an expenditure claimed could, for example, be gauged only with reference to the volume (quantity) in relation to which it is incurred and, further, on being compared across years or units, reveal its implication/s, and justification sought, or that furnished examined on merits. His order, accordingly, bears no reference to any of the documents referred to herein, or otherwise meets the Revenue's case. That is, proceeds *de hors* the record, without rebutting the AO's findings challenged before him, merely adopting what stands stated by the assessee.

The reason behind the apparently excessive profit of Rs. 488.34 lacs, i.e., on the basis of the cost allowed, even as the same is the gross, and not the net profit assessed, which is at an average rate of 33.05% (para 2.3), is the failure to realise that the assessee has shown a transport receipt of Rs.802.91 lacs on a sold quantity of 2,51,327 PMT (PB pg. 132)– both figures as reflected per the audited accounts, which works to Rs. 320 PMT. Further, in addition thereto, is the loading receipt, at Rs. 85.43 lacs, which, on being unitized, translates to Rs. 34 PMT (85.43/802.91 * 320), i.e., at a gross rate of Rs. 354 PMT. It is this exorbitant rate of realization, as against the claimed rate of Rs. 165 PMT (Rs. 180 PMT), or Rs. 167 PMT, on the basis of the quantities and rates stated at paras 3.2 & 3.5 respectively, that results in a 'higher' profit, and has nothing to do with the cost allowed, and which also explains the attempt by the assessee to supress this profit by booking bogus expenditure. The cost allowed by the AO, as would be seen, at Rs. 162 PMT (para 3.6), is rather very close to the average receipt @ Rs. 167 PMT, even as non-incurring of the additional cost (Rs. 37.2 PMT) on the ore shipped that is purchased, or at least the entire of it, would result in an average lower, i.e., than

Rs. 162 PMT, cost to the assessee, again pointing to the reasonability thereof and, thus, no reason to disturb the same. There has been no examination of the expenditure by the ld. CIT(A), much less in the entirety of the facts while adjudicating the impugned disallowance.

5.4 We, therefore, for all the reasons afore-stated, find the disallowance as made by the AO as valid in law in the facts and circumstances of the case. We, accordingly, restore the same, vacating the findings by the first appellate authority. We may, though, before parting with this part of the order, discuss the aspect of case law, even as none stands relied upon before us. The paper book, however, contains decisions by the Hon'ble Apex Court and Hon'ble jurisdictional High Court, which we may therefore advert to. The first is in *Pr. CIT v. R.G. Buildwell Engineering Ltd*., where SLP stands dismissed by the Apex Court. The same is per a non-speaking order and, therefore, to no consequence as far as its precedential value is concerned. Besides, no substantial question of law as per the judgment of the Hon'ble High Court (reported at 2017 CCH 453 (Del)) arises in the facts and circumstances of the case. The ratio of a decision is only where the Hon'ble High Court first admits a question of law u/s. 260A of the Act. Rather, the same endorses the view that the matter is principally factual. Likewise, for the decision in *CIT v. Pure Pharma Pvt. Ltd*. [2005] 277 ITR 273 (MP) inasmuch as, again, as per the Hon'ble Court, no substantial question of law arises for it to express its opinion thereon u/s. 260A. Further, the decision in *T.O. Abraham* (supra), relied upon by the assessee before the ld. CIT(A), is not applicable. This is for the reason that the same is in respect of estimation of income upon rejection of accounts consequent to non-production thereof. *How, one wonder, is the same applicable in deciding the validity or the quantum of disallowance u/s. 37(1)*? As afore-stated, merely because the results as derived stand applied by the AO to another year, a matter subsequent, would not convert it to a case of rejection of accounts and estimation of income, which again is to be made taking into account the entirety of

the facts of the case. Needless to add, the disallowance as made has been examined to find it as with reference to and consistent with the facts of the case.

5.5 We decide accordingly (also see para 7).

6. The second disallowance (Gds. 1(vi) & 1(vii)) agitated, on the ld. CIT(A) allowing a relief of Rs.18 lacs, is *qua* labour expenditure on breaking, sorting, and screening of the ore, claimed at Rs.361.19 lacs. The claim was found wanting by the AO as the same was through self-made vouchers, which were not amenable to verification, with the assessee further failing to produce the labour register. The same, as it appeared to him, was through Mukkadams (petty contractors), which is generally the case, *though no tax had been deducted at source* (para 6 of the AO's letter dated 19/3/2015/also see pg. 5 of the assessment order). Before the first appellate authority, the assessee sought to justify the expenditure on the basis of the same being consistent with the past inasmuch as the claim for AY 2011-12 was, at Rs.353.60 lacs, @ Rs.157.15 PMT, as against @ Rs.160.53 PMT for the current year; the production for both the years being at 225000 MT. The ld. CIT(A) also found the assessee's claim as deficient, though disagreed with the AO on the quantum of disallowance, restricting it to Rs.2 lacs. His reference to the decision in *Leeladhar Khodiyar* (supra) is not understandable. The AO has nowhere stated that the workers had put their thumb impression, or that the expenditure is doubted for that reason. The assessee failed to produce the labour register during assessment proceedings; producing the same, and that too in part, at the fag-end of the proceedings, whereat no meaningful verification could take place. That is, the basic record itself was not produced, with it being apparent that the same was, to the extent prepared, so only on it being requisitioned and, in any case of the matter, incomplete, and which could not be completed even by the close of the hearing in assessment. *This vital fact has escaped the ld. CIT(A)*. Why, an expenditure on labour would also be supported by applicability and,

consequently, payment of ESI (Employees' State Insurance) and EPF (Employees' Provident Fund), to which the same are subject, indirectly proving the expenditure or, in the alternative, bills of labour contractors, themselves duly registered under the authorities administering the said Acts. What further impugning of the assessee's case, who himself makes varying claims *qua* the said expenditure, i.e., at Rs.195 PMT before the AO (inclusive of purchases at 36,322 MT), i.e., 254956 MT (para 7 of the assessee's reply dated 24/3/2015), and at Rs.160.15 PMT (only on the quantity mined) before the ld. CIT(A). It is this, thus, that led the AO to enquire (vide his letter dated 19.3.2015 (para-7)) that the expenditure ought to, even if reckoned on production (2,25,000 MT) alone, be at Rs.438.75 lacs (as against Rs.361.19 lacs, as claimed), to no proper clarification by the assessee, who merely states – whatever that may mean, of there being no discrepancy. The question is not of discrepancy, but of the correct base with reference to which it is to be reckoned and, two, as to how it compares with the preceding year. This aspect is also relevant as a similar claim by the assessee in respect of transport expenditure, stated to be incurred in equal measure *qua* ore purchased, i.e., justification w.r.t. the past, would make the assessee's claim, as allowed (Rs. 400 lacs), in excess by far. *What does that show* if not the booking of the impugned expenditure at will and fancy. The expenditure for the immediately preceding year was at Rs.157.15 PMT and, further, *only on the quantity produced (mined), and which is, even as claimed by the assessee before the ld. CIT(A), the correct basis*. Further, the said expenditure, incurred under the account head 'Mining, excavation and allied charges', in the case of C.R. Mittal & Co. (for the relevant year), is at Rs.267.12 lacs on a mined quantity of 2,32,627 MT, i.e., at Rs.115 PMT. The quantity (scale) is comparable, and the nature of work, same. The disallowance at Rs.20 lacs by the AO works to an allowance of cost at Rs.151.64 PMT, as against at Rs.160.53 PMT claimed by the assessee. It may here be mentioned that the return for AY 2011-12 was not subject to scrutiny, while that for the two preceding

years were without any appraisal of evidence/s and, consequently, any finding/s, subject only to token disallowances. The same is itself not valid in law, as explained in *Asst. CIT v. Arthur Anderson & Co*. [2005] 94 TTJ 736 (Mum), relied upon by the assessee before the ld. CIT(A). The disallowance, as being confirmed by us, i.e., on the touch-stone of whether the assessee has been able to, in the conspectus of the case, prove the amount claimed (Rs. 361.19 lacs) as incurred wholly and exclusively for business purposes, the two indicating quantum and the purpose of the expenditure respectively, i.e., prove the expenditure in the sum claimed, and to which the answer is clearly in the negative, further finding the disallowance as made, i.e., Rs. 8.89 PMT (160.53 – 151.64), reasonable. No basis for reduction has been stated by the ld. CIT(A). Here it may be clarified that reference to the cost for the preceding year, as indeed to that of the comparable case, is only toward the reasonability of the disallowance made.

We have under the circumstances no hesitation in confirming the disallowance at the sum effected by the AO, i.e., at Rs.20 lacs. We may, before we conclude this part of the order (also see para 20, 25). We decide accordingly.

7. The foregoing though does not answer the Revenue's Ground 1(iii), which specifically agitates the disallowance u/s. 40A(3) *qua* transport expenses. As afore-stated (at para 5.3), the AO did not make any separate disallowance u/s. 40A(3), which he determined at Rs.391.46 lacs, so as to eschew double disallowance (also see para 3.3). His argument is unexceptional. This is as the sum representing aggregate payment to 30 creditors, transport bills raised by whom, at a total of Rs.592.87 lacs, were regarded by him as bogus and, accordingly, disallowed, and which stands confirmed by us. The Revenue's said Ground can therefore only be regarded as an alternate, without prejudice, Ground. Further, even as observed during hearing, the assessee's claim *qua* transport expenditure may also attract disallowance u/s. 40(a)(ia), being only in pursuance to a contract, which could as

well be oral, borne out by the conduct of the parties, with regular shipments spread over period of time, for a single (defined) rate (consideration), with, further, the transporters not declaring their PANs to the assessee. The said provisions (ss. 40A(3), 40(a)(ia)) would, however, stand to be invoked only where the disallowance as made in assessment and confirmed by us is deleted in whole or in part in further proceedings, as otherwise it would amount to a double disallowance. We, therefore, while accepting the Revenue's Ground in principle, hold for no separate and further disallowance, unless the disallowance as made u/s. 37(1) is revoked, in whole or in part, in further appeal. Further, Shri Ghai during hearing clarified that the threshold monetary limit u/s. 40A(3) r/wr. 6DD for payments to a transporter is Rs.35,000, and not Rs.20,000. He though made no attempt to quantify the change in the disallowance consequent to this change, which may remain unchanged, as where each single payment is in excess of Rs.35,000. We, accordingly, issue no finding with regard to the quantification, which, both for s. 40A(3) and s.40(ia), would be, where required, subject to determination after hearing the assessee in the matter, so that we may only be regarded as having a approved the disallowances under these provisions in principle.

We are conscious that the AO has not referred to s.40(a)(ia). That, however, would be little consequence inasmuch as the issue of disallowance *qua* transport expenses is open before us and, further, there is no estopple against law, with we having, as incumbent upon us, queried and sought the response of the parties during hearing. As clarified by the Apex Court time and again, it is the correct legal position that is relevant, and not the view that the parties may take of their rights in the matter (viz. *CIT v. C. Parakh & Co. (I) Ltd*. [1956] 29 ITR 661 (SC); *Kedarnath Jute Mfg. Co. Ltd. v. CIT* [1971] 82 ITR 363 (SC)). The purview of the appellate proceedings under the Act is the correct determination of the assessee's tax liability (see *NTPC v. CIT* [1998] 229 ITR 383 (SC)). The scope of assessment proceedings under the Act is to determine the real income subject to the provisions

of the Act (*Poona Electric Supply Co. Ltd. v CIT* [965] 57 ITR 521 (SC); *Southern Technologies Ltd. v. Jt. CIT* [2010] 320 ITR 577 (SC)). Rules 11 and 27 of the Income Tax (Appellate Tribunal) Rules, 1963 are not exhaustive of the powers of the Tribunal, so that it is in deciding an appeal, not confined to the grounds raised before it, though is bound to observe the principles of natural justice (*Hukumchand Mills Ltd. v. CIT* [1967] 63 ITR 232 (SC)).

