IN THE HIGH COURT OF MADHYA PRADESH

AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE SURESH KUMAR KAIT,

CHIEF JUSTICE

&

HON'BLE SHRI JUSTICE VIVEK JAIN

MISC. APPEAL (I.T.) No. 79 of 2004

COMMISSIONER OF INCOME TAX,JABALPUR

Versus

NORTHERN COAL FILEDS LTD.

WITH

MISC. APPEAL (I.T.) No. 80 of 2004

COMMISSIONER OF INCOME TAX, JBP.

Versus

NORTHERN COAL FIELDSS LTD.

INCOME TAX APPEAL No. 71 of 2014

COMMISSIONER OF INCOME TAX II

Versus

NORTHERN COALFIELDS LTD

INCOME TAX APPEAL No. 72 of 2014

COMMISSIONER OF INCOME TAX II

Versus

NORTHERN COALFIELDS LTD.

INCOME TAX APPEAL No. 70 of 2015

PR. COMMISSIONER OF INCOME TAX II JABALPUR

Versus

NORTHERN COAL FIELDS LIMITED

INCOME TAX APPEAL No. 74 of 2015

PR. INCOMISSIONER OF INCOME TAX II

Versus

NORTHERN COAL FIELDS LIMITED

INCOME TAX APPEAL No. 75 of 2015

PR. COMMISSIONER OF INCOME TAX II

Versus

NORTHERN COAL FIELDS LTD. SINGRAULI

INCOME TAX APPEAL No. 76 of 2015

PR. COMMISSIONER OF INCOME TAX II

Versus

NORTHERN COAL FIELDS LTD.

INCOME TAX APPEAL No. 77 of 2015

PR. COMMISSIONER OF INCOME TAX II

Versus

NORTHERN COAL FIELDS LTD

INCOME TAX APPEAL No. 78 of 2015

PR. COMMISSIONER OF INCOME TAX II

Versus

NORTHERN COAL FIELDS LTD.

INCOME TAX APPEAL No. 79 of 2015

PR. COMMISSIONER OF INCOME TAX II

Versus

NORTHERN COAL FIELDS LTD

INCOME TAX APPEAL No. 32 of 2017

PRINCIPAL COMMISSIONER OF INCOME TAX II

Versus

NORTHERN COALFIELDS LTD.

WRIT PETITION No. 5424 of 2020

NORTHERN COAL FIELDS LTD.

Versus

DEPUTY COMMISSIONER OF INCOMES

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Appearance:

Shri Siddharth Sharma - Advocate with Shri Harpreet Singh Gupta - Advocate, Shri Shantanu Sharma - Advocate, Shri Shubhashish Shrivastava - Advocate, Shri Shubham Manchani, Shri Devendra Prajapati - Advocate and Shri Satyam Shukla - Advocate for the Income Tax Department - Appellant.

Shri C.S. Agrawal - Sr. Advocate with Shri Abhijeet Shrivastava and Shri Amit Shrivastava - Advocate for the respondent-Northern Coal Fields.

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J U D G M E NT

(Reserved on : 20.02.2025)

(Pronounced on : 15.04.2025)

Per*: *Hon'ble Shri Justice Vivek Jain.

The present batch of appeals is under Section 260(A) of Income Tax Act 1961. The appeals have been filed on different grounds and different substantial questions law arise in these matters. However, there are certain substantial questions of law which arise commonly in many of the appeals and some other substantial questions of law arise in different appeals on different issues.

2. MAIT No. 79/2004 has been admitted on 13.04.2005 and substantial questions of law have been framed on that date which were thereafter reframed on 18.01.2016. By the same common order substantial questions of law were framed in ITA No. 71/2014. The operative part of the order dated 18.01.2016 is as under :-

> ***MAIT No.79/2004:***
>
> *This appeal is already admitted. Must proceed for final hearing under appropriate category as per its turn.*
>
> ***MAIT No.80/2004:***
>
> *Counsel for the appellant submits that this appeal be heard along with MAIT No.79/2004.*
>
> *Ordered accordingly.*
>
> ***ITA No.71/2014:***
>
> *As the question posed in this appeal, for which the appeal deserves to be admitted, is overlapping with the question already formulated in MAIT No.79/2004 and MAIT No.80/2004 which have been ordered to be heard analogously, accordingly, the appeal deserves to be*

admitted on the question formulated at serial no.1, which reads thus :-

"1. Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in holding the OBR expenses of Rs.202996.86 lakhs as revenue in nature whereas the removable matter are further used for that purposes?"

