R

IN THE HIGH COURT OF KARNATAKA, DHARWAD BENCH

DATED THIS THE 17TH DAY OF MARCH, 2023

PRESENT

THE HON'BLE MR JUSTICE K.SOMASHEKAR

AND

THE HON'BLE MR JUSTICE UMESH M ADIGA

ITA NO 100012 OF 2017

BETWEEN:

1 . THE PRINCIPAL COMMISSIONER
OF INCOME TAX (CENTRAL)
QUEENS ROAD, BENGALURU.

2. THE DEPUTY COMMISSIONER OF
INCOME TAX
CENTRAL CIRCLE, 1(3)
BENGALURU.

... APPELLANTS

(BY SRI.Y.V. RAVIRAJ, ADV.)

AND:

M/S OBULAPURAM MINING
COMPANY PVT. LIMITED
NO.6/4, RAGHAVACHARI ROAD
BALLARI-583101
PAN: AAACO5753D.

… RESPONDENT

(BY SRI. MAYANK JAIN, ADV.)

THIS ITA IS FILED UNDER SECTION 260A OF THE INCOME TAX ACT, 1961, PRAYING TO SET ASIDE THE ORDERS PASSED BY THE INCOME TAX APPELLATE TRIBUNAL, BENGALURU BENCH 'C' IN IT (TP) A NO.182 (BANG) 2014 DATED 20.10.2016 AND CONFIRM THE ORDER DATED 31.12.2013 PASSED BY THE

DEPUTY COMMISSIONER OF INCOME TAX CENTRAL CIRCLE 1 (3), BENGALURU.

THIS ITA HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 08.02.2023, COMING ON FOR PRONOUNCEMENT OF JUDGMENT THIS DAY, K.SOMASHEKAR J., DELIVERED THE FOLLOWING:

JUDGMENT

1.This appeal is filed by the revenue challenging the order dated 20.10.2016 passed by the Income Tax Appellate Tribunal, Bengaluru Bench 'C' in IT (TP) A No.182 (BANG) 2014 and thereby seeking to confirm the order dated 28.02.2013 passed by the Deputy Commissioner of Income Tax Central Circle 1(3), Bengaluru.

2. Heard the learned Standing Counsel Sri.Y.V.Raviraj for the appellant / Revenue and the learned counsel Sri.Mayank Jain for the respondent / Assessee. Perused the order passed by the Income Tax Appellate Tribunal, Bengaluru including the order passed by the Deputy Commissioner of Income Tax, Central Circle 1(3), Bengaluru.

3. The factual matrix of the case is that the assessee e-filed its return of income for the assessment year 2009-10 declaring an income of Rs.486,38,96,690/-. The case was selected for scrutiny and the assessment was completed under Section 143(3) read

with Section 144C(13) of the Income Tax Act on 31.12.2013, determining total income at Rs.10,86,34,35,052/- by making various additions, which reads as under:

Additional / Issues	**Rs.**
Transfer pricing adjustments	112,20,92,081/-
Claim of bogus transportation expenses of iron ore 40% attributable towards illegal mining.	86,43,47,335/-
Disallowance of expenses claimed under section 37(1) towards illegal mining.	387,76,69,992/-

4. Aggrieved by the above additions, the assessee preferred an appeal before the Tribunal against the additions made hereinabove, which came to be allowed.

5. It is stated in the appeal that during the assessment proceedings, it was observed that, M/s GLA Trading International Pvt. Ltd, is an 'associated enterprise' (for short 'AE') of the assessee respondent within the meaning of section 92A based on the fact that Sri.Gali Janardhana Reddy, Director of tax payer

company was appointed as Director of M/s.GLA Trading International Pvt. Ltd., on 19.12.2007. Subsequently, on 21.12.2007, issued and paid-up shares of the company (of the value of 1 Singapore dollar), which was hitherto held by Sri.Arangannal, was transferred to M/s.GJR Holdings International Ltd., another company registered in the Isle of Man of which Sri.Gali Janardhana Reddy is one of the Directors as confirmed by Sri.Gali Janardhana Reddy, in his statement recorded on 29.12.2009, before the Deputy Commissioner of Income Tax, Central Circle-1(3), Bengaluru. It was seen that the entire issued and paid-up share capital of M/s.GLA Trading International Pvt. Ltd., was held by M/s.GIR Holdings International Company (M/s.GJR Holdings International), where he had control over the activities and management of the said company. In brief, these facts clearly established that the assessee respondent company and M/s.GLA Trading Pvt. Ltd., Singapore, are AEs. within the meaning of section 92A of the income Tax Act, 1961.

6. It is further stated that the matter was referred to the Transfer Pricing Officer and subsequently an order under Section 92CA came to be passed on 23.01.2013 making the following adjustment to the admitted value of international transactions.

(a)	In respect of sale of iron ore	111,48,68,440/-
(b)	In respect of Helicopter Hiring Charges	72,23,641/-
	Total adjustments	**Rs.112,20,92,081/-**

7. It is further stated that the draft assessment order came to be passed under section 144C read with Section 143(3) of the Income Tax Act, 1961 by adopting the above adjustments to the value of the international transactions and the income of the assessee came to be upwardly revised by an amount of Rs.112,20,92,081/-. The assessee filed an appeal before the 'Dispute Resolution Panel' (DRP) Bengaluru, which by its order dated 29.11.2013, upheld the adjustments proposed in the draft order. Accordingly, the assessment was completed by upwardly revising the income of the assessee to the extent of Rs.112,20,92,081/-.

8. However, an appeal came to be filed against the above order before the Income Tax Appellate Tribunal. The Tribunal placed reliance on its order in the case of ***Page Industries Ltd., vs. DCIT in ITA No.163/bang/2015***. The Tribunal held that

only because one of the directors of the assessee company and of GLATIPL is common, Section 93CA is not applicable. The Tribunal also held that in order to constitute a relationship of an AE, the parameters laid down in both subsections (1) and (2) should be fulfilled. As per explanation, amendment carried out in sub-section (2) of section 92A by the Finance Act, 2002 w.e.f., 01.04.2002, mere participation of one or more persons in the management or control or capital of both the enterprises shall not make them AE unless the criteria specified in sub Section (2) is fulfilled and since the parameters laid down in sub Sections (1) and (2) of Section 92A are not fulfilled, there is no relationship of AE between the Assessee Company and GLATIPL and therefore, the provisions of chapter X of the Income Tax Act, are not applicable.

9. It is further stated as regards the issue of claim of bogus transportation expenses of iron ore at Rs.86,43,47,335/- that during the assessment proceedings, the assessing authority made enquiries with regard to the genuineness of the claim of transportation expenses of Rs.648,41,29,000/- made by the assessee which was far in excess compared to the immediate previous year. The assessee respondent also could not furnish any evidence in support of its claim of expenditure in the form of invoices, goods carriage number or details of transport permit

issued by the Director of Mines and Geology and Forest authorities. The enquiries made with the transporters to whom the assessee respondent is claimed to have paid transportation charges and deducted TDS, stated that they have not rendered any services to the assessee. It was found that some of them never owned any transportation vehicles and some of them did not have any means. Further, some of the vehicles were not transport vehicles but were autos, scooters, ambulances and school buses etc. However, on an examination of the bank accounts of the alleged transporters, it was also found that the amounts deposited in their accounts had been immediately withdrawn in cash. And finally, the expenditure claimed against the name of the parties, wherein enquiries had been done came to be disallowed by the assessing authority while completing the assessment. However, the Tribunal granted relief to the assessee by deleting the additions made on this issue by following its earlier order in the case of assessee for the assessment year 2010-11 on the ground that the assessing authority had not made available the persons for cross examination of the assessee despite its request. The Tribunal while granting relief had relied upon the judgment of the Delhi High Court in the case of ***CIT Vs. SMC Share brokers Ltd, (288 ITR 345 (DEL)***, wherein the

revenue had not made available the persons for cross-examination of the assessee despite of his request.

10. It is further stated regarding disallowance of claim of expenses attributable towards illegal mining Rs.387,76,69,992/- that during the assessment proceedings, the Assessing Authority noticed that the respondent was carrying on illegal mining activities by carrying out mining activities in areas other than those permitted by the Government. In this regard, the CBI, Hyderabad had also conducted an investigation and had filed a charge-sheet. The assessee company had incurred expenses towards shifting the permanent boundary pillars in order to encroach upon un-allotted area for illegal mining and formed illegal roads to transport the ore extracted illegally and during the year the assessee respondent had shown a total production of 57,10,000 Mts., out of which 22,81,141 Mts, was held to be illegal and the illegal production worked out to 40% of the total production. While completing the assessment, for the reasons given in detail, the assessing authority disallowed 40% of the total expenditure claimed towards transportation expenses at Rs.387,76,69,992/- under Section 37(1) of the Act. However, the Tribunal granted relief to the Assessee by deleting the additions made on this issue by following its earlier order in the case of

assessee for the assessment year 2010-11. The tax effect in the present case is Rs.273,39,03,77,056/- and fulfills the criteria of monetary limits prescribed by the Board. Aggrieved by the same, the appellant / revenue has filed this appeal by challenging the order dated 20.10.2016 passed by the Income Tax Appellate Tribunal, Bengaluru Bench 'C' in IT (TP) A No.182 (BANG) 2014 and to confirm the order dated 31.12.2013 passed by the Deputy Commissioner of Income Tax Central Circle 1(3), Bengaluru.