We may finally also clarify that the quantum of disallowance u/s. 40A(3) and s.40(a)(ia), which could again overlap, shall be with reference to the total amount allowed, i.e., excluding, from the sum claimed (Rs. 10.54 cr.), the amount held as not allowable and confirmed for disallowance u/s. 37(1).

We decide accordingly.

8. Grounds 1 and 2 of the assessee's CO are supportive of the impugned order, even as they get answered in our deliberations *qua* the Revenue's appeal. Ground 3 is in respect of disallowance of vehicle repair and maintenance expenditure, at 15% thereof, toward personal user of the vehicle/s. No separate argument *qua* the same was made during hearing. We find the same as valid and reasonable and, accordingly, decline interference.

9. In the result, the Revenue's appeal is partly allowed and partly allowed for statistical purposes, while the assessee's CO is dismissed.

AY 2013-14

10. The Revenue per it's three separate Grounds, as under, raises a single issue, i.e., the validity of the modification to the assessed profit in first appeal:

> 1. That on the facts and circumstances of the case, the ld. CIT(A) erred in facts and in law :
>
> (i) The ld. CIT(A) has erred in fact and law in reducing the net profit by Rs.2,48,29,295/- from 2,69,97,535/- to Rs.21,68,240/- by estimating the net profit of the assessee @2.57% of sale of bauxite Rs.8,43,67,299/-.

(ii) The ld. CIT(A) has erred in not considering the finding of the AO about bogus creditors. These are shown as outstanding due to inflated expenses debited to P&L Account under the head transportation and labour expenses.

(iii) The ld. CIT(A) has erred in not appreciating the facts that the addition was made because the assessee could not furnish detailed evidences during the course of assessment.

(iv) That the appellant reserves the right to amend/alter any of the grounds of appeal/add other grounds of appeal at the time of hearing.

2. That the appellant reserves the right to amend/alter any of the grounds of appeal/add other grounds of appeal at the time of hearing.

11.1 We observe no difference in the approach of the ld. CIT(A), who agrees in principle with the AO, applying the derived results, i.e., as obtaining upon effecting disallowances for the preceding year (AY 2012-13), as confirmed by him. Apart from the differences in the (amount of the) said disallowances, which shall stand substituted by that as modified by this order, or as may be further modified in further appeal, there are however other differences in the working by the assessing and the first appellate authority, which we shall examine for their validity/correctness by us. We may, in the process, stating reason/s therefor, also modify the said working with a view to remove the deficiencies or anomalies as may be found, so as to bring the assessed income in conformity with facts and law.

The first deficiency observed by us is in the AO regarding the transportation and loading charges receipt as of separate businesses of the assessee. The same, even as returned, is only a part of his mining business, which requires him to deliver the Bauxite at the railway siding, i.e., *ex siding*. However, instead of being paid a comprehensive rate, is paid *ex works (mine)*, with a separate charge being raised and allowed for delivery at the siding. *Nothing more, and nothing less*. That the assessee is being compensated (by the buyer) separately therefor, which is presumably as these charges may vary significantly with the location of the mine, even as emphasized before us, as indeed before the Revenue authorities, by stating the distances of his different mines (from the siding), would not make it a different

business, is a different matter and, rather, irrelevant. The receipt arises solely from his buyer, and on account of the terms of the delivery of the mined ore thereto, and would not make it a different business. Besides, cost dynamics of transportation charges, comprising principally of fuel, may vary significantly from that governing commodity prices and, thus, subject to being remunerated separately, which though would not make it, for that reason, a separate business. Arising only in the course of his mining business, having no existence in its absence, without in fact any means – the transportation, to comply with the terms of the delivery, being arranged from outside, i.e., market. *That is, is integral thereto*, and for which one may only, if at all required, refer to the minutes of the meeting dtd.18/6/2011 (see para 3.5), wherein the increase of Rs.30 PMT w.e.f. 01/5/2011 was spread by HIL, the buyer, (equally) over transportation charges and commodity price, even as, as also noted at para 3.5, there was no reference to an increase in transport cost. For the buyer, it was only compensating the supplier for his increased costs, nothing more and nothing less, so that it was immaterial as to if the increase was not in proportion to the increase under the two heads of receipt. In fact, the presentation thereto *qua* increased costs was also not category-wise. *So much for the same being a separate business*! Why, the *assessee himself* seeks to justify the increase in transport cost for AY 2012-13 (vis-à-vis the preceding years) on the basis of it being also incurred on the transfer of ore from deep mine to surface, and from mine head to storage site, as well as for removal of overburden, all costs of the mining business, which have nothing to do with the delivery, which would be either from the storage site or the mine head to the railway siding. The argument though is without merit, as these costs would have also been incurred in the past. Neither the assessee's return for the year under reference nor for the preceding years, nor the assessments for any of those years, the results of which stand relied upon, state so, or even remotely so suggest, i.e., of an independent business. In

fact, there is nothing on record to support the contention, much less corroborate it and, on the contrary, is inconsistent therewith.

The idea of a 'separate' business stands projected by the AO *de hors* any material and, as it appears to us, only with a view to, and for the purpose of, computing income, returned by the assessee, as in the past, as indeed for the following year (AY 2014-15), as of one, single business. Why, he himself computes the net profit rate for AY 2012-13 correctly at 33.05%, i.e., on a *gross turnover* of Rs.2110.83 lacs, i.e., inclusive of the transport receipt. However, he falters while applying the same (at 32%) for AY 2013-14, doing so only on the bauxite sale (Rs.843.67 lacs), as against the gross receipt of Rs.1295.05 lacs, i.e., including transport and loading charges receipt, on which, treating it as a separate business, he applies a rate of 8%. The ld. CIT(A), rather that correcting the said mistake, as was incumbent on him, compounds the error by segregating the assessed income for AY 2012-13, which was by the AO for a single business, into for two businesses, i.e., *sans* any basis and without stating any reason/s for the same. This action by the Revenue, as we shall presently see, is seriously flawed, with grave consequences and, being beneficial to the assessee, also explains his silence in the matter. To begin with, the income by way of transport (including loading) receipt, 'assessed' at 33.05% for AY 2012-13 (also see para 3.5), which is to be applied to AY 2013-14, gets assessed at 8% for that year, and which in turn is again applied, i.e., on first appeal, at 8% for AY 2012-13, making a hash of the entire process. We say so as the estimation of income is to be for the second year (AY 2013-14), and the issue at large for the first year (AY 2012-13) is the correctness of the disallowance of transport expenses. This disallowance, as corrected for any invalidity or otherwise any excess, and to the extent sustained *qua* genuineness, removing any artificial disallowance, if any, as u/s. 40A(3), also disputed before him, would furnish the real income of the business and, thus, a valid basis for being applied to the following year (AY 2013-14), business results

for which year are to be estimated in view of the book-results for that year being found not acceptable. *This would be so even if the transport activity is, for the sake of argument, regarded as a separate business*. The rate of 33.05% would sure be liable to be modified to factor in any observed variation between the two years, none though stand specified. This, then, is a second deficiency observed by us.

Continuing further, no basis for the adoption of the profit rate of 8% is stated. Sure, there could be more than one income stream for a particular business, each subject to a different rate of income. No attempt has however been made to segregate the transportation costs relatable to the mining (part of the) business, as against that for the transport part, even if one were to define the latter (i.e., for the sake of argument) with reference to the transportation of ore from the storage site to the railway siding. That is, even the contours of the transport business, i.e., the set of activities which stand to be included therein, remain unspecified, much less the related costs ascertained. As afore-noted, no such attempt, i.e., toward segregating cost, has been made at any time for the preceding years as well. Where, then, is the profit for the base year/s, or the normative profit, which may then be applied for the year for which the book results are found unacceptable, defeating the very purpose and objective of the undertaking the estimation. Even this elementary exercise, which follows in consequence, has not been performed by the ld. CIT(A). Put differently, the only manner in which the method adopted by the AO, and followed by the ld. CIT(A), is to be applied for AY 2013-14, is to delineate the set of activities comprising the transport business, and reduce the related costs, as finally allowed, in arriving at the profit of the said business. This is the only manner in which, even assuming so, i.e., a separate business, a separate rate of profit could be applied for 'transport business'. This would be so even where transport activity is regarded as a separate profit centre, as, as afore-stated, it is indeed possible for any business to have separate streams of incomes, each with separate profitability, which may therefore be, where subject to determination,

applied separately, with a view to a better improved estimation. In either case, common costs would have to allowed on some reasonable basis. All this in fact points to the futility of the exercise. This is as even if, as could surely be the case, the transport activity is subject to a different profit rate which is lower than the average profit rate of 33.05% arrived at for AY 2012-13, it would imply an enhanced rate of profit for the mining business. That is, the profit rate of the transport activity being merged in the combined, average profit rate, identifying it may not be of any consequence as it would result in a corresponding change in the profit of the mining business, to be separately applied. The same could therefore only be with a view to, as afore-noted, a better estimation, as where applying the derived separate rate for the other (mining) business for the other year results in material difference. This could be, as where the transport receipt and the mining receipt are not in tandem, which is not the case as both arise on the same volume, i.e., the quantity delivered and, accordingly, billed to the buyer (HIL). That is, much less a separate business, there is no case of the transport activity constituting a separate profit centre of the mining business. There is thus no factual or logical basis for determining the profit of the transport activity separately and, besides, in view of the two activities having their genesis in the same core activity, i.e., the ore delivered at the siding, to no consequence as a different profit rate for one activity would imply a corresponding and compensating variation in the profit rate of the other activity. That apart, we have found the transport activity to also yield the same profit rate (para 3.5) and, in fact, clarified that there is no basis for regarding it as a separate, independent business. In sum, the second deficiency is the absence of any no justification for applying a separate profit rate for transport activity, or any basis for the adopted rate of 8%.

The ld. CIT(A) goes a step ahead. He not only confirms the presumed profit rate of 8% for the transport activity, of course without stating any basis therefor, he applies the same for the first year, i.e., AY 2012-13, for which we observe no legal

or factual basis (also see para 5.3). Sure, he states of no factual difference observed in the facts for the two years (para 6.3 of his order), but that would rather suggest applying the rate for that year (AY 2012-13), as factually determined, to the current year. This is precisely what led us to state that he, rather than correcting, compounds the error of the AO. As explained in *Kapurchand Shrimal v. CIT* [1981] 131 ITR 451 (SC), an appellate authority *has the jurisdiction, as well as the duty, to correct all errors in the proceedings under appeal and to issue, if necessary, appropriate directions to the authorities below, in disposing of the whole or any part of the matter afresh, unless forbidden by law from doing so*.

The profit rate for any business is bound to, for various reasons, vary from year to year; nay, from time to time, and which rather is the justification for maintaining accounts and basing the assessment of income of a business under the Act thereon, so that, unless the accounts themselves are not reliable, the book results are adopted, though of course may be subject to specific, statutory disallowances where the condition/s of the relevant provision/s are met or, as the case may be, not met. Rather, the adoption of a uniform presumptive rate has the potential of distorting the result of the other (mining) business, which would, as afore-noted, necessarily require the profit attributable to the transport business to be reduced from the total disclosed profit so as to arrive at the disclosed profit of this business for a particular year. Not that the ld. CIT(A) is unaware of this, but circumvents this by presuming the disclosed profit rate at, again without basis, <u>at nil</u>, so that there is an inherent flaw in the manner of applying the results. The second presumption he makes, in doing so, is that the accounts for AY 2012-13, the first year, have been rejected, and it's income is, accordingly, liable to be estimated, which is again factually incorrect. The same was in fact not an issue before him, and neither, accordingly, has he issued any finding in the matter. The method adopted by the ld. CIT(A) is thus incoherent, and without any legal or factual basis. The foregoing explains both the error in the AO's working as well as

the reason for our stating of the ld. CIT(A), who merely adopts the figures as furnished by the assessee before him, as having making, as it were, a mockery and, as afore-stated, a hash of the entire process. This, then, is the third deficiency.