As this question will have to be analogously heard along with other two appeals, the other substantial questions of law, which have been raised in this appeal, can also be considered, which read thus:-

"2. Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the expenses of Rs.722.67 lakhs towards education wholly as business expenditure?

3. Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in treating the community development expenditure of Rs.441.33 lakhs as business expenditure and thereby deleting the addition made by the AO?

4 Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in holding the expenses of Rs.138.94 lakhs towards social overhead and other miscellaneous welfare as business expenditure?

5. Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in treating the expenses of Rs.5148.57 lakhs being other Development expenditure of expansion/continuation of existing business development mines as revenue expenditure?"

Accordingly, this appeal is ***admitted****.*

To be heard along with MAIT ***No.79/2004 and MAIT No.80/2004****.*

ITA Nos.72/2014, 70/2015, 74/2015, 75/2015, 76/2015, 77/2015, 78/2015, 79/2015:

Counsel for the assessee submits that there are other eight appeals which are pending in this Court

being ITA Nos.72/2014, 70/2015, 74/2015, 75/2015, 76/2015, 77/2015, 78/2015 & 79/2015.

*Post those appeals for admission on **22nd February, 2016.** Pendency of these appeals, however, will not delay hearing of other appeals which are pending since more than 10 years and are directed to proceed for final hearing under that priority category as well."*

3. So far as ITA No.72/2014 is concerned, the following substantial question of law has been framed on 14.01.2015:

"1. Whether on the facts and in the circumstances of the case, the ITAT was justified in law in confirming the order of C.I.T(A) holding that the assessee is entitled to additional depreciation in respect of machineries used in mining activities at Nigahi Project, ignoring that the assessee is engaged in extraction of coal, not amounting to manufacturing as stipulated in the Act for allowance of additional depreciation?"

4. In ITA No. 32/2017 the following substantial questions of law have been framed on 31.10.2017 :-

"a. Whether on the facts and in the circumstances of the case, the Hon'ble Tribunal was justified in law in deleting the addition of Rs.2466.34/- Cr. On account of disallowance of Overburden Removal Expenses with placed reliance on the observation of the Hon'ble Supreme Court in the case of Radhasoami Satsang Vs. CIT[1992] 193 ITR 321 (SC) in support of its view that there is not good reason to disturb the well settled factual aspect which permeates from year and year without appreciating the fact that resjudicata does not apply to income tax proceedings?

b. Whether on the facts and in the circumstances of the case, the Hon'ble Tribunal was justified in law in holding that Section 35E would not have any application on the facts of the case for the reasons that commercial production has begun in all the mines and deduction under Section 37(1)

could not be declined without giving cognizance to the decision of Hon'ble Supreme Court in the case of Pioneer Minerals Vs. CIT (313 ITR 366-SC). The Hon'ble Supreme Court in para-7 of the said order held that if any expense falls within both section 37 and 35E then the latter will apply and not Section 37. The Hon'ble ITAT has ruled the reverse in the relevant year ?

c. Whether the Hon'ble Tribunal was justified in law in deleting the disallowance of overburden removal expenses without appreciating the fact that the accounting policies are violative of notified accounting policies?"

5. MAIT 80/2004 was admitted on the following substantial questions of law, way back on 13.4.2005 by passing the order in following terms :-

"Petition is admitted for hearing as the following substantial questions of law arise for consideration :-

1. Whether on the facts and in the circumstances of the case the learned Tribunal was right in law in holding thatOver Burden Removal is a revenue expenditure ?

2. Whether on the facts and in the circumstances of the case the learned Tribunal was right in law in holding that education expenses are an allowable deduction ?

3. Whether on the facts and in the circumstances of the case the learned Tribunal was right in law in allowing education expenses in absence of details of the expenses either before the Assessing Officer or before the CIT.

4. Whether on the facts and in the circumstances of the case the learned Tribunal was right in law in holding that Community Development Expenditure was allowable business expenditure" ?

5. Whether on the facts and in the circumstances of the case the learned Tribunal was right in law in holding that a sum of Rs.2.44 lakhs out of the expenditure of 3.13 Lakhs stands disallowed on the part of Assessing Officer then any direction given by the Commissioner of Income Tax on this amount would be of no avail and the learned Tribunal, therefore left it on that".

6. Whether on the facts and in the circumstances of the case the learned Tribunal was right in law in giving their finding on transit camp expenses without even considering the judgment in the case of CIT Vs. Panna Knitting Industries reported in 253 ITR 656".