11. Learned standing counsel Sri.Y.V.Raviraj for the appellants/revenue contends that with regard to the issue of transfer pricing adjustment, the Tribunal has grossly erred in not appreciating the categorical finding of facts made out by the revenue authorities that M/s. GLAT International P. Ltd., is an 'associated enterprise' of the assessee company. The Tribunal has erred in not considering the detailed finding of fact made out by the Commissioner of Income Tax in his order dated 30.03.2012 passed under u/s 263 of the Act in the case of the respondent assessee for the assessment year 2008-09 identical to the facts of the present year, wherein it was clearly established that M/s. GLAT International Pvt. Ltd., is an associated enterprise of the assessee company.

12. The Tribunal ought to have appreciated that, in order to determine whether an entity is an associate enterprise, control is not merely in terms of shareholding but participation in management and decision making, as held in the following decisions:

i) 52 Taxmann.Com 520(Delhi) (2015) - First American securities (P) Ltd., Vs. Addl.CIT.

ii) 57 Taxmann.Com 62 (Mumbai Trib) (2015) - Kaybee (P) Ltd., V. ITO.

iii) 13 Taxmann.Com 62 (Mumbai) (2011) - Diageo India (P) Ltd. V.DCIT.

13. It is further contended that on the issue of claim of bogus transportation expenses, the Tribunal has grossly erred in rejecting various findings of fact gathered by the assessing authority before arriving at the conclusion to disallow a portion of the claim of transportation expenses as bogus.

14. Further, the Tribunal has grossly erred in relying upon the judgment of the High Court of Delhi in the case of ***M/s. SMC Share Brokers Ltd***., the facts of which are clearly distinguishable as in the said case, the assessee had made multiple requests with the assessing officer for cross-examination of the party. Whereas

in the present case, a request had been made only a week before the completion of assessment proceedings and when the assessment was getting barred by limitation.

15. The Tribunal has grossly erred in relying upon the judgment of the High Court in the case of ***CIT Vs. Pradeep Kumar*** as the facts of the case are distinguishable and the addition made by the assessing officer amounting to Rs.4,34,000/- related to agricultural income shown by the assessee. The above said case was also decided by the Hon'ble High Court by considering the monetary limits for the purpose of filing the appeal and decided in favor of the assessee. Whereas in the present case, the Tribunal ought to have appreciated that the additions have been made in well reasoned order.

16. It is further contended that the Tribunal ought to have appreciated the addition towards disallowance of claim of transportation expenses which has been made by the Assessing Officer relying upon the independent evidence collected from the Transport Department and the banks and not merely on the basis of the transporters from whom statement under Section 131 was recorded and as such the additions made are sustainable even without the reliance on the statements recorded under Section

131. The Tribunal has grossly erred in not considering the judgment of the Hon'ble Apex Court in the case of ***ITO vs. M.Pirai Choodi (20 Taxmann.com 733 (2012) (SC),*** wherein it was held that the order of assessment passed without granting an opportunity to the assessee to cross-examine, should have been set aside by the High Court, and consequently the Tribunal should have remanded the matter directing the Assessing Officer to grant an opportunity to the assessee to cross-examine the concerned party and re-do the assessment.

17. However, in the present case, the Tribunal has grossly erred in deleting the additions made instead of remanding the matter back to the Assessing Officer to grant an opportunity to the assessee to cross-examine the party concerned in order to meet the ends of justice.

18. It is further contended that the Tribunal ought to have taken into consideration the judgment of the Hon'ble High Court of Delhi in the case of ***Nath International Sales vs. UOI, JAIR (1992 (Del) 295) HC)*** wherein the Hon'ble Court has clearly held that right of cross-examination is not an absolute right. Further, in the case of ***State of J & K vs. Bakshi Gula Mahammad [AIR 1967 SC 122]*** the Hon'ble Apex Court has

held that the right of hearing does not necessarily include right of cross- examination.

19. It is further contended that on the issue of Disallowance under Section 37(1), the Tribunal has grossly erred in deleting the addition made by the Assessing Authority under section 37(1) of the Act towards the expenses claimed on its illegal mining activity. The Tribunal has grossly erred in rejecting the finding of facts on record relied upon by the Assessing Authority while making this addition.

20. Based upon the facts and the order passed by the Income Tax Appellate Tribunal, Bengaluru including the order passed by the Deputy Commissioner of Income Tax Central Circle 1(3), Bengaluru, this appeal was admitted on 15.03.2019 to consider following substantial question of law:

> *"1. Whether on the facts and circumstances of the case and in law, the Tribunal is correct in holding that there is no relationship of 'associated enterprise' between the assessee respondent company and GLAT International P Ltd and provisions of Chapter X of Income Tax are not applicable as parameters laid down in sub section (1) and (2) of section 92A are not fulfilled?*

2. Whether on the facts and circumstances of the case and in law, the Tribunal is correct in holding that there is no relationship of 'associated enterprise' between the assessee respondent company and GLA International P Ltd when the said GLA International P Ltd is a one dollar company with a single share and there is evidence of participation, management and control by the common director, holding more than 26% share in the assessee company and as such the findings of the Tribunal perverse?

3. Whether on the facts and circumstances of the case and in law, the Tribunal is correct in deleting the additions of Rs.86,43,47,335/- made by the Assessing Officer on account of bogus claim of expenditure on transportation made by the assessee, particularly when the Assessing Officer has arrived at the additions based on independent enquiries and evidence collected from the transport department, the banks and not merely on the statements recorded from the transporters?

4. Whether on the facts and circumstances of the case and in law, the Tribunal is correct in deleting the additions of Rs.86,43,47,335/- made by the Assessing Officer on account of bogus claim of expenditure on transportation made by the assessee by relying on the decisions of the Hon'ble Delhi high Court in the case of CIT VS. SMC Share Brokers Ltd, and in the case of CIT Vs. Pradeep Kumar Gupta, the

facts and circumstances of the cases are distinguishable?

5. Whether on the facts and in the circumstances of the case and in law, the Tribunal is justified in deleting the additions made by the Assessing Officer u/s 37(1) on account of illegal mining by disallowing the expenditure of Rs.387,76,69,992/-, wherein such disallowance has been made by the Assessing Officer on the basis of evidence from CBI, Hyderabad, Special Committee set up by the Andhra Pradesh Government and through investigation, thereby holding that there is illegal production of 22,81,141 mts i.e., @ 40% of admitted production of 57,10,000 Mts and accordingly disallowing @40%, the expenses on the same?"

21. Learned Standing Counsel Sri.Y.V.Raviraj has facilitated the order of the ITAT in IT(TP) A No.182 (Bang) 2014 of the assessment year 2009-10, wherein the ITAT has held that the assessee's appeal directed against the assessment order passed by the A.O. under Section 144C (13) as per the directions of the DRP for the assessment year 2008-09. Before the ITAT, learned AR of the assessee submitted that even if the allegation of the A.O. is accepted that this company i.e. M/s (GLAITPL) is an AE of the assessee company for this reason that entire share capital i.e. one Share of M/s (GLAITPL) was transferred by Shri Arangannal to