The fourth deficiency is that though he states of taking as the basis the declared results for the preceding 3 years, the ld. CIT(A) omits, as it appears to us, in his zeal to accept the figures furnished before him, that for AY 2011-12 which, along with AYs. 2010-11 and 2012-13, constitute the said 3 years. Further, the results for these years, also combined, i.e., for both the activities, could not therefore be applied in the manner done.

The fifth deficiency observed is in his not considering the results of the comparable case, i.e., C.R. Mittal & Co. This he does, not on merits, as where he finds it as not comparable, stating the reason/s therefor, but as the same were not confronted to the assessee, relying for the purpose on the decision in *Joseph Thomas* (supra). He appears to have not read the said decision, wherein the Hon'ble Court draws an exception for s.142(3), which specifically provides for giving opportunity to the assessee for being heard on the material gathered by the AO and, thus, observing the principles of natural justice, except where the assessment is, as in the instant case, made u/s. 144; the assessment in that case being u/s. 143(3). The AO, rather than not following, as the ld. CIT(A) presumes, has in fact followed the dictum of s.142(3), which provision again has not been read by him, and which also explains our observing of he having, without application of mind, merely repeated what the assessee states before him.

11.2 We may next review the judicial precedents with regard to two (or more) activities, i.e., the mining and the transport, constituting two separate businesses (of the assessee), or a single business. In *CIT v. Prithvi Insurance Co. Ltd.* [1967] 63 ITR 632 (SC), the life insurance and the general insurance businesses of the respondent company were held as constituting one composite business on the basis

of the inter-connection, inter-lacing, inter-dependence and unity furnishing evidence as to the existence of common management, common business organisation, common administration, common fund and a common place of business. *This is not even denied in the instant case*. This test stands reiterated and applied in several cases, as *Dy. CST v. Kelukutty* [1985] 155 ITR 158 (SC); *Waterfall Estates Ltd. v. CIT* [1996] 219 ITR 563 (SC), wherein it held as under:

'In order to determine whether various activities constitute the same or separate business no single test can be devised as universal and conclusive. The question has to be decided on a consideration of all the relevant facts and circumstances. Some facts may tend one way and some others the other way. An overall view has to be taken and a conclusion arrived at. Even if it is found that one or two circumstances among the several circumstances relied upon are not relevant, the finding of fact recorded by the Tribunal cannot be interfered with if there are other relevant circumstances which sustain the finding.'

In other words, the matter is principally factual. In *Apollo Tyres Ltd. v. CIT* [2002] 255 ITR 272 (SC), on the basis of such a plea, i.e., the business of manufacture and sale of tyres and the business of purchase and sale of units of UTI being intertwined and interlaced, the finding of the two business being the same was accepted by the Hon'ble Court.

It is in this view of the matter, that we considered this aspect in some detail hereinbefore (para 11.1), discussing various facets of the matter, i.e., with a view to ascertain if the transport activity constitutes a separate, independent business of the assessee, to find it as not, both forming part of one indivisible business, and which discussion also includes the manner of application of the derived results to the year of estimation (AY 2013-14). There is, as afore-explained, nothing on record to show that the transport activity is not integral part of the mining business. We mention here that this aspect of the matter having not been specifically argued during hearing, it was, considering its importance, only deemed proper that a clarification be sought thereon. The case was accordingly re-fixed for hearing the parties in the matter. The same however did not bear any further insight in the

matter. Sh. Ghai would, on behalf of the assessee, reiterate the bald claim of a separate business, without supporting it with even a single reason as to why transport activity, income of which stands itself returned throughout as part of the mining business, is to be regarded as a separate, independent business of the assessee. The same, as it obtains, would rather cease to exist in the absence of mining; the transport being admittedly sourced from outside to comply with the terms of delivery of the mining business. The Revenue, on the other hand, would again reiterate the basic facts of the case i.e., the transportation being confined only to the ore (bauxite) mined by the assessee and sold to its customer/s, so that the matter did not admit of two views. The interlacing and intertwining of the two activities, as indeed of the same management, has not been denied and, rather, is undeniable. This exercise, as afore-noted, was done only by way of abundant caution with a view to provide opportunity to the parties in the matter, which we believe as relevant and could have significant implication insofar as determination of income is concerned. In fact, even regarding the transportation activity as a separate business, it would matter little inasmuch as its results are in *pari materia* with that for the other business; with there being nothing on record to suggest the adopted rate of 8%, applied by the ld. CIT(A), and in fact for an earlier year as well.

11.3 That is, looked at whichever way, the entire application of the derived results for AY 2012-13 for the following year, valid in principle for the reason of non-production of books of account, and the consequent estimation of income, as made, is completely illogical, incomprehensible, and *de hors* the facts of the case; in short, absurd. We, accordingly, set it aside. *Ex consequenti*, the determination of the income for AY 2013-14 is wide open, and we proceed to consider the same.

12.1 The entire receipt being of one, integrated business, it would be subject to one rate, determined by the AO at 33.05% for AY 2012-13. It is this rate that

would hold for assessing the net profit for AY 2013-14, on its total receipt of Rs.1295.05 lacs. This is of course subject to any distinguishing feature/s or otherwise any difference/s for the current year vis-a-vis the immediately preceding year being found, though none stand stated. Then, of course, are the results of the comparable case, which are of course subject to the same being comparable and adjustment for any distinguishing aspects, if any.

The results for AY 2009-10 and 2010-11, which stand applied by the ld. CIT(A), are, as explained, not subject to any inquiry and are *sans* any definitive finding/s; the AO merely making token disallowances without causing any inquiry, itself invalid in law. Even otherwise, the very fact that the net profit for these years, returned at 2% and 3.9% respectively (which would stand to be enhanced marginally to 2.6% and 4.1% respectively after the nominal disallowances made in assessment), is at gross variance with that finally determined for AY 2012-13, the immediately preceding year, i.e., at a huge difference, itself suggests differences in the basic cost (or revenue) parameters, which would therefore have to be examined before deciding on their applicability, which exercise has not been undertaken. That is, are *prima facie* not applicable. These differences could only be explained by the assessee, who in fact pleads for the comparability and, thus, the applicability of their results, so that as per him there are no distinguishable features for these years vis-à-vis the current year (refer Para-III of written submission before ld. CIT(A)/PB pgs. 1-92). However, as apparent, the difference (in the net profit rate) has arisen primarily due to the disallowance/s made on examination in assessment for AY 2012-13, glossed over by the ld. CIT(A), and confirmed by us, which would therefore make us wary of applying the results for these years; rather, retrograde and contradictory. AY 2009-10, the operating statement for which does not contain any transport receipt, is even otherwise beyond 3 years, so that it would not fall for consideration. We have already (at para 11) noted the fallacy in applying the presumed transport rate at nil, itself without any basis, in determining

the profit rate for mining activity for AY 2012-13, for the purpose of applying it to the current year, i.e., the reverse application, making a travesty of the estimation process and, thus, of justice. The results for AY 2011-12 are not made available for reasons best known to the assessee, even as it falls within the period of 3 years preceding the current year, results of which were applied by the ld. CIT(A).

We, therefore, regard the operating results for AY 2012-13, as finally determined, as liable to be applied for AY 2013-14, and we are in this also supported, both in facts and in law, for which (the latter) reference may be made to the decision in *Vrajlal Mani Lal & Co*. (supra). The declared result for the current year being at 1.86% of the turnover (see para 4 of the assessment order), the decision by the Tribunal in *Yadav Bros. Construction Co. vs. ITO* (ITA No. 109/Jab/2012, dated 19.2.2015), holding non-estimation of income where the book-results, though not acceptable, are better than the preceding year, noted by the ld. CIT(A), without stating about its applicability or relevance, would be therefore of no assistance; the ld. CIT(A) rather himself applying the result of the preceding years as determined by him.

Two, we also consider the case of *C.R. Mittal & Co*. (supra) as comparable. This is, as also noted earlier (para 3.4), it also mines bauxite, in the same region, in about the same volume, and sells, as in the assessee's case, principally to HIL. The assessee has before the ld. CIT(A) (PB pgs.1-11), sought to distinguish the said results in view of the small difference, i.e., at 3% and 4% (for AYs. 2012-13 and 2013-14 respectively), between the gross and the net profit margin in that case, so that the administrative/indirect cost only to that extent stands incurred in that case, as against 7% to 8% in the assessee's case. *How, one wonders, would that make a difference; the disallowance/s by the AO (for AY 2012-13), leading to the assessment of income in a sum higher than that returned, and which is being sought to be applied for the following (current year), being qua transportation and labour expenditure, i.e., the direct cost of operations, impacting the gross profit*

rate. Why, in *Vrajlal Mani Lal & Co*. (supra), the rate applied was the gross profit rate, implying allowance of the indirect expenditure in full, as also in *CIT v. Pilliah (K.Y.)* [1967] 63 ITR 411 (SC). Each firm has a different management structure, etc., with a separate set of expenses applicable thereto, and, accordingly, the expenditure would vary and even otherwise not furnish readily imposable data. For example, the assessee has incurred, and been allowed, interest expenditure at Rs.14.23 lacs and Rs.9.02 lacs for AYs. 2012-13 and 2013-14 respectively, while there is none such in C.R. Mittal & Co. The objection has no basis in law or facts.

It is before us then said that the said case is not comparable inasmuch as, as against the average sale rate of Rs.486.59 PMT (AY 2012-13) (Rs.1222.49 lacs/251327 MT) the average sale rate in that case is Rs.634.94 PMT, i.e., at Rs.148.35 PMT more. Surely, it is argued, that would give rise to a higher profit in that concern. The argument is misconceived. This is as it is nobody's case that the bauxite is not supplied at the siding in C.R. Mittal & Co., but is *ex mine*. Further, the rate applied by the AO is lower than the derived result of 33.05% (for AY 2012-13) in the assessee's own case. The comparison has thus resulted in a lower rate of 32% being applied, so that the assessee, rather than suffers, benefits on account of the said comparison, stated to be detrimental/prejudicial to him! In fact, the said firm has no separate transport receipt, which perhaps results in a lower gross sale rate, i.e., when reckoned at gross of transport receipt. The assessee has incurred indirect expenditure at 7% and 8% for AYs. 2012-13 and 2013-14 respectively. Adding the same to the net profit rate to the determined/applied rate of 33% and 32% respectively for those years, works to a gross profit rate of 40% for both the years, which neatly matches with the average of the disclosed gross profit rate of 35% and 44% for the said years by the said concern (see para 2.3).