Shri Shrivastava, Advocate takes notice for the Respondent."

6. So far as remaining appeals i.e. ITA Nos.70/2015, 74/2015, 75/2015, 76/2015, 77/2015, 78/2015 and 79/2015 are concerned, substantial questions of law have not been framed specifically in the aforesaid appeals. However, these appeals involve the questions of law which are already involved in the connected appeals wherein questions of law have been framed.

7. A preliminary objection has been raised by the learned counsel for the assessee at the outset that in many of the appeals substantial questions of law have not been framed and therefore, this Court should not entertain the said appeals in absence of framing of substantial questions of law and it has to be inferred that once substantial questions of law have not been framed, therefore the appeals do not involve any substantial question of law and therefore, these appeals should be dismissed at the threshold.

8. By order dated 22.2.2016 passed in these cases, it was ordered by this Court that questions of law have been framed and the appeals are to be heard finally. The questions of law actually have been framed in five appeals as noted above. However, in all these appeals, it was agreed by counsel for the rival parties that the appeals involve common question of law and therefore, they may be heard together. The following common order was passed in MAIT No. 79/2004, I.T.A. No. 71/2014, I.T.A. No. 72/2014, I.T.A. No. 70/2015, I.T.A. No. 74/2015, I.T.A. No. 75/2015, I.T.A. No. 76/2015, I.T.A. No. 77/2015, I.T.A. No. 78/2015 and I.T.A. No. 79/2015 :-

"MAIT No. 79/04, I.T.A. No. 71/14, I.T.A. No. 72/14, I.T.A. No. 70/15, I.T.A. No. 74/15, I.T.A. No. 75/15, I.T.A. No. 76/15, I.T.A. No. 77/15, I.T.A. No. 78/15and I.T.A. No. 79/15 -

22/02/16

All these appeals have been admitted for hearing and questions of law have been framed. There is already an order on 18/01/16 wherein a Bench of this Court has already directed that the appeal must proceed for final hearing under the appropriate category as per its turn. In view of the aforesaid, office to take steps for listing the appeals for final hearing in accordance with the order passed in MAIT No. 79/04 on 18/01/16."

9. We note that looking to the various previous orders passed by this Court at the interlocutory stage while hearing the appeals, it was not in dispute between the parties and the parties were *ad idem* that substantial questions of law have already been framed and therefore, the matter be posted for hearing. Importantly the orders quoted above are relevant here and from perusal of these orders, it is evident that this Court had come to a conclusion that common questions of law are involved in the present matters and therefore, this Court ordered the cases to be posted for hearing. Non-formulation of separate questions of law in some of the matters in the bunch of connected cases wherein admittedly and undisputedly common questions are arising and the questions as arising in the MAIT Nos.79/2004, 80/2004, ITA No.71/2014, ITA No. 72/2014 and ITA No. 32/2017 in which specific substantial questions of law have been framed, arise in all these matters and only difference is that some of the questions arise in some of the matters and some other questions arise in some of the matters but none of the matters in which questions of law have not been specifically framed involve any such issue which is not involved in the other matters in which substantial questions of law have already been

framed. In view of this position, reliance on the judgement of the Hon'ble Supreme Court in the case of **Bikram Singh Vs. Principal Commissioner of Income Tax, reported in 2023 SCC Online SC 1320**, is utterly misplaced. In the said case, substantial questions of law were framed and at the time of preparation of judgement, the High Court had framed such questions. Therefore, it was the case of the assessee before the Supreme Court that there was no notice to him with regard to the question of law raised in the appeal. In these circumstances, it was held that the substantial questions of law have not been framed and the matter was remitted to the High Court.

10. However, in these cases, this Court at interlocutory stage time and again has noted that substantial questions of law have been framed and the appeals be set out of for hearing and these orders were passed in presence of learned counsel for the assessee. Therefore, at this stage, the assessee cannot take benefit or leverage of the mere fact that separately substantial questions of law have not been framed in each of the appeals when none of the appeals in which substantial questions of law have not been framed involves any issue or question which is not already covered in the substantial questions of law already framed in connected appeals in which such substantial questions have already been framed. Therefore, the contention of learned counsel for the assessee is hyper technical in nature and is hereby discarded. This Court will now proceed to answer the substantial questions of law which are involved in this batch of matters and the fate of the appeals will be governed by the answers which will be given by this Court in this order.