M/s (GJRHIL) on 21.12.2007, then also it is an AE of the assessee company for two days only because the said one share of GLATIPL was transferred by GJRHIL to Inter Link Services Group Ltd. ILSGL on 22.12.2007 and with this company or its directors, the assessee company or its directors has no relationship. It was submitted by the learned AR of the assessee that regarding TP issues, this is the submission that TP provisions cannot be applied in the present case because the parameters specified u/s 92A (2) of the I.T. Act are not attracted, where reliance was placed on the tribunal order rendered in the case of ***Page Industries Limited vs. DCIT*** in ITA No. 163/Bang/2015, copy of which is available on pages 15 to 38 of the paper book. It was also submitted that on pages 5 to 14 of the same paper book is a copy of Notarial certificate issued to Inter Link Services Group Limited and in particular, where the attention of the ITAT was drawn to page 11 as per which, on the date 12.05.2011, the current director of Inter Link Services Group Limited was Arangannal S/o Kathamuthu and he was appointed on 24.04.2001 and the current shareholder on that date was Iyer Corporate Services Pvt. Ltd. (Formerly known as Crest Services Pvt. Ltd.,). Thereafter, it was submitted that as per the assessment order, the A.O. has held that M/s GLA Trading International Pte Ltd. (GLATIPL) is an AE of the assessee company

as per section 92A of the I.T. Act and his decision is on this basis that Sri G. J. Reddy, a director of the assessee company was appointed as a director of (GLATIPL) on 19.12.2007 and thereafter, on 21.12.2007, the entire share capital of (GLATIPL) being only one share of the value of 1 Singapore Dollar was transferred to GJR Holdings International Ltd. (GJRHIL) registered in the isle of MAN and Shri G. J. Reddy is one of the directors of that co. also i.e. (GJRHIL). Thereafter, it was submitted that the said one share of (GLATIPL) was transferred by GJRHIL to Inter Link Services Group Ltd. (ILSGL) on 22.12.2007 and the necessary evidence in this regard is available on page 169 of the paper book. It was submitted that in the present year i.e. during 01.04.2008 to 31.03.2009, the only one share of GLATIPL was held by ILSGL and neither the assessee company nor its directors are holding any share of that co. i.e. ILSGL and the directors of the assessee company are not a director in that co. i.e. ILSGL and hence, provisions of section 92A are not applicable under these facts and in view of the order rendered by the tribunal in the case of ***Page Industries Limited vs. DCIT*** (Supra). As against this, learned DR of the revenue supported the assessment order, TPO's order and the order of DRP. On consideration of the rival submissions, the ITAT reproduced the provisions of Section 92A of

the I.T. Act as it contains the definition of the Term "Associated Enterprise" i.e., AE. These are as under:-

> *"92A.(1) For the purposes of this section and Sections 92, 92B, 92C, 92D, 92E and 92F, "associated enterprise", in relation to another enterprise, means an enterprise-*
>
> *(a) which participates, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise; or*
>
> *(b) in respect of which one or more persons who participate, directly or indirectly, or through one or more intermediaries, in its management or control or capital, are the same persons who participate, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise.*

22. The ITAT took note of the objections of the A.O., assessee's explanations and relevant facts in this regard. The objections of the A.O. as reproduced above are these that Shri GJR, one of the directors of the assessee company was appointed a director of (GLATIPL) also on 19.12.2007 and on 21.12.2007, the entire share capital of (GLATIPL) being one equity share was transferred to (GJRHIL) in which, Shri GJR is one of the directors.

Hence, as per the objections of the A.O., the entire share capital of (GLATIPL) is held by (GJRHIL) on 21.12.2007 and on that date, Shri GJR, one of the directors of the assessee company is director of (GJRHIL) also being a company holding entire share capital of (GLATIPL). It is further submitted that whether these facts make (GLATIPL) an AE of the assessee company and see that whether during the period from 01.04.2008 to 31.03.2009 also, the facts were same or not because if the facts are not same in this later period, then even if it is held that (GLATIPL) is AE of the assessee company on 21.12.2007, it will not help the revenue in the present year. As per the subsequent developments for which evidence is also available on record, the said one share of (GLATIPL) was transferred by (GJRHIL) to Inter Link Services Group Ltd. (ILSGL) on 22.12.2007 and the necessary evidence in this regard is available on page 169 of the paper book. Hence, on and from 22.12.2007, (ILSGL) is the shareholder of (GLATIPL) holding its entire share capital and the only director of (ILSGL) as per Notarial certificate issued to (ILSGL) on 12.05.2011, the current director of Inter Link Services Group Limited was Arangannal S/o Kathamuthu and he was appointed on 24.04.2001 and the current shareholder on that date was Iyer Corporate Services Pte Ltd. (Formerly known as Crest Services Pte Ltd.).

Hence, it is seen that from 22.12.2007 till 12.05.2001 at least, the entire share capital of (GLATIPL) was held by (ILSGL) and with this company, the assessee company or its directors has no relationship.

23. On considering the rival submissions, the ITAT held that since the learned DR of the revenue could not point out any difference in facts, we find no reason to take a contrary view in the present year. Hence in line with the Tribunal order in A.Y. 2010-11 in assessee's own case, ITAT deleted first two disallowances i.e., 1) Disallowance of Transportation charges, and 2) Disallowance of Expenses under Explanation to section 37(1) and in respect of third issue i.e., addition made on account of sale of Land, the ITAT set-aside the order of CIT (A) on that issue and restored the matter to A.O. for a fresh decision with the same directions as were given by the tribunal in A.Y. 2010-11 and ground No.6 was allowed and the appeal of the assessee was allowed.

24. Learned Standing Counsel Sri.Y.V.Raviraj for the appellant / revenue has also produced the proceedings of the Dispute Resolution Panel dated 29.11.2013 under Section 144C(5) read with Section 144C(8) of the I.T. Act for the assessment year

2009-10, wherein the grounds of objections raised where the A.O. ought not to have made the reference to the TPO under Section 92CA of the Act since the assessee has not entered into any international transactions defined under Section 92B of the Act and the A.O. and also the TPO ought to have appreciated that the assessee company is not an associated enterprise of M/s. GLA Trading International Pvt. Ltd., as defined in Section 92A of the Act. The Dispute Resolution Panel accordingly held that,

> *"the assessee has entered into a complicated arrangement whereby a helicopter owned by an AE at Singapore is shown to be leased out to two Indian charter companies which in turn hire out the same helicopter to the assessee itself. By this mechanism, the hire charges, though apparently paid to the charter companies actually and practically benefitted to the AE which owned the helicopter. It is a kind of circular transaction wherein the veil of obfuscation of the actual transactors has been lifted by the TPO who has rightly treated the transaction as an international transaction and benchmarked the same. Here too, the ratio of the Mcdowell case referred to earlier has a bearing. The tax authority does retain the prerogative to go behind the form of a transaction to determine its actual nature Therefore, the action of the TPO is justified and duly upheld by this panel.*

Based on the above discussion, the directions of the Panel as per the provisions of Section 144C(5) of the IT Act hereby are communicated to the assessee and the Departmental authorities concerned."

25. On controvert to the arguments advanced by the learned Standing counsel Sri.Y.V.Raviraj for the appellants / revenue, learned counsel Sri.Mayank Jain has taken us through various contentions by urging the reliance of the Patna High Court in the case of ***Kanak Kumari vs. Commissioner of Income Tax*** reported in ***(1955) 28 ITR 462***, relating to the scope of Section 133(4) of the Income Tax Act, wherein it is held that Section 133(4) has granted a very wide statutory discretion to the Income Tax Appellate Tribunal in disposing of an appeal but the discretion given under this section to the Income Tax Appellate Tribunal is a judicial discretion which must be exercised in accordance with legal principles, and not in an arbitrary or capricious manner. Discretion means when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinion. It is to be, not arbitrary, vague and fanciful, but legal and regular. It must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.

26. Learned counsel Sri.Mayank Jain for the respondent / assessee further placed reliance on a decision in the case of ***Rajesh Babubhai Damania vs. Commissioner of Income Tax*** reported in ***(2001) 251 ITR 541***, wherein at para 7 it is held as under:

> *"7. The Tribunal totally overlooked the assessment of evidence done by the Commissioner of Income-tax (Appeals) and dealt with the matter as if it was entertaining an appeal against the order of the Assessing Officer. There was no question of giving "one more innings" to the Assessing Officer. The appeals are not to be decided for giving "one more innings", to the lower authorities. In the appellate jurisdiction the appellate court has to consider whether there is justification for upsetting the order against which the appeal is filed. In this case, where the assessee had repeatedly produced the creditors before the Income-tax Officer and had filed affidavits in support of the credit entries and also filed confirmations and given names and addresses of the concerned parties as well as proved repayment of the amounts by account payee cheques and done all that was within his power to prove the genuineness of the loans, the finding arrived at by the appellate authority on the basis of such reliable material could not have been so cursorily dealt with by the Tribunal for the purpose of giving "one more innings" to the Assessing*

Officer. It was the duty of the Tribunal to ascertain the reasons which were given by the Commissioner of Income-tax (Appeals) in whose order the order of the Assessing Officer had merged and not to base its decision merely on "a bit of negligence" of the Assessing Officer in not cross-examining the parties who were produced before him four to five times. In our opinion, the Tribunal has reached the conclusion which cannot reasonably be reached by anyone, and there is no warrant for restoring the matter to the Assessing Officer on such specious grounds as are given by the Tribunal.

27. Learned counsel Sri.Mayank Jain for the respondent / assessee contended that it is the case of the revenue that protective assessments have been passed in the hands of transporters, where it is quantified that no transportation has taken place. Therefore, it is deemed that assessee has not transported iron ore during the current assessment year. In order to substantiate this claim, revenue produced three orders i.e., i) the provisional assessment order dated 28.03.2012, where provisional/protective assessment passed in the hands of Rageni Gangadhar, under Section 143(3) of the Income Tax Act, ii) the order passed by the Commissioner (Appeals) (Karnool) dated 12.07.2012 which upheld the order of assessment. However, held that the assessment is on substantive basis and iii) the order of

the Tribunal (Hyderabad) dated 14.12.2012 wherein it set aside both the orders of the assessment and appellate Commissioner.