12.2 The annual accounts for fy 2012-13, the previous year relevant to AY 2013-14, are on record (PB pgs. 71-92). It would be therefore incumbent on us to, before

applying the results for AY 2012-13 thereto, examine the same for the comparability of various operational parameters as, in case of any variation/s, the operational results may not be directly applicable, and suitable adjustments may require being made. The same exhibits a sale rate of Rs. 523 PMT (Rs. 843.67 lacs / 161314 MT) as against a sale rate of Rs. 486.6 PMT (Rs. 1222.49 lacs / 251237 MT), i.e., higher by Rs. 36.4 PMT, or by 7.5.%. Even if, therefore, the direct expenditure, at 67% of the receipt (Rs. 326 PMT), increases by the said %age for AY 2013-14, it would imply a parity of result, i.e., a gross profit at 33% (or Rs. 172.6 PMT) for AY 2013-14. The transport receipt, at Rs. 239 PMT (Rs. 386.05 lacs / 161314 MT), however, witnesses a sharp decline from Rs. 320 PMT for AY 2012-13. The difference of Rs. 81 PMT works to 25% of the receipt. The same reduces the profit margin seemingly to 8%, though, would, on account of a lower base (Rs. 239 PMT), work to 10.67% of the receipt for the current year. There is in fact a slight increase in the loading receipt, i.e., to Rs. 40 PMT, as against Rs. 34 PMT for the preceding year, so that the gross receipt is at Rs. 279 PMT. A profit rate of 8% implies a cost of Rs. 257 PMT, or at an increase by Rs. 20 PMT (or nearly 8.5%) over that for the earlier year, i.e., Rs. 237 PMT (on a gross receipt of Rs. 354 PMT). The increase of 8.5% is understandable considering the increase of 17+% in the loading charges receipt, which also agrees with the general perception of the labour receipt bearing a gross margin of 40% to 50%. This, it may be appreciated, is only toward evaluation of the reasonability of the assessed profit rate of 8%, particularly considering that the same is at a marked decline w.r.t. immediately preceding year in the assessee's case, found valid by us, and, further, stands adopted by the Revenue authorities *sans* any basis or finding/s in its respect.

12.3 There is, thus, a case for retention of profit rate at 33% on the mining receipt, and revision thereof to 8% for the transport (and loading) receipt. We are conscious that decline in the transport receipt by Rs. 75 PMT (Rs. 354 – Rs. 279) is compensated to some extent by the increase of Rs. 36 PMT in ore sale

realisation, so that there has been a net decline by only Rs. 39 PMT. We, however, are inclined to regard the two receipts, though arising from and forming part of the same business, separately for the purpose of estimation of profit incident thereon. This is as, as already noted, the cost dynamics of the two are different and which perhaps has led to the two being billed separately to the buyer. Two, and equally important, we had found the profit rate on the transport receipt for AY 2012-13 as largely on account of exorbitant rate of Rs. 320 PMT. It is, this, that led to our finding of the profit rate thereon as matching the profit rate on the ore sale and, thus, corroborating the average profit rate of 33%. This, however, does not obtain for the current year, bringing down the profit margin thereon, and which has been found as conservatively & reasonably estimated at 8%.

12.4 We, therefore, notwithstanding our observations at para 12.1 above, in view of the differences that obtain between the two years, approve of the applied rate of 8% in respect of transport activity for the current year. As regards the mining activity, the same clearly shows an upswing in terms of unit realization. The assessee has infact claimed even higher per unit charges than even the immediately preceding year. Under the circumstances, therefore, we find the applied rate of 32%, which is marginally lower than the average profit of 33% for the said year, as reasonable. Though, strictly speaking, the figures for AY 2013-14 (PB pgs. 71-92); the books of account having not been produced, ought not to be considered, the gross receipt and the quantity shipped and sold are not in dispute for any year, so that the same could be taken note of and factored into, the purport of an estimation exercise, which places a heavy onus on the authority estimating it, is to be as reasonable as the circumstances admit, looking at the matter from all angles.

12.5 We decide accordingly.

13. Coming to the assessee's CO, the first ground impugns the confirmation of addition in respect of profit of the mining business by the ld. CIT(A) at Rs.

21,68,240, being estimated @ 2.57% on the mining turnover (i.e., sale of bauxite and other minerals), at Rs. 843.67 lacs (see para 2.3). The said rate represents the average of the returned profit for AYs. 2009-10 and 2010-11, and the assessed profit, as modified in first appeal, for AY 2012-13. That is, as against the profit rate of 32% assessed by the AO, *qua* a comparable case, being lower than the profit rate of 33.05% arrived for AY 2012-13. As apparent, this forms the subject matter of the Revenue's appeal, discussed in detail at paras 11 & 12 of this order. Rather, inasmuch as the profit rate of the preceding year was also in reckoning, being subject to disallowance/s, paras 3 to 6 of the order are equally relevant. Our adjudication thereof would thus cover the assessee's said ground as well. Likewise, for Gd. 2, which contests the application of profit rate of 8% on the transport and loading charges receipt, found by us as very reasonably estimated. The two issues being interrelated, the foregoing adjudication would thus cover the said Ground as well. In other words, our adjudication of the Revenue's appeal would govern the assessee's CO as well. We cannot help here recording our appreciation for the discretion and circumspection exercised by the AO in determining and applying the estimates. Rather, as apparent from the foregoing, but for the sharp, though unexplained decline in the transport receipt, i.e., by 25% thereof; the two issues being interrelated, we might as well have restored the matter back to the AO for consideration on the lines suggested inasmuch as the Tribunal is to decide on the basis of findings of fact, based on material on record. The assessee's CO is accordingly held as without merit. We decide accordingly.

14. In the result, the Revenue's appeal is allowed and the assessee's CO is dismissed.

AY 2014-15

15. We shall take up the principal addition in the Revenue's appeal first; being *qua* bogus creditors, for Rs.189.62 lacs. The assessee's balance-sheet as at

31.3.2014 reflects as many as 49 (i.e., at an increase of 20% over that for AY 2012-13) trade creditors, aggregating to Rs.695.28 lacs as at the year-end (PB pgs. 19-30). Notices u/s. 133(6) were sent to 10 of them, with balances aggregating to Rs.189.62 lacs, 2 of whom responded and deposed u/s. 131 to have not done any transport work for the assessee. The others were not found at the stated addresses. The AO, accordingly, added the entire balance outstanding *qua* the said creditors, i.e., Rs. 189.62 lacs, even as confirmations from them had been filed with him. Both the statements and the confirmations are a part of the record (see para 2.4).

We shall begin by taking a macro view of the matter, i.e., w.r.t. the assessee's annual accounts (PB pgs. 17-43), before proceeding to appraise the evidences on record. To begin with, even as the assessee's sales for the year, at Rs.12.05 cr., declines by 9.06 cr., i.e., by 43%, vis-a-vis that for AY 2012-13 (at Rs.21.11 cr.), credits, at Rs. 3.89 cr. for that year, increase by Rs.3.06 cr., i.e., by 79%. *This is anomalous.* A contraction in sales implies a lower volume and, accordingly, is generally accompanied by a decline in various related operational parameters, viz. purchases, costs, creditors, debtors, etc., while, as afore-noted, the creditors show a substantial increase. Further, the transportation cost, at Rs.8.51 cr., in proportion to gross sales, is at 70.62%, as against at 50% (Rs.10.54 cr./Rs.21.11 cr.) for AY 2012-13, the base year, i.e., an increase by over 40%, and which itself was found as in excess by nearly 60% thereof. On a per unit basis, the same works to Rs.842 PMT (Rs.851.30 lacs/101090 MT), as against Rs.414 PMT for AY 2012-13, i.e., *an increase by over 100%*. As against this, the transport receipt, at Rs.437 PMT (Rs.442.02 lacs/101090 MT), is at an increase of 23% over that for AY 2012-13 (at Rs.354 PMT). In short, while the receipt, on a *pro rata* basis, reflects a decent increase, the related transport cost exhibits, inexplicably, a much higher increase, i.e., w.r.t. AY 2012-13, for which year the assessee was found to have incurred an excess cost by Rs.654.87 lacs. The creditor balance, correspondingly, increases to Rs. 6.95 cr., representing an average credit of almost

10 months. *What does, one may ask, all this exhibit*? Unless suitably explained with evidences and cogent reasons, having its basis in economic reality, the same unmistakingly points to an inexplicable and highly exaggerated claim.

To have a broad idea of the excess claim, as against a price hike of Rs. 83 PMT (437 – 354), the additional expenditure booked is at Rs. 428 PMT (842 – 414). A profit margin of 8% implies a cost of 92% of the receipt. The additional receipt of Rs. 83 PMT, thus, entails an expenditure of Rs. 76 PMT, representing an increase of 47% of the cost allowed at Rs. 162 PMT on the quantity mined for AY 2012-13; the purchases for the year, in contradistinction to AY 2012-13, being very marginal. The assessee has, accordingly, booked an additional expenditure of Rs. 352 PMT (428 – 76), or, at Rs. 355.84 lacs, on the current year volume of 101090 MT. A moderate hike in transportation cost, as for receipt, would result in a cost of ~ Rs. 500 PMT, yielding an excess cost by ~ Rs. 342 PMT. That apart, the claim of Rs. 414 PMT for AY 2012-13, the base year, was found to be in excess by far, i.e., ~ 60%, booked essentially to 'contain' the increased profit due to a higher transport yield. The expenditure claimed thus far exceeds the actual expenditure, lower by far than the assumed cost of 92%, so that the profit margin of 8% becomes, in view of the peculiar circumstances, valid for AY 2013-14 only.

Coming to the specific evidences, for and against, the assessee's entire case is based on the confirmations filed which, having been relied upon before us by both the parties, form part of their respective paper-books (as APB pgs.59-90). In addition, while the Revenue relies on the denial statements on oath by the two who deposed u/s.131 on 28.12.2016 (PB pgs. 92-95), the assessee does on the retraction statements dated 30.1.2018 furnished in the appellate proceeding (PB pgs. 190, 191). The ld. CIT(A) did not admit the same on the ground that the said statements were not covered under any of the clauses, (a) to (d), of r.46A(1) (para 6.2.3) (iii) of his order). This falls in face of the specific denial by the assessee, i.e., of the statements having been recorded at his back and, further, having been supplied

copies thereof only on 15.1.2018, and in respect of which counters were therefore sought to be admitted as additional evidence on 07.02.2018 (PB Pgs. 188-192, *though the date on the application is wrongly mentioned as 07/2/2017)*. The ld. CIT(A) makes no reference thereto in his order, which clearly fall u/r. 46A(1)(c)/ (d) in relation to the assessee's Gd. 2 before him. The denial of admission of this evidence by the ld. CIT(A) is thus not valid, and is accordingly admitted. On the basis of the evidence on record, the matter gets split into two components, i.e., *qua* 8 creditors, from whom though confirmations were filed, were stated as not found at the stated addresses upon issue of notices u/s. 133(6) (PB pgs. 50-59) and, two, *qua* the 2 who deposed u/s. 131 in response to the said notices. The assessee's case with reference to their retraction is a non-starter. To begin with, he though contests the disallowance/addition, does not seek opportunity to cross-examine the two deponents, making a request for a copy of the statements, even as the first hearing of the appeal – and even though the said request could be made independent of it, was fixed on 18.1.2017. The request was made by him a year later, on 15.1.2018, and promptly complied with. Sure, it was not correct for the AO to have relied on the said statements without confronting them to the assessee, but then that is precisely the irregularity that was required to be addressed/met. It was incumbent on the assessee, preferring an appeal, which he does on 13.01.2017, to have sought cross-examination along with or immediately thereafter. There is no question of his filing retraction statements of the creditors upon being supplied copies of their statements, which clearly shows him to have contacted them. Both Shri Hetram Kol and Shri Dujiya Kol clearly state to be working as labourers in the mines of the assessee (Shri Hetram Kol) and Shri Ashok Vishwakarma, the assessee's brother (Shri Dhujiya Kol). That they had done no transport work for the assessee, and nothing was therefore due to them from him. That they had no vehicle and, in fact, did not file any income-tax return. Both stated to be having a single bank account, i.e., with Canara Bank, Katni. They are, clearly, poor, illiterate or semi-