11. Learned counsel for the assessee had further argued that in terms of Section 260-A (4), the respondent of the appeal can argue at the time of

hearing of the appeal that the case does not involve such substantial questions of law which has been framed and also that the said question is not a substantial question of law. We are afraid that this objection cannot be considered as a preliminary objection and it will be considered at the time of taking up the said questions for adjudication that whether the case involves such question or not, or whether the said question is a (substantial) question of law, or is it a question of facts. Therefore, this Court proceeds to adjudicate the appeals on the questions involved in the appeals.

12. All these appeals are filed by Revenue / Income Tax Department against a single assessee i.e. Northern Coal Fields Ltd. which is running open-cast coal mines in District Singrauli (M.P.). The said assessee has been taking benefits of different expenditures from its balance-sheets by deducting the said expenses from its profits and the disputes in the different appeals relate to different assessment years on account of various deductions claimed by the assessee/Northern Coal Fields Ltd. which is a Mini Ratna Enterprise of Government of India towards various expenditures incurred by them in the matter of development of mines, extraction of coal and other expenses and overheads involved in the said process of extraction of coal. In some of the matters, consequent to decision by the Tribunal which has given rise to MAIT No.79/2004, the assessee had filed a rectification application and the rectification was allowed by the Tribunal on the basis of the decision made in the appeal which had given rise to MAIT No.79/2004. The facts in these cases are on slightly different footings from each other but since the assessee is common and the issues of law involved in each of the assessment years revolve on identical facts and the difference only being there in the matter of assessment year, therefore, these appeals are being decided by this common order.

13. From a perusal of the substantial questions of law framed in the five appeals where the same are specifically framed, questions arise in the matter of claiming deductions on account of machinery upgradation, social development, community development expenses incurred, education expenses, transit camp, overburden removal, etc.

14. As per Section 10(2)(xv) of the Income Tax Act 1922, the assessee was entitled to certain deductions from its assessed income which are in the nature of revenue expenses and the questions that arise in these matters are as to permissibility of deductions claimed under Section 37 of the Income Tax Act 1961, that corresponds to Section 10 (2)(xv) of Income Tax Act 1961 (for short hereinafter referred to as "Act of 1961").

15. The questions that arise for consideration of deductions claimable under Section 35-E or under Section 37 of Act of 1961 are in the matter of deductions towards the following heads on which the substantial questions of law have been framed in these appeals and quoted above. The deductions claimed, therefore, can be broadly categorized into following:-

(a) Overburden removal expenses which is the main thrust of argument of the rival parties.

(b) Expenses incurred towards education.

(c) Expenses towards community development.

(d) Expenses towards transit camp.

(e) Depreciation in respect of machinery.

The appeals in which substantial questions of law have not been framed separately do involve these issues in the following manner:-

ITA No.70/2015-permissibility of overburden removal expenses in terms of Section under Section 35-E /37 of Act of 1961.

In **ITA No.74/2015** the issues involve education expenses and welfare expenses.

In **ITA No.75/2018** the issues involve overburden removal expenses in terms of Section 35-E and Section 37 of Act of 1961.

In **ITA No.76/2015** the issues involve overburden removal expenses and deductions towards expenditure incurred on lease rent.

In **ITA No.77/2015** the issues of education expenses, welfare expenses and other development expenses are involved.

In **ITA No.78/2015** the issues involved are overburden removal expenses being claimable for deduction under Section 35-E /37 of Act of 1961.

In **ITA No.79/2015** the question of overburden removal expenses is involved.

We will deal with the deductions claimed item-wise, so that these answers would cover all the questions framed and arising in these appeals, in the following manner :-

Education Expenses:-

16. In the matter of deduction of education expenses it has been held by the learned Tribunal that there were certain institutions within the coal mines area which were providing education facilities to the children of employees of assessee and running expenses of these institutions were incurred by the assessee and the expenditure therefore, was in the nature of

welfare expenses of the employees and allowable under Section 37(1) of the Act of 1961. The Commissioner held that the assessing officer accepted the version of assessee without applying his mind and without caring to obtain particulars of institutions and also particulars of the students who were receiving such education and also whether the expenditure claimed was capital in nature or amounted to charity / donation etc.

17. The case of the assessee was that there were three schools namely Kendriya Vidyalaya, Delhi Public School and DAV Public School operational during the relevant period and are run by societies operating pan-India, and as the mining operations were being carried out in remote areas, the children of mine workers did not have access to proper education facilities and the assessee was therefore, obliged to make arrangements with various educational institutions in the interest of its own business. Since it was not in a position to maintain and run its own institutions, therefore, it had made arrangements with the said authorities running the aforesaid three institutions who set up the institutions / schools with arrangements that part of expenditure was to be incurred by the assessee in return of which the children of employees of assessee got the educational facilities and such arrangement was in furtherance of agreements entered into by the assessee with the Unions.