28. It is further contended that under the Old Income Tax Act, 1922, provisional / protective assessments were provided for u/s. 23-B of the IT Act, 1922. This provisional assessment was a prelude to an advance tax or to regular assessments. In other words, if an Assessing Officer desires to pass a provisional assessment he had to do it u/s. 23-B of the IT Act, 1922. The Hon'ble Supreme Court had an occasion to deal with this provision in two judgments which are as under:

a. Lalji Haridas Vs. ITO & Ors., (1961) 43 ITR 387 (SC)

b. ITO Vs. Bachu Lal Kapoor (1966) 60 ITR 74 (SC)

"15. Some argument was advanced on the question of the validity of what are called protective or precautional assessments" Reference was made to Jagannath Hanumanbux us TO (1957) 31 ITR 603 (Cal) and to the decision of this Court in Lals Haridas us. ITO (1961) 43 ITR 387 (SC) In the former, the validity of protective assessment was approved and in the latter, this Court though the question of assessment was raised, did not express its final opinion thereon. This Court held that when there was

a doubt as to which person among two was liable to be assessed, parallel proceedings might be started against both; and it also laid down an equitable procedure to be followed in that situation. In this case, the question of protective assessment does not call for our decision and we do not express our opinion thereon."

29. It is further contended that in the New Income Tax Act, 1961, provisional / protective assessments were provided u/s 141 of the IT Act, 1961, which contemplated provisional assessment for the purpose of computing advance tax. This provision came up for interpretation before the Hon'ble Supreme Court, in the case of **Jaipur Udyog Ltd., & Anr., Vs. CIT & Anr.,** reported in **(1969) 71 ITR 799 (SC)** wherein it was held as under:

"10. We are unable to accept the opinion of the High Court if it be assumed that provisional assessment has to be made in accordance with and subject to the provisions of the Act, distinction between a provisional assessment and a regular assessment gets completely blurred. The scheme of s. 141 is to call upon the assessee to pay tax provisionally at the appropriate rate on what he admits is his taxable income, subject to the benefit of the ounces under subs (2) The section by the assessee exceeds the amount admitted by him, nor whether the allowances or deductions claimed are

admissible. If there be a discrepancy between the return made and the accounts and documents accompanying the return, the ITO may ask the assessee to explain the discrepancy. but he must make a professional assessment on the basis of the return initially made or clarified and the accounts and documents filed. He cannot make a provisional assessment by holding that certain claims made by the assessee are in law unjustified. It is transpired that the assessee has without reasonable cause concealed particulars of his income or has furnished inaccurate particulars of his income, it may be open to the ITO to impose penalty upon him after the regular assessment is completed. But it is not open to him to determine whether there has been any concealment of particulars of income or to decide whether claims which have been made are unwarranted. In the view we have expressed, the ITO was not justified in holding that the claim made by the company for carrying forward and seeking to debit against Rs.74 lakhs odd an amount of Rs.103 lakhs odd was liable to be rejected.

30. Learned counsel for the respondent / assessee contended that therefore, the provisional / protective assessment order passed by the Assessing Officer (Ananthpur), which was confirmed by the Appellate Commissioner is without jurisdiction and has no legs to stand on and cannot be enforced. It is without

"authority of law" as contemplated under Article 265 of the Constitution of India. Hence, the order of the Assessing Officer (Ananthpur), Appellate Commissioner's order (Karnool), Tribunal's order (Hyderabad) is without jurisdiction and cannot be looked into.

31. Learned counsel for the respondent / assessee facilitated the assessment order dated 31.12.2009 for the assessment year 2008-09 and contended that the assessee has filed e-return of income for the assessment year 2008-09 under Section 139 on 30.09.2008 under ack. No.44479161300908 with digital signature declaring income of Rs.764,53,84,970/-. The financial year 2007-08 is the year of search in the case of the assessee. Consequent to the material gathered in the case of the assessee searched, action under Section 153A of the Act was initiated in the assessee's case for earlier years. In view of this, in the case of assessee the assessment year 2008-09 falls under Section 153B(1)(b) of the Act. Accordingly, the case was posted for hearing by issuance of notice under Section 143(2) on 15.09.2009.

32. It is further contended that GLA Trading International PTE Ltd., formerly known as MAN-GO PUB PTE Ltd., is a registered

company in Singapore with Register No. 200414580K. On the basis of the Annual Report and other reports filed by GLA Trading International PTE Ltd. with Accounting and Corporate Regulatory Authority (ACRA), Singapore, it is seen that Shri Gali Janardhan Reddy is a Director of the said company with effect from 19.12.2007. At this point, it may not be out of place to explain a little about ACRA. ACRA is the International Regulator of Business Entities and Public Accountants in Singapore. ACRA also plays the role of a facilitator for the development of business entities and the public accountancy profession. ACRA was formed as a Statutory Board on 1 April, 2004, following the merger of the then Registry of Companies and Business (RCB) and the Public Accountants Board (PAB). This authority is responsible to administer various Acts of Singapore including Accounting and Corporate Regulatory Authority (ACRA) Act, Accountants Act, the Companies Act, the Business Registration Act etc. The companies registered in Singapore are required to lodge/file reports regarding the changed particulars regarding Company's Directors, Managers, regarding change of name, change of registered office etc., to the ACRA. It is seen from one of such reports lodged with ACRA on 01.02.2008 by GLA Trading International PTE Ltd., regarding change of particulars of company's directors that Shri

Gali Janardhan Reddy was appointed as a Director in the company w.e.f. 19.12.2007. It was further observed that Shri Gali Janardhan Reddy who is the Director in the assessee company is also a Director in GLA Trading International PTE Ltd., Singapore. The assessee company has sold/exported iron ore as mentioned in the above chart to GLA International Trading PTE Limited after Shri Gali Janardhan Reddy became a Director. Thus it is a case of an international transaction of sale/export of iron ore between two associate entities with Shri Gali Janardhan Reddy as a Director in both the companies. Further, as seen from the chart above, it is very clear that there is gross under-invoicing in respect of sales/exports made by the assessee company to the associate company (GLA Trading International PTE Ltd).

33. The assessee company was issued with a showcause notice requesting them to explain why the difference in price/rate representing under invoiced portion should not be added to the income of the assessee company for the Asst. Year 2008-09 under the provisions of Income Tax Act.

34. It is further contended that in view of non-reference by the assessing officer to the TPO for determining Arm's Length Price (ALP) is erroneous and also prejudicial to the interest of

revenue inasmuch as the matter could not be examined by the TPO as per the Instructions of the CBDT in Instruction No 3, as mentioned above, having regard to the fact that the international transaction was more than the specified amount.

35. However, the submissions made by the assessee company before the Commissioner of Income Tax were as under:

> *(a) In this case, the assessment has been completed under section 143(3) of the Act on 31/12/2009 by the Deputy Commissioner of Income Tax, Central Circle-1(3), Bangalore. During the course of assessment proceedings the Assessing Officer vide para No.4.1 to 7, considered the transactions done by the assessee company with GLA Trading Pvt. Ltd., and added a sum of Rs.86,42,88,802/- to the returned income on the ground of under-invoiced sale price. The assessee has filed appeal against the assessment order to the CIT(Appeals) which is pending for disposal.*
>
> *Now the IT Commissioner is of the opinion that the assessment order is erroneous on the ground that C.B.D.T's Instruction No.3 of 2003, dated 20/5/2003 has not been followed. As per Ld. C.I.T. wherever the aggregate value of international transaction exceeds Rs.5 crore (now raised to 15 crore), the case should be selected for scrutiny and reference under section 92CA be made to the transfer pricing officer for*

determination of arms- length price(ALP). The copy of above instruction has not been provided to the assessee.

(b) Referring to Section 92CA(1), the assessee's representative contends that nowhere in the Act it is stated that the matter has to be referred to the Transfer Pricing officer mandatorily. The Assessing officer in his wisdom has applied provisions of Sec.40A(2) of the Act. Thus the AO has followed the law both in letter and spirit.

(c) As per the Act the CBDT can issue instructions under section 119 of the Act. Subsection (1) of Section 119 of the Act provides that the Board may, from time to time, issue such orders, instructions and directions to other income tax authorities as it may deem fit for the proper administration of this Act, and such authorities and all other persons employed in the execution of this Act shall observe and follow such others, instructions and directions of the Board. So, the instruction can be issued by the CBDT for the proper administration of the Act and instruction cannot overrule the Act itself. As per the section 119, the subordinate Authority shall observe and follow instructions. The instructions are not binding on the assessee. CIT Vs. Hero Cycle Pvt. Ltd. 228 ITR 463(SC).