literate workers, who could not write, subscribing their thumb impressions on the depositions, working in the mines of the assessee and his brother for a living. The assessee himself does not file any counter affidavit, averring the said statements to be false or incorrect in any material respect. He does not seek cross-examination to rebut the charges made by them per their sworn statements. *The facts stated therein thus remain undisputed*. He does not even state any substantive fact, viz. the additional need for hiring since January, 2014; not hiring directly from the market; the reason for the outstanding inasmuch as no amount stands paid; the capacity of the creditor to extend the credit for any sum, *much less the entire sum billed*; the transportation record on the basis of which the claims for the work performed had been made by them; the vehicles (quantity, with registrations numbers, deployed by them for the purpose); bills raised by them and entered in his accounts the reason for non-deduction of tax at source, etc. That is, does not, apart from filing their affidavits, substantiate his case in any manner. *Why it is so we wonder*? The work requires trained manpower, with the driver/s being a licence holder (for heavy vehicles). In the absence of the assessee seeking cross examination of the deponents, his reliance on *Andaman Industries vs. CIT* [2015] 94 CCH 187 (SC) is misplaced. In the facts of that case, the assessee had disputed the correctness of the statement and, further, sought cross-examination, while in the instant case, neither has the assessee made any counter claim nor sought cross examination. There is in fact nothing sacrosanct about an affidavit or cross-examination, so as to fail an assessment, and may be allowed, or even denied in the facts and circumstances of the case by the authority concerned, stating the reason/s therefor. Reference in this context be made to the larger bench decision in *ITO v. M. Pirai Choodi* [2011] 334 ITR 262 (SC) (also see *Gunwantibai Ratilal v. CIT* [1984] 146 ITR 140 (MP)). Even where found as wrongly denied, or otherwise merited in the facts and circumstances of the case, it is open to the appellate authority to allow the same, remanding the matter for the purpose, or even

allowing it before itself; it being well-settled that the proceedings would revert back to the stage at which the irregularity intervened (viz. *Guduthur Bros. v. ITO* [1960] 40 ITR 298 (SC); *Suptd. CE v. Pratap Rai* [198] 114 ITR 231 (SC)). The issue, after all, is to be decided on the basis of evidence, and not affidavits and counter affidavits. *The statements are categorical*. Also, none of the facts, some of which are personal in nature, viz. number of family members, bank account/s, no transportation work performed; working as labourers in the mines, etc., stated therein, is claimed in the retraction as incorrect. How could it be then said that the statements were not read out, or that the deponents had only placed their thumb impression thereon without understanding their contents, with in fact oath being administered at the start of the statement itself. The retractions are only managed statements, obtained by the assessee after over a year of the original statements, being only from his own workers. No credence could be placed thereon. The retraction is thus not valid, and the retraction statement not admissible evidence in law, i.e., on merits.

We, next, consider the addition for the balance Rs.158.13 lacs *qua* the remaining 8 creditors. To begin with, we observe that no payment, as to the two creditors afore-discussed, has been made, and the entire amount billed outstands as at the year-end, for 6 creditors aggregating to Rs.97.94 lacs. For the other 2, the position is as under, and shall be considered separately: (Amt. in Rs.)

s.no	Name of the persons	Opening balance as on 01.04.2013	Bills raised during year	Payment made	Outstanding as on 31.03.2014
1.	K.K.Earth Movers	8,85,800/-	37,11,704/-	15,00,000/-	30,97,504/-
2.	S.C. Consilmation	8,38,963/-	30,82,511/-	10,00,000/-	29,21,474/-

The confirmation in all cases was filed not by the creditor concerned, but by the assessee himself, on 19.12.2016 (refer submissions filed on 20/7/2022 by the ld.

CIT-DR, while forwarding the copies of the confirmations). Enclosed along with is their PAN and copy of the creditor's account in the assessee's books of account, signed by the creditor. It is therefore clear that they were approached by the assessee, and confirmations, all per identically worded typed copy, clearly pre-typed, obtained. Further, it making reference to the enclosed PAN and said copy of account, states, in all cases, that the transportation work was done through vehicles hired from the market, without naming the persons from whom hired. That also confirms that none of them owns even a single vehicle. This is quizzical in the least. Any reasonable person, much less a prudent businessman, would only engage a person in the said trade, that being precisely what is meant by or one understands by 'hiring from the market'. Why, in the instant case, two of assessee's brothers are in the trade and, in fact, providing him transport services on a regular basis. It was in fact one of them, Sh. Ganesh Vishwakarma, who had represented him in the meeting with HIL on 18/6/2011, held to discuss and negotiate price revision. All of which point to the assessee being a well-informed, hard-nosed and ably assisted businessman. *Could he, one may ask, negotiate and conduct business with HIL, a market leader and a giant company, and for years, if it was not so*? What, instead, we are told, in the name of hiring from the market, and even as he could, apart from his brothers, i.e., assuming capacity constraint, not shown, much less contended, easily contract local transporters for the purpose, he engaged novices, with no knowledge or experience of the trade. *Only a moron would do that*. And that is what we are in effect being thus urged to accept. And which cannot be. *In the commercial world, even assuming capacity constraint, the assessee's brothers, being in the trade, would themselves source from the market*.

No wonder, the claim is wholly unsubstantiated. Hiring by the creditors, which would in any case be required to be shown, has both financial and TDS implications, again not demonstrated. No evidence toward the same has been brought on record. There is in fact nothing to show that they are in this trade,

which is also supported by the fact that none of them admittedly has any vehicle, confirmed by the two who deposed. In fact, this has cost implications for the assessee, who would rather obtain services direct from the market, saving additional cost, being a primary concern, as indeed for any reasonable person, even as seen from the minutes of the meeting with HIL, exhibiting the price increase being subject to a thorough and informed deliberation. *Again, there is no deduction of tax at source on the bills raised on him*. Continuing further, none of them is an assessee, inasmuch as the AO also required them to file the tax return for AYs 2013-14 to 2015-16, as well as the balance-sheet for those years. The copy of the assessee's accounts are in english, even as all of them, including the two who deposed, have, save one, signed in hindi or by putting their thumb impression. Rather, we amusingly observe, even the name of the concern is a fancy name in english. In all cases, the bills on the assessee, not produced (before the AO), are raised with a periodicity of one month, *and are the only bills raised by the creditor concerned*. No payment is made by the assessee even as the bills are raised month after month, to the tune of Rs.4 to Rs. 6 lacs per month, January 2014 onwards, resulting in an outstanding of Rs.12-17 lacs for each creditor. Now, if they were in the trade, they would have raised bills, similarly, on others parties as well, or at least prior to January, 2014, whereat the operations in all cases have started. This phenomenon, again startling, has not been explained at any time, including before us. Was it a result of sudden break-down in the regular services, i.e., December 2013, onwards, and which continued unabated thereafter. Or was it a result of an increased off take, necessitating enhancement in capacity. The normal course of conduct would be for the assessee to bank for the increased supply on his regular suppliers, who have served him well for long and are both experienced and dependable. *Rather, as observed earlier, the assessee's sales for the year are at 43% lower than that for two years ago*. Why were people with no demonstrated experience, even if not from his regular service providers, chosen; none, other than

the two to whom payments are stated to have been made, to be considered separately, had worked for the assessee earlier. Were the services of the new creditors continued? Why were they not paid? No reason or justification for any of these and other similar questions in respect of the strange and weird state of affairs, which emanate from the material on record, have even been attempted to be explained, much less satisfactorily explained and/or shown. The assessee in fact states no substantive or positive fact. The underlying record, only on the basis of which the bills would have been raised, and their veracity checked at the assessee's end and, accordingly, entered in his accounts admitting the liability, is not produced at any stage. All this despite the fact and in the knowledge of heavy disallowance on this account having been made in assessment for AY 2012-13, and results estimated for AY 2013-14, for which year books were not produced in assessment. It may be said that the deficiency, where so, and these questions ought to be rather directed toward the creditors, and not the assessee. This is again misplaced; the primary onus to prove his return as well as the claims preferred thereby, is on the assessee (*CIT v. Calcutta Agency Ltd*. [1951] 19 ITR 191 (SC)), and which can further only be on the basis of proper materials (*CIT v. R. Venkataswamy Naidu* [1956] 29 ITR 529 (SC)), and which remains completely undischarged. None of creditors, except the two who deposed, could be served the notices u/s. 133(6), being not found at the stated addresses. The confirmations obtained from them and furnished to the AO have been by the assessee, making it his evidence, as against that of the Revenue, as where the confirmations/statements had been given directly to it in response to the said notices. Even the copy of account furnished along with is not from their accounts, as called for, but from the assessee's accounts, and on which 'their' signature/thumb impression had been obtained. Why were they not produced, so that they could be examined? There is, further, nothing to show of them maintaining accounts? Why? How, and on what basis, then, did they validate the account statements presented before them, even as

the same was only much later in time? Further, what value, then, their confirmations, i.e., in the absence of accounts? It is their accounts which would exhibit the persons from whom they, in turn, hired the vehicles, as also as to how the operations were financed. *No tax at source, clearly, stands deducted by them*.

The question is not of the balance as at the year-end, which may well be nil, but of the genuineness of the expenditure itself, which is in serious doubt; the balance outstanding only adding another dimension, another puzzling aspect, as it were, thereto and, thus, to the intrigue**.** The payments are in any case not evidenced with any substantive or corroborative material. The entire claim is fabricated and smacks of non-genuineness from its every pore. This also explains the non-response to the notices u/s. 133(6). Several facts would be incident to a genuine claim, viz. trade affiliations/registrations, skilled/trained manpower, resources, etc. all conspicuous by their absence. The regular transportation work, as it appears to us, is got done from the assessee's two/three brothers, i.e., Shri G.P. Vishwakarma, M/s. Shakti Industries, and Shri Ashok Vishwakarma, being in the business of transportation (audit report/PB pg. 43), also deducting tax at source thereon. Notably, the assessee does not produce the bills raised by them on him or otherwise states the transportation rates charged by them. We state so as that may throw light on the normative rates applicable; their charges, despite falling u/s. 40A(2)(a). We may though, as aforesaid, add that a non-genuine claim could assume different forms, and it is not necessary that a similar rate charged by the bogus creditors would make their claim genuine (also see para 5.3). It may equally be that the rate charged per such bills, i.e., which do not represent the actual work undertaken, is at the same rate. Further, the credit period in their respect, on the basis of the year-end balances, works to 3.07 months (i.e., Rs. 119.93/ Rs. 468.98 * 12 months), as under: (Amt. in Rs.)

Name of the Creditor	Bills	Balance o/s as on 31/3/2014
Ganesh P. Vishwakarma	2,09,27,174	56,17,905
Shakti Industries	1,06,28,195	19,690
Ashok Vishwakarma	1,53,42,284	63,55,284
	4,68,97,653	1,19,92,879

The average credit period, on excluding the three creditors afore-stated, increases from 10 months to 18 months, as under (i.e., 575.35/382.32 x 12M): (Rs. in lacs)

Total expenditure	851.30	695.28
Excluded Creditors	468.98	119.93
Net	382.32	575.35

That is, quixotically, while the regular creditors, presumably well-established, provide credit for 3 months, the non-regular ones, with no credentials, do so for, on an average, six times the same! We are conscious that the impugned trade credits (other than where part-payment is made) stand sourced January, 2014 onwards, so that a linear assumption *qua* credit period would not apply. The information/ comparison is no less significant. With no trade relations to back on, and in fact no resources, the normal behaviour would be one of circumspection, treading carefully, with, rather, being only mediators, themselves out-sourcing, they would be operating on very thin margins, further disallowing them any room for extending credit and, thus, entail financial risk. While here we find them to, as afore-said, continue to provide services with abandon, without a care in the world for being paid; the two who stand paid during the year, having been in fact not paid for year/s. The bizarre average credit period of 18 months, under the circumstances, suggests non-payment to some for years. *What more indicting of the assessee's claim*? In fact, this period would stand to increase further inasmuch as it is nobody's case that there are no genuine creditors other than those under reference. Equally though, we may add, that, clearly, it cannot be said that all the creditors, other than the 10 identified by the AO (and 3 by us), are genuine, even

as for the purpose of the assessment, the AO concentrated thereon, drawing his conclusions in their respect, and to which he therefore restricts the disallowance made by him. *The impugned claim is as spurious a claim as one can think of*.