18. The Tribunal noted that the assessee had been incurring expenditure on running of the institutions by three bodies which are running pan India schools i.e. Kendriya Vidyalaya Sangathan, DAV School Society and DPS Society and also that the liability to discharge the obligation towards education fell on the assessee in terms of National Coal Wage Agreement entered into with the employee union and the assessee which was enforceable under law both under the Indian Contract Act as well as

Industrial Disputes Act and also that it was not a voluntary expenditure incurred by the assessee but was incurred to discharge its obligation in terms with National Coal Wage Agreement which bound the assessee statutorily to honour the said agreement arrived at with the union and therefore, the expenses incurred towards Education amounted to revenue expenses in running of the business of the assessee.

19. We find that the aforesaid logic and justification given by the Tribunal does not suffer from any infirmity or illegality in view of the obligations upon the assessee in terms of National Coal Wage Agreements, and therefore, the expenses are in the nature of business expenses. Therefore, this issue is answered in favour of the assessee and against the Revenue and the order of the Tribunal is upheld whereby deduction towards education expenses has been allowed to the assessee.

Community Development Expenses :-

20. Before the Assessing Officer the case of the assessee was that the expenditure had been incurred in the villages surrounding coal mine area on education and welfare activities like construction of link road, repair of roads, primary schools, health dispensaries, water supply arrangement, repair of tubewells, electricity supply arrangements, etc. The assessee claimed the expenditure on the aforesaid items to be in nature of staff welfare expenses and therefore, allowable as deductions from its gross income. The Commissioner while deciding the appeal had disallowed 5% of the total claims with finding that entire expenditure has not been laid down or expended wholly and exclusively for the purpose of business.

21. It was further the case of the assessee before the Commissioner that some of the assessee's staff was residing in some of the villages and further that working in coal mines was affecting the health of inhabitants of these

villages and was creating a lot of resentment among local population that could have hampered smooth mining operations, which was required to be dealt with by indulging in welfare activities and it was indented to nullify the resentment against working of coal mines in the area and was, therefore, allowable as business expenditure, because ultimate aim was to maintain peace or harmony so as to permit the coal mines to work without resistance of the local people.

22. The Commissioner disallowed the expenditure on the ground that the expenses incurred to eliminate resentment into maintain peace and harmony are not acceptable, because such expenditure cannot be treated as having been incurred for business purpose.

23. The Tribunal by noting the rival submissions held that the expenses are allowed as a deduction, because the same have been incurred wholly and exclusively for the purpose of business of assessee and on considerations of commercial expediency. The Tribunal gave two reasons for the same. Firstly was that once some of the employees of the assessee were residing in the rural areas in which welfare and community development activities were carried out, therefore, it was not possible to carry out such activities in a piece-meal manner by including the employees of the assessee and excluding others, because such work like street lighting, drinking water facilities, road widening, etc. would benefit the community as a whole and cannot be done in a piecemeal manner. The Tribunal also gave the reason that once the assessee came with a plea that to maintain peace and harmony in the community and to reduce resentment and resistance towards coal mining activity being carried out by the assessee in the area, it was expedient to carry out community development works, the said expenditure on this ground also amounted to commercial

expediency. The Tribunal in principle allowed the deduction on such expenditure, but granted liberty to the assessing officer to examine relevant details and compare those with the items on which expenditure has been allowed in case of other coal mines run by other subsidiaries of Coal India Limited like South Eastern Coalfield Ltd. and if there is any such item on which expenditure has been incurred and falls outside the items allowed in that case, then such individual items can be examined by the assessing officer on merits.