(d) Without prejudice to the above, the case does not fall under section 92CA of the Act. Section

92CA is applicable in the cases where arm length price has to be computed under section 92C of the Act, in the cases relating to an international transaction. The term international transaction has been defined in section 92B of the Act. Subsection (1) section 92B eads as under" for the purpose of this Act and section 92, 92C, 92D and 92E, International transaction" means a transaction between two or more associated enterprises, either or both of whom are non residents. The term associated enterprises have been defined in section 92A of this Act.

The A.R. in his submissions has reproduced Sec. 92A and contends that in the assessee's case Sri G. Janardhan Reddy is the director of the Assessee Company and GLA Trading International Private Ltd. The assessing officer has NOT established that Assessee Company is in the management or control or capital of the other enterprise. The assessing officer has not proved that G. Janardhan Reddy owns more than 25% of voting power in the other company. All these things show that the GLA Trading International Private Ltd is not an associated enterprise of the Assessee Company.

(e) Without prejudice to the above, the contracts with G LA Trading International Private Ltd were entered into on 4/12/2007, whereas Sri G.Janardhan Reddy became director of the other company only on 19/12/2007. As on the date of

contract, GLA Trading International Private Ltd. was not an associate enterprise of Obulapuram Mining Company Private Ltd. After becoming the director of the GLA Trading International Private Ltd the assessee has only executed the contract which was entered into earlier. Hence the question of application of section 92CA in the present case does not arise.

(f) Hon'ble ITAT Delhi in the case of CIT Delhi-IV Vs. International Travel House Ltd. As reported (2010) 45 DTR (Del) 249; (2010) 194 TAXMAN 324 which has been confirmed by the order of the Hon'ble Delhi High Court held that the order to be prejudicial to the interest of revenue, the loss of revenue should be glaring in the assessment order. In the above case it is said that, the invoking of jurisdiction under section 263 of the Act by the Commissioner of income tax for revising the return without recording a specific finding regarding the extent to which the order passed by the AO was prejudicial to the interest of revenue and rather asking the AO to conduct further inquiry to verify the net commission transferred to P&L Account afresh when the AO had already examined this aspect merely amounted to change of opinion which is not permissible u/s.263 of the Act Accordingly the order passed by the and hence, the order passed by the Commissioner of income tax 263 of the Act requires to be canceled. under section 263 of the Act is hereby canceled and the grounds of appeal taken by the assessee stand allowed.

(g) In the case of Malabar Industrial Company V/S CIT 243 ITR 83, honorable Supreme Court has held that a bare reading of this provision makes it clear that the prerequisite to the exercise of jurisdiction by the Commissioner Suomoto under it, is that the order of the Income tax is erroneous in so far as it is prejudicial to the interest of the revenue. The Commissioner has to be satisfied of twin conditions, namely (1) the order of the assessing officer sought to be revised is erroneous; and (ii) it is prejudicial to the interest of the revenue. If one of them is absent - if the order of Income tax officer is erroneous but is not prejudicial to the revenue or if it is not erroneous but is prejudicial to the revenue - recourse cannot be had to section 263(1) of the Act.

There can be no doubt that the provision cannot be invoked to correct each and every type of mistake and error committed by the assessing officer, it is only when an order is erroneous that the section will be attracted. incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind.

The Apex Court further held that when the Assessing Officer adopted one of the courses permissible under law and it has resulted in loss of revenue, or where views are possible and where AO

has taken one of the views with which the Commissioner of income tax does not agree, it cannot be treated as the erroneous order prejudicial to the interest of revenue, unless the view taken by the AO is unsustainable in law.

(h) In the case of CIT Vs. Smt. Minalben S Parikh 215 ITR 81, Honourable Gujarat High Court held that, Every loss of revenue as a consequence of an order of the assessing officer cannot be treated as prejudicial to the interests of the revenue, for example, when an income tax officer adopted one of the coerces permissible in law and it has resulted in loss of revenue; or where two views are possible and the income tax officer has taken one view with which the commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue, unless the view taken by the income tax officer is unsustainable in law. It has been held by this Court that where a sum not earned by a person is assessed as income in his hands on his offering, the order passed by the assessing officer accepting the same as such will be erroneous and prejudicial to the interests of the revenue.

(i) In the case of CIT V/S Ratlam Coal Ash Co. honorable Calcutta High Court held that, the commissioner does not have unfettered power to initiate proceedings by revision, re-examining the matter and directing fresh on his own whim for change

or having a different view. He has been conferred with a quasi judicial power and the same is hedged with limitation and therefore, it has to be exercised within the parameters of the provisions. When the commissioner is himself not able to form an opinion, he cannot direct another inquiry by the assessing officer u/s 263 of the Act.

(j) In the case of CIT V/S. Arvind Jewellers Honourable Gujarat High Court has held that, Section 263 of the Act does not empower him to take action on these facts to arrive at the conclusion that the order passed by the Income tax Officer is erroneous and prejudicial to the interest of the revenue. Since the material was there on record and the said material was considered by the Income tax Officer and a particular view was taken, the mere fact that a different view can be taken, should not be the basis for an action u/s 263 of the Act and it cannot be held to justified"

(k) In the case of CIT V/S Gabrial India Ltd Honourable Bombay High Court has held that, if there are no materials on record on the basis of which it can be said that the commissioner acting in a reasonable manner I could have come to such a conclusion, the very initiation of proceedings by him will be illegal and lwithout jurisdiction. The Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already

concluded. Such action will be against the well accepted policy of law that there must be a point of finality in all legal proceedings, that the issue should not be reactivated beyond a particular stage and that lapse of time induce other spheres of human activity.

36. It is further contended that the assessee filed the return of income on 30.09.2008. The Assessing Officer passed an order of assessment on 31.12.2009 u/s 143(3) of the IT Act. He had computed the transfer pricing difference in respect of all the international transactions without referring the matter to the transfer pricing officer. Therefore, the Commissioner exercised jurisdiction u/s 263 of the IT Act and directed the Assessing Officer to transfer the file to the transfer pricing officer in accordance with law. This order of the Commissioner was challenged before the Income Tax Appellate Tribunal. The Tribunal proceeded to hold that section 92CA(4) of the IT Act which came into effect from 01.06.2007 would be applicable only for Assessment Year 2009-10 and not for the current Assessment Year 2008-09 by relying on a number of judgments. Hence, the Tribunal by order dated:29.07.2016 held that exercise of jurisdiction u/s 263 of the IT Act was erroneous and allowed the appeal of the assessee.

37. In the meantime, based on the order of the Commissioner, proceedings were initiated by the Assessing Officer by referring the matter to the Transfer Pricing Officer. The Transfer pricing officer passed an order. Consequently the Assessing Officer gave effect to this Transfer Pricing Officer's order by passing a separate assessment order u/s 143(3) read with Section 263 and 144C (13) of the IT Act. This order of the Assessing Officer was challenged before the Tribunal who proceeded to confirm its earlier order dated 29.07.2016 and allowed the appeal of the assessee under an order dated 17.10.2016.

38. Both the orders were subject matter of appeal before this Hon'ble Court. This Hon'ble Court was of the view that CBDT Circular No.3 of 2003 was applicable to the facts of the case. It further held that the Assessing Officer was bound to refer the matter to the Transfer Pricing Officer. Therefore, the order passed by the Commissioner was upheld. Consequently, both the orders of the tribunal were set aside.

39. The subject matter of this appeal for the Assessment Year 2008-09 is whether the Assessing Officer can suo-moto decide the issue regarding transfer pricing by himself or the

matter has to be referred to the Transfer Pricing Officer. Answering this question, the Hon'ble High Court held that the matter should be referred to the Transfer Pricing Officer. It is submitted that this finding of this Hon'ble Court for the Assessment Year 2008-09 has absolutely no connection to the subsequent Assessment Year 2009-10. Hence, the revenue cannot trace any reliance on the order for the year 2008-09.

40. It is contended that there is incomplete order - Hon'ble High Court for Assessment Year 2008-09 has set aside both the orders of the tribunal. It has also upheld the order of the commissioner referring the matter to the Transfer Pricing Officer. However, the subject matter of controversy was "jurisdiction". In respect of Whereas, the question on merits whether the quantification of Transfer Pricing Officer is correct or not has not been addressed. Therefore, for Assessment Year 2008-09 the proceedings are incomplete.