The 'payment', which is only to two parties afore-stated, would under the circumstances, and for the said reason, matter little. The reason is simple. If the expense itself is not genuine, what is the payment for? That is, to what purpose and effect? Rather, a credit, where it obtains for an abnormal and inordinately long period of time, as in the instant case, is indicative and strongly suggestive of the corresponding credit being not genuine, i.e., a trade credit arising in the normal course of business. There could, of course, be special/peculiar circumstances obtaining in a given case explaining the continuing credit, which thus becomes a relevant consideration while considering the genuineness of the credit. No such circumstance, however, has been explained, with, rather, the same being a constant feature, with the two creditors where part payment has been made, the same being only in respect of sums outstanding as on 31/3/2012, so that even assuming it to *qua* credits arising during fy 2011-12, the credit extends across years. The same were listed separately with a view to see if the 'opening balance' or 'payment' would in any manner have any bearing on the amount disallowed. While 'payment', as afore-noted, would not, the opening balance, being not a part of the expenditure claimed for the current year, surely cannot form part of the disallowance. In other words, irrespective of the quantum of balance outstanding as at the year-end, which would depend on the payment made in relation to that outstanding at its start as well as that credited during the year, would have no bearing on the expense liable to be disallowed as not genuine. *Why, the year-end balance may well be at a higher sum, as where no payment is made, or is in a sum lower than the opening balance*. That is, neither the opening balance nor the stated payment shall impact the amount of disallowance, which is u/s. 37(1), finding the expenditure as not genuine. The question of non-deduction of tax at source, which

is otherwise attracted, leading to a disallowance u/s. 40(a)(ia), also becomes irrelevant, a non sequitur, in-as-much as the expenditure itself is found as bogus. *The same shall though become liable to be invoked where the expenditure is, reversing our finding, held as genuine, in whole or in part*. The AO's action in bringing only the amount outstanding to tax is thus inconsistent with his finding of the same being not genuine. It is, rather, self-defeating, as it could be construed to imply that the expenditure is, to the extent paid, genuine! Why, for that matter, even that outstanding as at the year-end, would get discharged at some later point in time (in the assessee's accounts), lending it credibility as it were. That is, an expenditure found not genuine, becomes liable to be regarded as genuine on account of its payment subsequently, a contradiction in terms inasmuch as an outstanding itself implies an obligation to be discharged. On the contrary, the very fact of it remaining unpaid for long, with no explanation therefor, and 'paid' only much later, raises serious doubts as to it being a genuine credit in the first place. The part-confirmation by the ld. CIT(A) has again only been on the basis of the creditors having denied any transaction with the assessee. That being so, the question of the outstanding of the credit balance, to whatever extent, becomes an irrelevant consideration. The reverse, though, cannot be said to be true. This is as non-payment, resulting in an accumulation of credit, which is not shown to be consistent with the trade practice; rather, contrary to it, could surely lead to the inference of the credit as not representing an actual liability. Couple this with the creditor being a man of no means or, in any case, his capacity not established, and other relevant factors, as the creditor being not shown by any credible material to be in the trade, etc., all of which would weigh in arriving at a finding of the transaction being not a genuine transaction, i.e., representing an actual transaction.

The restriction of the addition by the AO in the instant case to the amount outstanding as at the year-end is thus inconsistent with the finding, on the basis of the material before him, of the transactions, which of course include the amount

reflected outstanding to them by the assessee, as not genuine. About the action by the ld. CIT(A) in reversing the addition in part, the less said the better. The same is solely on the basis of the confirmations having been filed, and without anything further. He, in doing so, in fact treats those who responded on a lower footing than those who addresses were not correctly stated, as the AO claims/infers, and even assuming service of notice, failed to respond inasmuch as their personal attendance, along with the relevant material, was required per notices u/s. 133(6), so that the so-called confirmation, filed by the assessee, could not be said to be in compliance the said notice. There is no appraisal of the material on record by him. There is in fact nothing to show of the transactions being genuine. In fact, the transportation work being sourced from 3 related parties, being the assessee's brothers, none of which has been assailed for its genuineness, a comparison of their antecedents vis-a-vis the creditors under reference, would, where comparable, have provided a ground for regarding them as genuine. It is settled law that a failure to adduce evidence and, rather, the best evidence that a party can furnish, being that which is supposed to be in its possession, would raise the presumption as to adverse inference (*Union of India v. Rai Deb Singh Bist* [1973] 88 ITR 200 (SC); *CIT v. Krishnaveni Ammal* [1986] 158 ITR 826 (Mad)). We may though clarify that, in the conspectus of the case, the same provides yet another ground for regarding the impugned credits as not genuine, even as a comparison, to the extent possible under the circumstances, stands made by us. Coming to the quantum, suffice to state that the claim, as against at Rs.414 PMT for AY 2012-13, disallowed to the extent of Rs.257 PMT, has been made at Rs.842 PMT. The disallowance (Rs.189.62 lacs), implies Rs.188 PMT; the assessee's claim being at Rs.851.30 lacs and thus an allowance of Rs.654 PMT, as against Rs.162 PMT for AY 2012-13, i.e., is much higher than that would arise if the assessee's income was to be computed on an estimate basis, taking an overall view of the net profit or gross profit. Our appellate jurisdiction being confined to the subject matter of

appeal, it is, in case of specific disallowances, not the correct assessment of income, but the correct addition/disallowance, in the facts and circumstances of the case. The comparison is thus only supportive of the disallowance under reference.

16. We, accordingly, confirm the disallowance for Rs. 121.68 lacs, i.e., corresponding to the 8 creditors in whose cases no payment stands made. For the balance 2, to whom payments for Rs. 25 lacs in aggregate stand made during the year, the matter is restored back to the file of the AO to allow the assessee an opportunity to show as to why, in the face of the finding of the expenditure being bogus and not genuine, should the disallowance in its respect be restricted to the sum outstanding in its respect as at the year-end, or Rs. 60.19 lacs, i.e., as against Rs. 67.94 lacs for which sum transport bills stand booked and expense claimed. The same would decrease the allowance marginally to Rs. 647 PMT. This restoration is apart from and independent of that may be required *qua* the whole or part of the disallowance toward application of s. 40(a)(ia), for which reference may be made to *Shree Choudhary Transport Co. v. ITO* [2020] 426 ITR 289 (SC).

We are conscious, when we say so, that it could be, though was not argued, that no addition *qua* a non-genuine trade creditor could be made, i.e., either u/s. 37(1) or u/s. 68. As clarified hereinbefore, the reference to the genuineness of the credit is only from the stand-point of a genuineness of the claim for expenditure. Reference in this context be made to, inter alia, *VISP (P.) Ltd. v. CIT* [2004] 265 ITR 202 (MP); *Indian Woollen Carpet Factory v. ITAT* [2003] 260 ITR 658 (Raj)). Rather, it was permissible for the assessee to contend that the income assessed includes secreted profits of its business, routed by way of credit, and where so shown, the same would be telescoped, so that there is no double addition (also see para 5.3). Reference here to the decision in *CIT v. S. Nelliappan* [1969] 66 ITR 722 (SC) is apposite. We may finally consider another aspect of the matter, i.e., remittance to the AO for considering the addition for Rs. 7.76 lacs which may be

construed as an enhancement and, therefore, not permissible. With reference to the decision in *Kapurchand Srimal* (supra), it stands clarified (para 11.1) that an appellate authority is within its jurisdiction and, rather, duty bound to correct all the errors of fact or law made by the authorities whose order/s is under challenge before it. Appellate proceedings, it needs to be borne in mind, are only a continuation of the assessment proceedings, and subject only the limiting terms of the statute (*CIT v. Reham Foundation* [2019] 418 ITR 205 (All) (FB)). The Tribunal being final fact finding authority, is to decide all questions that arise out of the subject matter of appeal, which itself is to be broadly construed (*CIT v. Edward Keventer (Successors) P. Ltd.* [1980] 123 ITR 200, 212 (Del)) and, further, in the light of the evidence and consistent with the justice of the case (*CIT v. Walchand & Co. (P) Ltd*. [1967] 65 ITR 381 (SC)). It may be noted it is the subject matter of appeal that constrains us to restrict the scope of the adjustment to the correct amount of disallowance/ addition. The Tribunal is in fact required to decide all questions of fact or law raised or arising in appeal (*Esthuri Aswathiah v. CIT* [1967] 66 ITR 478 (SC)). We have already noted at para 7, with reference to the judicial precedents, that it is the correct view that is relevant, and would hold, and not that which the parties may take of their rights in the matter. The view of the appellate Court may not, thus, necessarily agree with that of either side before it (*CIT v. Dalmia Investment Company Ltd*. [1964] 52 ITR 567 (SC)) (also: *Madras Industrial Investment Corp.v. CIT* [1997] 225 ITR 802 (SC)). In sum, the Tribunal is duty bound to take into account all the facts and circumstances of the case and, in fact, in their factual setting. Case law in the matter is legion, even as we may here refer only to the decision in *Sree Meenakshi Mills Limited v. CIT* [1957] 31 ITR 28 (SC). Further, we have in fact with a view to avoid any injustice or otherwise any legal constraint, even as we find none, have restored the matter back to the AO, who shall decide thereupon after allowing the assessee an opportunity of being heard in the matter *CIT v. Assam Travels Shipping Service*

[1993] 199 ITR 01 (SC)). Finally, it may be clarified that the nature of the assessment proceedings under the Act is not in the nature of a *lis* or a civil suit between the parties, so that the common law concept that the appellant may not be put in a position worse than in which he was prior to the appeal may not apply in such proceedings (*Gadgil (S.S.) v. Lal & Co*. [1964] 53 ITR 321 (SC)). Reference in this context may also be made to the decision in *Fidelity Business Services (P.) Ltd. v. Asst. CIT* [2018] 169 DTR 73 (Kar). In any case, the decision in *Assam Travels Shipping Service* (supra) should put all controversies to rest.