41. It is further contended by the learned counsel for the respondent / assessee that this appeal under Section 260A of the IT Act by raising five substantial questions of law for consideration of this Hon’ble Court. The facts which arise in this appeal is addressed first and thereafter the grounds in support of the order

of the Tribunal dated 30.09.2009 declaring Rs.486,38,96,690/- as income of the assessee. Assessee during the year claimed firstly income declared on sale of iron ore abroad, secondly expenses claimed towards transportation of iron ore from assessee's stock yard to port and thirdly expenses claimed towards excavation of iron ore, processing iron ore and royalty paid to the Government for transportation. On 13.07.2010 notice was issued u/s. 143(2) of the IT Act for scrutiny of the return of income to the assessee. On 28.10.2010 Section 92CA(1) of the IT Act, first Reference made by Assessing Officer to TPO-2, Bangalore to compute arms length price in respect of export sale of iron ore to M/s. GLA Trading International P. Ltd., worth Rs.205,07,08,959/- on the ground that M/s. GLA Trading International P. Ltd., and assessee had common Director. On 23.05.2012, Section 92CA(2A) of the IT Act, the second reference made by Assessing Officer relating to helicopter hiring charges paid to M/s OSS Air Management Pvt. Ltd., New Delhi and M/s Heligo Charter Pvt. Ltd, Mumbai of Rs.3,99,41,330/- on the ground that it amounted to international transaction. On 03.11.2010 Section 92CA(2B) of the IT Act Transfer Pricing Officer, proceeded to issue notice to the assessee to show cause as to why iron ore sold to GLA Trading International, Singapore should not be computed at "arms length

price" by invoking the cup method of computation. On 10.12.2010, reply sent by the assessee to the Transfer Pricing Officer, stating that response filed to the penalty notice dated 04.02.2010 should be taken as a response to the show cause notice. On 23.01.2012 Section 92CA(2B) of the IT Act, the Transfer Pricing Officer, issued notice to the assessee proposing to treat the assessee and GLA Trading International Pte., Ltd., as "associated enterprises" for the previous year 01.04.2008 to 31.03.2009 i.e., AY. 2009-10.

42. It is relevant to refer to the written submission of the learned counsel for the respondent, the merits regarding valuation of helicopter rentals that the rentals were paid to Indian Companies. Further there is no computation made regarding the arms length price as to the actual rentals to be paid. What is disallowed is the rental actually paid to the Indian companies. There is no foreign transaction involved. Further Chapter X itself is not attractive. The charge regarding domestic transactions, helicopter rental in this case was applicable by Finance Act, 2012 w.ef. 01.04.2013. Therefore, for the current Assessment Year 2009-10, domestic transactions of helicopter rentals cannot be made applicable. These are all the contentions made by the learned counsel for the respondent/assessee and on these

premises, learned counsel submitted that no interference is required in the order passed by the Income Tax Appellate Tribunal and seeks to dismiss the appeal as being devoid of merits.

43. Having heard the learned Standing Counsel Sri.Y.V.Raviraj for the appellant/revenue and the learned counsel Sri.Mayank Jain for the respondent / assessee, it is relevant to peruse the order passed by the ITAT, Bengaluru Bench "C", Bengaluru in IT (TP) A No.182 (Bang) 2014 of the assessment year 2009-10. The impugned order passed by the AO under Section 144C(13) as per the directions of the DRP for the assessment year 2008-09 has been challenged by the appellant namely M/s. Obulapuram Mining Company Private Limited, thereby arraigned as respondent/assessee in this appeal. It is also relevant to refer to Section 92A of the IT Act, 1961, as it contains the definition of the Term 'Associated Enterprise' i.e., AE, which is as under:

> *"92A.(1) For the purposes of this section and Sections 92, 92B, 92C, 92D, 92E and 92F, "associated enterprise", in relation to another enterprise, means an enterprise -*
>
> *(a) which participates, directly or indirectly, or through one or more intermediaries, in the*

management or control or capital of the other enterprise; or

(b) in respect of which one or more persons who participate, directly or indirectly, or through one or more intermediaries, in its management or control or capital, are the same persons who participate, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise.

(2) For the purposes of sub-section (1), two enterprises shall be deemed to be associated enterprises if, at any time during the previous year,

(a) one enterprise holds, directly or indirectly, shares carrying not less than twenty-six per cent of the voting power in the other enterprise; or

(b) any person or enterprise holds, directly or indirectly, shares carrying not less than twenty-six per cent of the voting power in each of such enterprises; or

(c) a loan advanced by one enterprise to the other enterprise constitutes not less than fifty-one percent of the book value of the total assets of the other enterprise, or

(d) one enterprise guarantees not less than ten per cent of the total borrowings of the other enterprise; or

(e) more than half of the board of directors or members of the governing board, or one or more executive directors or executive members of the governing board of one enterprise, are appointed by the other enterprise; or

(f) more than half of the directors or members of the governing board, or one or more of the executive directors or members of the governing board, of each of the two enterprises are appointed by the same person or persons; or

(g) the manufacture or processing of goods or articles or business carried out by one enterprise is wholly dependent on the use of know-how, patents, copyrights, trade-marks, licenses, franchises or any other business or commercial rights of similar nature, or any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process, of which the other enterprise is the owner or in respect of which the other enterprise has exclusive rights, or

(h) ninety per cent or more of the raw materials and consumables required for the manufacture or processing of goods or articles carried out by one enterprise, are supplied by the other enterprise, or by persons specified by the other enterprise, and the prices and other conditions relating to the supply are influenced by such other enterprise; or

(i) the goods or articles manufactured or processed by one enterprise, are sold to the other enterprise or to persons specified by the other enterprise, and the prices and other conditions relating thereto are influenced by such other enterprise, or

(i) where one enterprise is controlled by an individual, the other enterprise is also controlled by such individual or his relative or jointly by such individual and relative of such individual; or

(k) where one enterprise is controlled by a Hindu undivided family, the other enterprise is controlled by a member of such Hindu undivided family or by a relative of a member of such Hindu undivided family or jointly by such member and his relative; or

(l) where one enterprise is a firm, association of persons or body of individuals, the other enterprise holds not less than ten per cent interest in such firm, association of persons or body of individuals; or

(m) there exists between the two enterprises, any relationship of mutual interest, as may be prescribed.'

44. Keeping in view the aforesaid provision of the IT Act, 1961, and even taking into consideration the objections of the A.O., assessee's explanations and relevant facts in this regard, the

objections of the A.O. as reproduced above are that Shri Gali Janardhan Reddy, one of the directors of the assessee company was appointed a director of (GLATIPL) also on 19.12.2007 and on 21.12.2007, the entire share capital of (GLATIPL) being one equity share was transferred to (GJRHIL) in which, Shri Gali Janardhan Reddy is one of the directors. As per the objections of the A.O., the entire share capital of (GLATIPL) is held by (GJRHIL) on 21.12.2007 and on that date, Shri Gali Janardhan Reddy, one of the directors of the assessee company is director of (GJRHIL) also being a company holding entire share capital of (GLATIPL). Therefore, looking into the result, whether these facts make (GLATIPL) an AE of the assessee company later but before that, we first examine the facts in the present year and see whether during the period from 01.04.2008 to 31.03.2009 also, the facts were same or not because if the facts are not same in this later period, then even if it is held that (GLATIPL) is AE of the assessee company on 21.12.2007, it will not help the revenue in the present year.

45. Perusal of the provisions of sub section (2) of section 92A, for the purpose of Sub Section (1) of section 92A, at least one condition out of 13 conditions prescribed in sub section (2) as per clause (a) to (m) has to be satisfied. Since, the only one share

of GLATIPL was held by ILSGL and the assessee company or its directors are not holding any share in that company and none of the directors of the assessee company is a director of ILSGL, none of the conditions specified in sub section 2 of section 92A is being satisfied. On a specific query put to learned DR of the revenue in this regard by the ITAT, in reply, he stated that the condition specified in clause (j) of sub section (2) is satisfied in the present case. But ITAT found that even this clause is not applicable because there is no common director or common shareholding in the case of the Assessee Company and ILSGL. Admittedly, there is a common director of the assessee company and GLATIPL i.e. Shri Gali Janardhan Reddy but in view of this fact that the entire share capital being one share of GLATIPL is held by ILSGL and there is no link or relationship between the assessee company and ILSGL or between the directors of the assessee company and directors of ILSGL, it cannot be said that GLATIPL is controlled by Shri Gali Janardhan Reddy merely because he is a director of GLATIPL without any shareholding in that company or without any relationship with the directors of holding company of GLATIPL i.e. ILSGL or with the director of ILSGL.

46. In the light of the facts, ITAT examined the applicability of the tribunal order rendered in the case of Page Industries

Limited vs. DCIT (Supra). Para No. 11, 11.1 and 11.2 of this tribunal order are relevant and hence, these paras are reproduced herein below:-

> *"11. It is the case of the AO that the assessee-company and JII are AEs as they fall within the parameters of clause (g) of sub- sec. (2) of sec.92A of the Act. It is not the case of the AO that the present case falls within parameters of sub-section (1) of sec.92A of the Act. In this background, we are called upon to adjudicate whether both the entities are AEs within the meaning of sec.92A of the Act. The definition of the term 'AE is divided into two sub-sections (1) and (2). Sub-sec. (1) contains (definition of AE is parameters of management control or capital of that enterprise. Sub-sec. (2) contains a deeming provision and also enumerates circumstances when the enterprise can be deemed to be AE. The opening words of sub-sec. (2) are amended by Finance Act, 2002 w.e.f. 1/4/2002. The amendment was explained as follows by the Memorandum of Finance Bill 2002: (means)*
>
> *"It is proposed to amend sub-sec. (2) of the said section to clarify that the mere fact of participation of one enterprise in the management or control or capital of the other enterprise or the participation of one or more persons in the management or control or capital of both the enterprises shall not make them*

associated enterprise unless the criteria specified in sub-sec (2) are fulfilled.""