17. This decides Ground-1(ii) and Ground 1 of the Revenue's appeal and assessee's CO respectively.

18.1 The next addition under dispute is for Rs.15,81,655 toward bogus creditors u/s.41(1)(b) of the Act. The amount, due to 2 creditors, being outstanding for long, the AO entertained doubts as to the genuineness of the liability and, accordingly, summoned them, being husband and wife, and proprietors of their respective transport concerns, u/s. 131. Shri Rajesh Tipa, attended, and in his statement on oath, recorded on 30/12/2016, stated on behalf of himself and his wife, of though being in transportation business, had not undertaken any transport or other related work for M/s. New Minerals. No amount was therefore due from the assessee. This forms the basis of the addition in the impugned sum of Rs.15.82 lacs. The ld. CIT(A) did not admit additional evidence even as, without doubt, the said statement was not confronted during assessment to the assessee, i.e., without a valid reason, as in the case of the other 2 transport creditors (see para 15). The same, being an affidavit dtd.30/1/2018 by Shri Rajesh Tipa, is admitted (PB pg. 192). It states of he (and his wife) having undertaken transport work for Shri Shankarlal Vishwakarma in the past, against which dues were outstanding in the stated sum/s from him. The said business had though been since closed due to losses. We are, again, unable to fathom the assessee's non-requisition for cross

examining the said creditor/s and, instead, approaching them and procuring an affidavit from him. The affidavit does not state any reason for giving a false/wrong statement earlier. The 'reason' stated is of the deposition being in the absence of any record inasmuch as he *just happened to visit the Tax Department* for some other purpose on that date. Now, this is as farcical at it can get. Rather, whether he had any other work in the Department on that date, unstated though, is wholly irrelevant. What matters, and is of consequence, is his responding to the summons u/s. 131, statement whereunder has evidentiary value under law. Two, the retraction, per the subsequent affidavit, is completely unsubstantiated. *Where, one may ask, is the question of any record, when he (and his wife) had not undertaken any work for the assessee*? *Where, one may ask, is a need for record to state that his business stands closed*? Rather, if indeed so, he would have definitely stated of he having since closed his business (and of his wife) inasmuch as non-receipt of dues from, *inter alia*, the assessee, would be a contributory, if not the prime, factor for the closure of the businesses. Why, we are unable to fathom the extension of credit by the transporters who, as per the trade practice, even as Sh. Ghai was at pains to emphasize during hearing, require immediate payment in view of the nature of their expenses. This would be particularly so in case of transporters from the market, engaged on need basis, as the creditor/s under reference; there being no transaction during fy 2012-13. And to think, that the creditor/s, despite facing operational difficulties, and driven to the extreme of closing his business, did not press the assessee, who discontinued business with him, for payment. Not only that he 'forgets' all this while deposing u/s. 131. Remembering it all, without any substantiation though, only after the assessee was, on request, supplied the copy of the statements relied upon in assessment! It is on the contrary, retraction statement, per his affidavit, that needs to be supported by record, and which is not, and *de hors* any material. Both the existence as well as the closure of business, which would, where so, be supported by evidences galore, are without any, so that there

is nothing on record to support the same, even as the deponent claims to have realized his mistake with reference to the record, conspicuous by its absence. That is, there is nothing to show of it being a mistake. We cannot also help noticing that its 'discovery' coincides with the assessee obtaining a copy/s of his statement over a year later. The affidavit is no more than a managed statement, procured by the assessee, inadmissible in evidence, i.e., on merits. Reference in this context be made to the decision in *Gunwantibai Ratilal* (supra). As also afore-noted, furnishing of the affidavit by the assessee, makes it as his evidence, even as his only right in law is to be supplied a copy of the statement relied upon in assessment, and opportunity to cross examine the deponent, not sought. The opening balance in both the cases, as evident from the details listed in the assessment order (para 2, page 2) for AY 2012-13, finding mention at Sr. Nos.22 & 26 of the list of 30 creditors, as under, arises out of the bills raised during the previous year relevant to that year:

s.no	Name of creditors	Credit balance as on 31.3.2012/2014 (Rs.)	Total of bills raised during the year (Rs.)	Total payments received (Rs.)
1.	Mandal Constn. Goshalpur	7,23,005/-	16,23,005/-	9,00,000/-
2.	Mangalam Engg Works, Satna	8,58,650/-	17,58,650/-	9,00,000/-

If anything, the continuing outstanding, despite they being in losses, validates our inference of the same being bogus, and therefore its disallowance (forming part of Rs.654.87 lacs disallowed) for that year, since confirmed by us. The creditor, despite being not paid for over a year, does not insist on liquidation of his old dues, nor for non-extension of any credit for future. The inference is unmistakable, with the credit balance as on 31/3/2014 being the same as on 31/3/2012! The same only implies that balance does not represent an actual trade liability of the assessee. How could we wonder the same be then added on account of remission of a

liability, which necessarily implies existence of a liability in the first place, found non-existent. This in fact is precisely what was sought to be brought home by us in the preceding para (# 15), that neither 'payment' nor 'outstanding' would have any bearing on the quantum of a disallowance of any expenditure found bogus or non-genuine. The ld. CIT(A) has allowed relief on the basis of an addition u/s. 41(1)(b) being impermissible under the circumstance of an opening balance not written back in the assessee's accounts. His order, though in result in agreement with our order, cannot have our approval inasmuch as he has on facts not confirmed the relevant disallowance (Rs.654.87 lacs), but approved of the assessee having incurred a cost of 92% of the transport receipt (Rs.802.91 lacs) for that year, i.e., at Rs.738.68 lacs. He also does not define the 'transport business'. This becomes relevant as the assessee, apart from the transport of ore from mine head to siding, also incurs transport cost on removal of overburden and transfer of mined ore from deep mine to the surface, and the cost incurred and claimed by him is for all the three different works. Unless, therefore, his order is accompanied by a finding, either express or by necessary implication, as to disallowance of the impugned sum as not genuine, the stated reason will not apply to his orders. The addition is confirmed for deletion, and the Revenue fails on its Gd. 1(vi).

18.2 We may, before parting, though clarify that if the disallowance of Rs.654.87 lacs for AY 2012-13 is reversed, in whole or in part, in further appeal, that would directly and consequentially impact our decision *qua* the impugned addition of Rs.15.82 lacs, as the same, forming part of aforesaid disallowance, stands found, while adjudicating the said disallowance, as not a genuine transaction and, thus, as not representing an actual liability. The question of its remission therefore does not arise. In case, however, the same is found as genuine expenditure – a matter of fact (*Ratanchand Darbarilal v. CIT* [1985] 155 ITR 720 (SC)), we, for the reason/s afore-stated, have found it as liable for addition. And which could be u/s. 41(1)(b)

or s.69, or even u/s.68. As regards s.41(1)(b), the same becomes applicable in the face of definite statement on facts, unrebutted, of no amount being due to him (and his wife) as on 31.3.2014, so that the inference that consequently arises, in wake of the expenditure found as genuinely incurred, is of remission of the liability in favour of the assessee. That the assessee has not though chosen to record this fact in his accounts is a different matter, not determinative thereof. It is trite law that the passing or, as the case may be, non-passing of accounting entries is by itself not determinative of the matter (refer *Sutlej Cotton Mills Ltd. v. CIT* [1979] 116 ITR 1 (SC); *Kedarnath Jute Mfg. Co. Ltd.* (supra)). The decision in *Bhogilal Ramjibhai Atara* (supra) becomes distinguishable on facts. The other inference, equally valid, is the creditor having been paid outside books, which fact therefore is not recorded in his accounts, though would attract s.69A/C. The assessee admitting his liability to the creditor/s as on 31.3.2012 and 31.3.2013, it is only for the relevant year that, on the basis of the evidence in the possession of the Revenue, no liability is found existing as at the year-end (31.3.2014), leading to the inference of its discharge during the current year. As regards s.68, sure, the credit does not arise during the year, which is also the basis of the decision in *Parmeshwar Bohra* (supra). The applicability of s. 41(1) or s.69C, which would be in alternative, it shall be noted, is on the premise of the non-existence of any liability to the 2 creditors, despite the assessee's accounts continuing to reflect liability thereto, which cannot be regarded as conclusive or binding. That is, by disregarding, on the basis of the evidence on record and absence of any positive evidence to the contrary, i.e., to prove an actual liability as on 31/3/2014. The applicability of s.68, on the other hand, proceeds on the basis of a regard of the denial of due from the assessee by the creditor/s, so that the credit shall have to be tested on the anvil of s. 68. The nature of the credit is the services rendered by the creditor, duly accounted by the assessee in his accounts for AY 2012-13. The genuineness of the purchase implies that the creditor had the capacity to extend a

credit to the assessee in its respect, resulting in the concomitant liability being a genuine credit as on 31.3.2012. The continuing credit, however, raises serious doubts subsequently as to it being a subsisting liability, i.e., as to its genuineness. It is therefore open for the Revenue to require the assessee to prove the capacity of the creditor to continue to extend credit during the current year, i.e., fy 2013-14, with a view to ascertain if the same obtains as on 31/3/2014. The circumstance of the credit continuing to outstand for years, even as the regular trade creditors are paid in the normal course, admitting of a normal credit of 1-2 months (say), or perhaps no credit, even as sought to be emphasized by Shri Ghai while arguing the non-applicability of s.40A(3) *qua* this expenditure, and even as the creditor has admittedly incurred losses and, in fact, closed his business, make this particularly relevant for the current year. Juxtapose this with the fact that there is nothing on record to exhibit the capacity of the creditor, viz. his balance-sheet, capital account, income-tax return etc., with he (and his wife) not being even shown to be assessees on the record of the Revenue. While therefore the nature of the credits stand reasonably explained, i.e., as purchase of services, the source thereof is rendered in serious doubt, at least as on 31.3.2014, if perhaps also earlier, as on 31.3.2012 and 31.3.2013. That is, the amount is for that reason liable to be included as income u/s. 68 for any of the years. Lest it be said that a trade liability cannot be subject to s.68, the provision makes no such distinction, though this question does not normally arise where the genuineness of a purchase is not in doubt. The purchase of goods/services, it may be appreciated, is only an explanation of the nature of the credit. That would not though oust it from its source being required to be satisfactorily explained, particularly where circumstances, as we have found to exist, raise genuine doubts in its respect. Reference, in this context, may, with profit, be made to the decisions in *Vijay Kumar Talwar v. CIT* [2011] 330 ITR 1 (SC); *V.I.S.P. (P.) Ltd.* (supra); *Indian Woollen Carpet Factory* (supra).

18.3 We decide accordingly.

19. Next, we may take up grounds 1(i), 1(iii) and 1(iv) of the Revenue's appeal disallowing following expenditure, at 5% thereof:

a. Breaking, Sorting and Screening expenses, at Rs.6,69,529/-
b. Poclain expenses, at Rs.6,23,577/-
c. Loader expenses, at Rs.5,02,130/-

These are taken together as the facts and circumstances of the same are similar, as are the basic reasons for the disallowance, as indeed for the deletion. *Qua* these expenses, the AO, upon examination of books of account and the supporting document produced before him, found various deficiency and discrepancies, listed at paras 5, 7 and 8 of his order respectively. For (a), the entire of expenditure (Rs.133.91 lacs) stand incurred in cash; the assessee was unable to produce the basic record, i.e., *qua* the work done, viz. as to how much brass/sq.feet/ trolly, etc. had been done. The wages register, in which the payments are recorded, was also not produced. As it appears, the assessee had only used different names (of workers) for booking expenditure and their identity could not be proved. Further, though the work is done through contract labour, i.e., Mukadam (petty contractor), who in turn engage the labour, the expenditure had been booked directly to avoid TDS provision. Further still, the expenditure continues unabated even during rainy season, i.e., June to September, whereat the mines are closed, or the operations substantially scaled down.

For poclain expenses, the same, incurred at Rs.124.77 lacs, the same were for diesel (fuel) for proclain machine/s used for digging mines. The labour expenditure also included under the said account head, was explained to be toward manual labour, for manual digging where it was not possible through the proclain machine. The expenditure was again through self-made vouchers, not liable to verification, with no proof of the identity of the labourers.

Qua loader expenses (Rs.100.43 lacs), the same was again toward diesel (fuel) for trucks used for loading and on truck repair. The incurring of labour expenditure was explained to be for loading, which could not be done by machine, though was found incurred through self-made vouchers, not liable for verification, with no basic record or wages register available, nor identity of the labour proved.

Disallowance at 5% in all cases, toward inflation of expenditure, was effected by the AO. None of this finding has been met or rebutted at any stage, including before us. The ld. CIT(A) has allowed relief on the legal premise of disallowance u/s. 37(1) being un-permissible as an *ad hoc* disallowance, relying on the decision by the Tribunal in *Ganesh Pratap Singh* (Supra).