The resultant of the amendment is thus explained that unless the requirements of sub-sec. (2) are fulfilled, the sub- section (1) cannot be applied at all. This implies that in order to constitute a relationship of an AE, the parameters laid down in both sub- sections (1) and (2) should be fulfilled. If we were to hold that there is a relationship of AE, once the requirements of sub-se (2) are fulfilled, then the provisions of sub-sec. (1) renders otiose or superfluous. Now, it is well settled canon interpretation of statutes that while interpreting the taxing statute, construction shall not be adopted which renders particular provision otiose When interpreting a provision in a taxing statute, a construction, which would preserve the purpose of the provision, must be adopted.

11.1 As observed in State of Tamil Nadu v. M.K. Kandaswami [(1975) 36 STC 191, 198 (SC)], in interpreting a provision, a construction which would defeat its purpose and, in effect, obliterate it from the statute book should be eschewed. If more than one construction is possible, that which preserves its workability and efficacy is to be preferred to the one which would render it otiose or sterile. In that view of the matter, courts should not adopt construction which would upset or even impair the purpose in

introducing a particular provision in the statute [Calcutta Jute Manufacturing Co. v. CTO, (1997) 106 STC 433, 439 (SC)]. Therefore, following this principle, we hold that since the parameters laid down in sub-section (1) are not fulfilled, there is no relationship of AE between assessee-company and JII and therefore, the provisions of chapter X of the Act have no application.

11.2 In the result, the transfer pricing adjustment made by the TPO is not valid in law."

47. In the facts of the case, the ITAT order is squarely applicable because as per the revenue, only because one of the directors of the assessee company and of GLATIPL is common, section 92CA is applicable but it was held by the tribunal in this case that in order to constitute relationship of an AE, the parameters laid down in both sub sections (1) and (2) should be fulfilled. As per the explanation, amendment carried out in sub section (2) of section 92A by Finance Act, 2002 w.e.f. 01.04.2002, as reproduced by the tribunal in Para 11 above, mere participation of one or more persons in the management or control or capital of both the enterprises shall not make them AE unless the criteria specified in sub section (2) are fulfilled and even as per the learned DR of the revenue, clause (j) of sub section (2) of section 92A is attracted but this claim is also devoid of merit because he

could only point out that one director of the assessee company and of GLATIPL is common but this fact alone does not establish that the said common director is controlling GLATIPL when the said company is a subsidiary of ILSGL and the assessee company or its directors are not having any relationship with ILSGL or director of ILSGL. Hence, by respectfully following the Tribunal's order, that since the parameters laid down in sub section (1) and (2) of section 92A are not fulfilled, there is no relationship of AE between the Assessee Company and GLATIPL and therefore, the provisions of Chapter X of the I.T. Act has no application.

48. The grounds relating to Corporate Tax issue as per Grounds No. 6, 9 and 10, the learned AR of the assessee submitted that three issues are involved in this ground i.e. 1) Disallowance of Transportation charges, 2) Disallowance of Expenses under Explanation to section 37 (1) and 3) Addition made on account of sale of Land. He submitted that all these three issues are covered in favor of the assessee by the tribunal order rendered in assessee's own case for A. Y. 2010-11 in ITA No. 653/Bang/2015 dated 29.07.2016 and accordingly, in the present year also, the disallowance should be deleted because facts are same. Thereafter, he submitted that Para 14 and 15 of tribunal's order are relevant in respect of Disallowance of

Expenses under Explanation to section 37 (1), which was deleted by the tribunal in that year. Regarding the third issue i.e. Addition made on account of sale of Land, he submitted that in Para 21 of that tribunal order, the tribunal held that gross amount of sale proceeds cannot be taxed and the matter was restored back to the AO for a fresh decision with a direction that deduction should be allowed regarding cost of acquisition, if any incurred by the assessee. He submitted that all these three issues may be decided in the present year also on similar lines. Learned DR of the revenue supported the orders of the authorities below but he could not point out any difference in facts.

49. On consideration of the rival submissions and first of all, Paragraph Nos. 8, 14, 15 and 21 of the tribunal order are extracted below for the sake of reference. The same reads as under:-

> *"8. In the next judgment of the Hon'ble Delhi High Court rendered in the case of CIT Vs Pradeep Kumar Gupta (Supra) also, it was held by the Hon'ble Delhi High Court that it was mandatory for the revenue to produce A for cross examination by the assessee on the specific demand in this regard and thereafter, it was held that the violation of the revenue to produce A for cross examination by the*

assessee assumes fatal consequences. Hence, as per these two judgments, for this reason alone that the revenue has not made available these persons for cross examination of the assessee despite such request by the assessee before the AO, these statements cannot be used against the assessee and without taking help from these statements of the transporters, the disallowance made by the AO out of transportation charges is not sustainable as per these two judgments relied upon by the Id. AR of the assessee and no contradictory judgment of the Hon'ble jurisdictional High Court or Apex Court or of any other High Courts could be made available by the learned DR of the revenue and therefore, respectfully following these two judgments of the Hon'ble Delhi High Court, ITAT held that in the facts of the present case, these disallowance out of transportation allowance is not sustainable. Ground 0.2 of the assessee is allowed.

14. In the present case, we are not concerned as to whether he assessee is engaged in illegal mining or not but in the present case, because this is not the case of the AO that any deduction has been claimed by the assessee for facilitating to carry out the illegal mining alleged by the AO or for any penalty in respect of such illegal mining because the disallowance has been made by the AO to the extent of 40% of the total mining expenses and since 60% of the expenses are allowed by the AO, the remaining 40% of the

same expenses cannot be considered as expenses for the purpose of offense or unlawful purposes. Hence, this disallowance is not justified.

15. Now we examine the applicability of various judgments cited by the Id. AR of the assessee. The first judgment cited by him is of the Hon'ble Apex Court rendered in the case of CIT Vs Piara Singh (Supra). In this case, it was held that loss arising from confiscation by Customs authorities is deductible from the income derived from smuggling activities. Hence, expenses incurred in course of an illegal business is allowable for computing income from such business but this judgment is prior to introduction of Explanation -1 to sec.37 of the IT Act and therefore this judgment is not relevant in respect of those expenses which are hit by this explanation and in our considered opinion, the normal mining expenses are not hit by this explanation and hence, this issue is covered in favor of the assessee by this judgment since the explanation to section 37 (1) is not attracted in the facts of the present case. Similarly, the other two judgments of which reliance has been placed by the ld. AR of the assessee are also for the period prior to introduction of Explanation-1 to sec.37 (1) of the Act, 1961 been and therefore, as per these judgments also, this issue is covered in favor of the assessee since the explanation to section 37 (1) is not attracted in the facts of the present case. In view of our above discussion, ground no.3 of the assessee is allowed.

21. We have heard the rival submissions. We find force in the submission of the ld. AR of the assessee because we find that the amount of Rs.86,60,079/- for which addition has been by the AO is the amount of assessee's share in the sale consideration for sale of land and hence, even if it is held that income on this account is to be taxed in the present year, the same cannot be to the extent of gross amount of sale proceeds and income has to be assessed after allowing deduction regarding cost of acquisition, if any incurred by the assessee but since there is no discussion on this aspect in the orders of the authorities below, we feel it proper that this issue should be restored back to the file of the AO for a fresh decision in the light of the above discussion after providing adequate opportunity of being heard to the assessee. We order accordingly. This ground is partly allowed for statistical purposes."

50. With reference to the aforesaid reasons, the ITAT held that the learned DR of the revenue could not point out any difference in facts and hence we find no reason to take a contrary view in the present year. Hence in line with the tribunal order in A.Y. 2010-11 in assessee's own case, we delete first two disallowances i.e. 1) Disallowance of Transportation charges, and 2) Disallowance of Expenses under Explanation to section 37 (1) and in respect of third issue i.e. Addition made on account of sale

of Land, we set aside the order of CIT (A) on that issue and restore the matter to A.O. for a fresh decision with the same directions as were given by the tribunal in A. Y. 2010-11. Ground No. 6 is allowed in this manner and held that the grounds raised by the assessee do not require any separate adjudication and the appeal of the assessee was allowed. The same has been challenged in this appeal by urging various grounds and also raising substantial questions of law.

51. It is relevant to refer to the assessment order dated 31.12.2013 under Section 143(3) read with Section 144C(13) of the IT Act, for the assessment year 2009-10, wherein the export sale to GLA trading international Pte Ltd., claim of bogus transportation expenses of iron ore, illegal mining, personal expenses of directors of the assessee company, sale of land, bogus of accommodation entry has been taken for consideration and the Central Bureau of Investigation, Hyderabad, has conducted investigations into the illegal mining activity of the assessee Company and has filed a charge sheet in RC 17(A)/2009. It was found during investigations that the assessee in its lease area of 68.50 Ha. in AGK Mines had shifted permanent boundary pillars of station No.8 to Western direction about 40 mtrs. and constructed a permanent pillar in order to encroach unallotted

area for illegal mining. It was also found that the permanent pillar of station No. 10 was removed. The assessee company has formed illegal roads for transportation of ore to join station No.7 instead of to station No.8. They have also formed illegal roads near station No.1 in the reserved forest area outside the lease area, over a distance of 2.95 kms. During investigations, it was also found that the assessee company has extracted iron ore illegally by encroaching upon the adjacent forest lands and adjacent mines of other leaseholders. These are the things which are considered by the ITAT and the same has been challenged under this appeal by the appellant/revenue.

52. It is the case of the revenue that protective assessments have been passed in the hands of the transporters, wherein it is quantified that no transportation has taken place. Therefore, it is deemed that the assessee has not transported the iron ore during the current assessment year. In order to substantiate this claim, the revenue has produced certain orders dated 28.03.2012, 12.07.2012 & 14.12.2012. Admittedly the assessment order passed by the assessing officer, Ananthapura is provisional/protective assessment and this order is passed without authority of law as contemplated under Article 265 of the Constitution of India, which stipulates that no tax shall be levied

except authority of law. Whereas, the learned counsel for the respondent/assessee contended that the provisional/protective assessment order passed by the assessing officer, Ananthapura which was confirmed by the Appellate Commissioner is without jurisdiction and has no legs to stand and cannot be enforced. Further, it is without authority of law as contemplated under Article 265 of the Constitution of India. This contention is made by the learned counsel for the respondent/assessee for consideration and for dismissal of the appeal as being devoid merits.

53. It is further contended that the respondent/assessee has filed return of income on 30th September 2008, the assessing officer passed an order of assessment on 31.12.2009 under Section 143(3) of the I.T. Act. He is competent to transfer all international transactions without referring the matter to the Transfer Pricing Officer. Therefore, the Commissioner exercised jurisdiction under Section 265 of the I.T. Act and directed the assessing officer to transfer the file to the transfer pricing officer in accordance with law. This order of the commissioner was challenged by the Tribunal and the Tribunal proceeded to hold that Section 92(c)(a)(4) of the I.T. act, which came into effect on 01.06.2007 would be applicable only for the assessment year 2009-10 and not for the current assessment year 2008-09 by

relying several judgments and an order dated 29.07.2006 and held that the exercise of jurisdiction under Section 263 of the I.T. Act was erroneous. On this premise, allowed the appeal of the assessee.

54. The subject matter of this appeal is that the assessing officer was bound to refer the matter to the Transfer Pricing Officer. Therefore, the order passed by the Commissioner was upheld. Consequently, both the orders of the Tribunal were set aside. Further, the subject of this appeal for the assessment year 2008-09 is whether the assessing officer can *suo motu* decide the issue regarding transfer pricing that the matter has to be referred to the Transfer Pricing Officer; the assessment year 2008-09 has absolutely no connection to the subsequent assessment year 2009-10. The revenue cannot trace any reliance on the order passed for the assessment year 2008-09. However, the subject matter of the controversy was in respect of jurisdiction. Whereas the question on merits whether intervention of the Transfer Pricing Officer is correct or not has not been addressed. Therefore, for the assessment year 2008-09, the proceedings are incomplete. As this contention is also made by the learned counsel for the respondent/assessee, even different provisions of Section 37(1) of

the I.T. Act made declaration of Rs.3/- crores to cover up the expenses which calls for disallowances.

55. However, keeping in view the contention made by the learned Standing Counsel Shri Y.V. Raviraj for the appellant / Revenue and so also the learned counsel Shri Mayank Jain for the respondent / Assessee, at the cost of repetition, it is relevant to state that the counsel for the respondent / Assessee had relied the judgment of *THE COMMISSIONER OF INCOME TAX AND ORS. Vs. MANJUNATHA COTTON AND GINNING FACTORY AND ORS. (MANU / KA/ 2416/2012),* wherein a Co-ordinate Bench of this Court has extensively addressed the issues relating to the provisions of the IT Act, 1961 and more particularly, has addressed the issues relating to Section 271(1)(c) of the IT Act, 1961, by referring to so many reliances.

56. Similarly, another Co-ordinate Bench of this Court in the case of *PR. COMMISSIONER OF INCOME TAX & ANR vs. M/S. ENNOBLE CONSTRUCTION (I.T.A.No.383 OF 2016) dated 20.07.2022,* has addressed the issues relating to the provisions of Section 260A of the IT Act, 1961 referring to various reliances to arrive at a conclusion relating to the response to the substantial question of law in the given facts and circumstances of the case and so also relating to the concept of Section 37 of the IT Act,

1961 as well as the burden of proof and impossibility of its discharge and so also relating to Legal maxim '*Lex Non Cogit Ad Impossibilia* (Co.Litt. 231 b.) – The law does not compel a man to do that which he cannot possibly perform…"

57. These are all the issues that have been addressed by the Co-ordinate Benches of this Court. The aforesaid reliances are squarely applicable to the present case on hand in the given facts and circumstances of the case. Therefore, it is said that the various contentions made by the counsel for the appellant / Revenue do not hold any substance to question the impugned order passed by the Income Tax Appellate Tribunal.

58. At a cursory glance of the impugned order passed by the ITAT, it is seen that the assessee's authorized representative, during the course of hearing on 27.02.2013 has stated that the land is kept as stock in trade and that the assessee's share of the sale proceeds has been kept as advance. The balance sheet as at the end of the year when the sale transaction has been completed by way of registration of sale deed that the assessee's action treating the sale proceeds as advance as incorrect. Therefore the sale proceeds amounting to Rs.3,09,74,266/- is brought to tax as the assessee's business income. As per the golden rule of interpretation two views are possible and the view favorable to

the assessee has to be adopted. Tax can be imposed only if a case falls within the words of the statute and it does not avail to said that it comes within the spirit of statutes Intention of the legislature to be found in the words of the statute and any omission cannot be supplied vide ***Padmanatha Rao vs. CIT*** reported in 255 ITR 147 (SC). One has only to look at the words of the statute and nothing should be implied so as to supply any assumed deficiency, but a deeming provision should be strictly construed and given the settled legal position, the TPO gets no jurisdiction at all since he has unable to show under which specific provision of law there is an associated enterprise as defined by Section 92A of the I.T. Act. It is stated that the TPO is unable to show which specific clause under Section 92A(1) or 92A(2) is attracted in the case of the assessee, and that the only ground taken by the TPO in support is that M/s GLA Trading Intl. Pvt. Ltd., (GLA) is an AE of the assessee that the transactions are hit by Section 92B(2). These are all the observations made in the impugned order and arrival of conclusion to determine the arms length price (ALP) has to be selected based upon the availability of the data application of method as well as the degree of comparability between the international transactions. Even the company had similar contemporaneous transactions with other

unrelated parties as well price date of such uncontrolled transactions *(INTERNATIONAL CUP*) can be applied to determine the arms length nature of your international transaction with your AE. Iron ore being a widely traded commodity, data relating to the same are available in public domain. These are all the observations that have been made to the arrival of conclusion keeping in view the provision of Section 144(c)(5) of the I.T. Act. Even the order passed by the Commissioner of Income Tax, Director of Income Tax (International Taxation & Transfer Pricing), Ahmedabad and Director of Income Tax (International Taxation & Transfer Pricing), Kolkata communicated to the respondent/assessee namely M/s. Obulapuram Mining Company Pvt. Ltd., therefore, this appeal even raises substantial questions of law based upon the grounds as urged but the same has been considered by the ITAT extensively. Therefore, keeping in view of the ratio of reliance which facilitated by the learned counsel for the respondent/assessee and even the reliance placed by the learned Standing counsel namely Sri.Y.V.Raviraj for appellant/ revenue but keeping in view the contention made by the learned counsel of the respondent/assessee are concerned, it is said that the appeal preferred by the appellant/ revenue by urging various

grounds and even facilitated various reliance do not hold any force in it, which calls for any interference.

59. In terms of the aforesaid reasons and findings as opined, the appeal deserves to be rejected as being devoid of any merits and accordingly the substantial questions of law raised in this appeal are answered.

ORDER

The appeal preferred by the appellant/revenue is hereby rejected. Consequently, the order passed by the ITAT, Bengaluru Bench 'C' in IT(TP)A No.182(Bang)2014, dated 20.10.2016 is hereby confirmed.

Before parting with this judgment, this court places on record its deep appreciation for the able research and assistance rendered by its Research Assistants-cum-Law Clerk, Mr.Pranav.K.B.

Sd/-
JUDGE

Sd/-
JUDGE

Vnp & Rsh