20. We have heard the parties, and perused the material on record.

Section 37(1) reads as under:

> "37. (1) Any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession".

Clearly, as the language of the provision itself states, both the conditions of 'wholly' and 'exclusively' are to be satisfied for an expenditure to be allowed as deduction as a business expense u/s. 37(1). As is well-settled, the word 'wholly' refers to the quantum of expenditure, and the word 'exclusively' refers to the motive, the objective or purpose of the expenditure. We have already noted that the burden of proving the necessary facts in respect of satisfaction of the test of 37(1), i.e., that the expenditure has been incurred wholly and exclusively for the purpose of his business, is on the assessee (*Calcutta Agency Ltd*. (supra); *Lakshmiratan Cotton Mills Co. Ltd. v. CIT* [1969] 73 ITR 634 (SC)). To be a permissible deduction, thus, there has to be a direct and intimate connection between the expenditure and the character of the assessee as a trader. That is, it

must be incidental to his business and justified by commercial expediency (*Travancore Titanium Product Ltd. v. CIT* [1966] 60 ITR 277 (SC)). These tests stand deliberated upon in *Ram Bahadur Thakur Ltd. v. CIT* [2003] 261 ITR 390 (Ker) (FB). It is, thus, in every case a question of fact whether the expenditure was incurred wholly and exclusively for the purpose of trade or business of the assessee, which is to be decided based on evidence. We do not, in the facts of the case, find this positive and definite test as satisfied, i.e., of assessee having proved the expenditure in terms of s. 37(1). It is permissible for the tax authorities to consider disallowing the sum estimated as incurred in excess (*Swadeshi Cotton Mills Co. Ltd. v. CIT* [1967] 63 ITR 57 (SC*); Lakshmiratan Cotton Mills Co. Ltd.* (supra); *Lachminarayan Madan Lal v. CIT* [1972] 86 ITR 439 (SC)). The AO has, accordingly, made an estimate of the expenditure liable for disallowance, which we find as reasonable. We, accordingly, uphold the disallowance as made.

21. This leaves us with Gd. 1(v) of the Revenue's appeal, i.e., the deletion of Rs.8808, as the interest component of Rs.12,608, disallowed by the AO regarding it as the penalty under the sales-tax law. The basis of the relief (to the extent of Rs.3800) by the ld. CIT(A) is on the basis of the detail furnished by the assessee before him, claiming the amount impugned to be interest and not penalty. Before us, it was the admitted position that the penalty component cannot be allowed as a deduction inasmuch as infraction of law cannot be regarded as an incident of business. And that the matter may be remitted to the file of the AO. Surprisingly, the assessee has, neither before ld. CIT(A) nor before us, furnished any evidence toward penalty being at Rs.3,800, and the pleading for restoring the matter to the AO is an admission of same. The tax audit report u/s. 44AB for the relevant year (PB pgs. 32-43) reports the penalty at Rs.5808 (vide para 21 (a)(vi)). Under the circumstances, we consider it appropriate to rely thereon and, accordingly, confirm the disallowance at Rs.5,808, so that the balance Rs. 6800 is to be allowed. We decide accordingly.

22. Next, we may consider the assessee's CO. All its grounds are supportive of the impugned order and, therefore, warrant no separate adjudication, i.e., except Ground 2, which agitates the confirmation of an addition for Rs.4,30,000 u/s. 56(2)(vii) of the Act.

23. The brief facts in relation thereto are that the assessee purchased an immovable property at Katni for Rs.9.17 lacs on, as stated, 10.3.2013, the market price of which as on the date of purchase was Rs.14.21 lacs. The assessee objecting, on being show caused for an addition for the difference of Rs.5.03 lacs, the matter was referred by the AO to the District Valuation Officer, Jabalpur, who valued the property at Rs.13.47 lacs. Reducing the difference in valuation to Rs.4.30 lacs, which was brought to tax u/s. 56(2)(vii). The same was confirmed in appeal for the same reason/s. The primary facts, as indeed the valuation, are not in dispute, and s.56(2)(vii)(b) is clearly attracted in principle in the instant case. The said provision, however, stands coopted on the statue-book w.e.f. 01.4.2014, i.e., AY 2014-15 onwards, so that it shall apply to a transaction during the relevant previous year, i.e., fy 2013-14. The transaction was in the instant case completed on 10.3.2013 and, therefore, the difference cannot be assessed u/s. 56(2)(vii) for AY 2014-15; the genuineness of the purchase transaction having not been doubted. Doubts were during hearing raised as to of there has been a typing mistake in the recording the purchase date as '10.3.2013', i.e., instead of '10.3.2014', which the parties were called upon to clarify, and which they did not. The balance-sheets for the relevant years stand also perused, to observe no addition in the landed property, except agricultural land, which is reflected for the 3 years, as under:

31.3.2012 : Rs. 70.40 lacs

31.3.2013: Rs. 92.20 lacs

31.3.2014: Rs.108.27 lacs

Subject therefore to the verification of an addition of an immovable property at Indira Gandhi Ward, Katni during fy 2012-13, and not fy 2013-14, we confirm the deletion on account of non-applicability of 56(2)(viii), which shall otherwise hold. We decide accordingly.

24. In the result, both the Revenue's appeal and the assessee's CO are partly allowed.

25. We may, before parting with our order, wish to clarify certain aspects of the matter, germane to our adjudication and, further, common for all the years, so that it was considered proper to state them together and, further, at the end of the order, which would enable placing the same in context.

A. The principal disallowance in the instant case is toward transport expenditure. The same, as apparent, is for the reason of the same having not been proved on the anvil of s.37(1), with, in fact, its genuineness being in serious doubt, rather, to our mind, disproved. Genuineness is again a matter of fact, to be decided in the conspectus of the case, and which explains our at length discussion of the facts and circumstances of the case. We are conscious, when we say so, that the assessee may have incurred expenditure on liaison with Railways and other Departments, having been apparently compensated by its Principal in that regard. No such claim, i.e., toward such expenditure, has however been made by the assessee in its accounts or even otherwise per his returns of income. The adjudication by the Tribunal, the final fact finding authority, is to be necessarily based on the material on record, and not on the basis of assumptions and presumptions, case law on which is legion, even as we may cite some, viz.

CIT v. Radha Kishan Nandlal [1975] 99 ITR 143 (SC)

Udhavdas Kewalram v. CIT [1967] 66 ITR 462 (SC)

Omar Salay Mohamed Sait v. CIT [1959] 37 ITR 151 (SC)

Dhiraj Lal Girdharilal v. CIT [1954] 26 ITR 736 (SC)

True, the income liable to be assessed is the real income, but the same is again subject to the provisions of the Act (*Poona Electric Supply Co. Ltd.* (supra); *Southern Technologies Ltd.* (supra)). In fact, even if the assessee had so claimed, the same would not be a permissible deduction in view of *Explanation* to s.37(1) barring all expenditure prohibited by law. In fact, even prior thereto, the same being against public policy, stood regularly struck down by the Hon'ble Courts as not a legitimate claim (*Maddi Venkataraman & Co. (P) Ltd. v. CIT*) [1998] 229 ITR 534 (SC)). The matter admits of no two views, and the case law in the matter is legion, even as we may cite some (*Apex Laboratories v. Dy. CIT* (SLP (C) No. 23207 of 2019, dated 22/2/2022); *Gwalior Road Lines v. CIT* [1998] 234 ITR 230 (MP); *CIT v. Jamiyatrai Rajpal* [1998] 232 ITR 437 (MP); *CIT v. Rajdev Kirana Stores* [1990] 181 ITR 285 (MP).

B. Secondly, the disallowances of transportation expenses, effected in the sum of Rs.654.87 lacs and Rs.189.62 lacs for AYs. 2012-13 and 2014-15 respectively by the AO, and confirmed by us, is only u/s. 37(1). The same, as afore-stated, bears no element of any artificial disallowance, as u/s. 40A(3) (r.w.s. 40A(3A)) or s. 40(a)(ia), even as the same has been found to be applicable in principle. This is for the reason that the question of manner of payment or the non-deduction of tax at source, which triggers the said disallowances, become irrelevant where the expenditure itself is regarded as not genuine and, besides, would amount to a double disallowance. Where, however, the said disallowance/s, i.e., as confirmed, is reversed in further appeal, in whole or in part, i.e., on the expenditure being regarded as genuine to that extent, the same would become liable to be effected. The same would though require the assessee being heard on quantification, and may have a bearing in the assessment of a subsequent year/s as well. For instance, s. 40A(3A) specifically provides for a disallowance being made where the payment per the proscribed mode/s is made *qua* an expenditure claimed and

allowed in an earlier year. Without doubt, the assessee shall have to be fully heard where the disallowance u/s. 40A(3A) arises for a year subsequent to the last of the years under reference, i.e., AY 2014-15. Similarly, s. 40(a)(ia) also clearly provides for no disallowance where the payee has either paid tax on the sum on which deduction of tax at source had not been made, or is demonstrated to bear no tax liability for the relevant year upon inclusion of the income being claimed an expenditure by the assessee's payer. That apart, the disallowance, even if it subsists, is itself liable to be reversed in a later year on the assessee deducting and depositing tax at source subsequently. The amendment to this effect has been held as retrospective, and for which reference may be made to the decisions in *CIT vs. Calcutta Export Co*. [2018] 404 ITR 654 (SC) and *Sagar Tobacco Industries v. Asst. CIT* (in ITA No. 48/Jab/2017, dated 13.9.2022). The decision in *Shree Choudhary Transport Co*. (supra) would apply both on facts, *qua* at least two other aspects. That is, the provision being applicable to the part of the expenditure paid during the year. And, further, of the amendment w.r.t. the disallowance being restricted to a fraction thereof (thirty percent) by Finance (No. 2) Act, 2014, w.e.f. 1/4/2015, being prospective.

Further, we are conscious that while the disallowance for Rs.592.87 lacs (out of disallowance of Rs.654.87 lacs for AY 2012-13) is a total disallowance, that for balance of Rs.62 lacs is itself at a fraction (of Rs.291.81 lacs). As such, it would not be possible to identify as to which amounts out of the total sum of Rs.291.81 lacs stands disallowed and, thus, upon reversal, in whole or impart, allowed. The exercise for identifying the payment in violation of s. 40A(3) or, as the case may be, s.40A(3A), as indeed u/s. 40(a)(ia), would thus extend to the entire sum of Rs.291.81 lacs. Finally, we here also clarify that the disallowance u/s. 40A(3A), would, where so, stand to be made only in respect of the sums allowed u/s. 37(1) for AYs 2012-13 and 2014-15, and cannot extend to sums already allowed for preceding year, but liable to be disallowed in assessment for

any of the three years under reference inasmuch as the same do not qualify as the subject matter of appeal.

26. In the result, the appeals by the Revenue and the COs by the assessee are decided on the afore-said terms.

Order pronounced in open Court on January 27, 2023

Sd/-	Sd/-
(Manomohan Das)	(Sanjay Arora)
Judicial Member	Accountant Member

Dated: 27/01/2023
vr/aks

Copy to:

1. The Assessee: Shri Shankarlal Vishwakarma, New Minerals, Jalpa Devi Ward, Katni (MP)
2. The Revenue : Asst. CIT, Circle, Katni
3. The Principal CIT-2, Jabalpur (MP)
4. The CIT(Appeals)-1/2, Jabalpur.
5. The CIT-DR, ITAT, Jabalpur.
6. Guard File.

By order

(VUKKEM RAMBABU)
Sr. Private Secretary,
ITAT, Jabalpur.