24. The twin grounds considered by the Tribunal in the present case on the present question, i.e. commercial expediency to carryout welfare activities to reduce resentment and resistance to its coal mining activity and also that the welfare activities could not be carried out in piecemeal manner when some of the staff of the assessee was residing in these villages, in our considered opinion for both these reasons the expenditure incurred on the Committee development would lead to an expenditure incurred solely as business expenditure and is allowable as such. We are fortified in our conclusion by the judgement of the Hon'ble Supreme Court in the case of ***K. Ravindranathan Nair Vs. CIT, reported in 2001 (1) SCC 135 = (2001) 247 ITR 178*** wherein while upholding the decision of the Tribunal, it was held as under :-

> ***5.*** *As we read the judgment of the Tribunal, it extensively analysed the documents placed before it and came to the conclusion that ten units run by the assessee constituted a single business, that the four units in Kerala did not constitute a separate business and that, therefore, the payment that was made was not on account of closure of business, which would not be allowable under Section 37. The Tribunal found, on the basis of the accounts placed before it, that only one set of accounts were maintained for all the ten units. It found that there was one central financing system, that all the units were financed by banks and that these accounts were operated from the head office and that the cashew was purchased for processing by the head office for all the units together. It was also found that there was unity of management and control. Accordingly, the Tribunal said that it was satisfied that all the units were fully interlinked and interlaced so that the inevitable inference was that all these units were one*

business alone. The Tribunal went on to hold that the facts were sufficient to establish a nexus between the payment of Rs 4,18,107 and the business. Because a part of the business had been affected by labour disputes, for the industrial health of the business as a whole, it was thought just and necessary that the industrial dispute in that one part of the business be stopped. This was the purpose for which the payment was made and it was, therefore, incurred for the purposes of the business. The Tribunal noted, correctly, that it was for the assessee to decide how he would conduct his business. For the purposes of continuing his business, he had to reduce the number of units from ten to six. Any incidental expense in reducing those units was an expenditure incurred in the course of conducting the business and allowable under Section 37.

The liberty already granted by the Tribunal in the present case, to examine each item on case to case basis also saves the rights of the revenue because the assessing officer can verify each claim raised by the assessee on item to item and case to case basis subject to general principle that the expenses incurred to reduce resentment and resistance to the project by carrying out welfare activities and also that some of the staff for residing in the said villages, the deduction of expenditure cannot be faulted with. Therefore, this question is also answered in favour of the assessee and against the revenue.

Sports and Recreation Expenses :-

25. So far as the expenses incurred in relation to sports and recreation of employees are concerned, it was the case of assessee that since its coal mines are located in a remote area, therefore, it was obliged to incur expenses on sports and allied activities for the welfare of its employees and annual sports were organized in which the employees of the company participated which resulted in maintenance of good physical and mental health of the employees.

26. The Commissioner held that even if the expenditure was for purpose of maintaining mental and physical health of the employees, this cannot said to be sufficient to hold that expenditure was laid out wholly and

exclusively for the purpose of business and the Commissioner held that there was no direct nexus between the two.

27. The Tribunal held that the expenditure was necessitated by the National Coal Wage Agreement entered into between the management and the Union of employees. And further that so far as the incurring of the expenditure is concerned, that has already been accepted at the time of audit by statutory auditors including Comptroller and Auditor General of India (CAG). The Tribunal held that such expenditure incurred on indoor and outdoor games, sport kits, shoes, prizes, awards to participants, participation charges, hiring charges, tents, lightings, fitments, etc. are in accordance with para 10.8.0 of National Coal Wage Agreement and the assessee was under obligation to spend towards sports and recreation facilities to its employees and thus, the Tribunal held that upon principle such expenses is allowable as deduction from the gross income of the assessee. It was held that expenses are having nexus with assessee's business, because good physical health and mental condition of employees would improve business output and a happy employee would do a better job than another employee and therefore, there was commercial expediency in incurring the said expenses. However, the Tribunal held that it would be open for the assessing officer to consider the exact expenses incurred and summon details for the said expenses.

28. We do not see any error or perversity in the aforesaid reasoning of the Tribunal looking to the reasons mentioned by the Tribunal as narrated above. Therefore, this question is also answered in favour of the assessee and against the revenue.

Environmental Expenses:-

29. The assessee had claimed expenses towards social afforestation, part of community development expenditure, by stating that huge waste dump created environmental problems and also proved hazardous in working of the mine due to erosional effect of soil during rainy season and therefore, expenses had to be incurred in covering the same by a thick forest and the expenditure including development of several forest nurseries to provide sapling for afforestation work, which were maintained by a designated departments of Government of Madhya Pradesh and Uttar Pradesh and costs were being borne by the assessee. The Commissioner held that development of green belt was not a small activity, but an activity which brought about benefit of enduring nature and as a matter of fact, huge amounts were spent in planting lakhs of trees and such nurseries and trees were permanent providers of saplings and disallowed the claim.

30. The Tribunal held that the land on which afforestation was carried out and nurseries were established did not belong to the assessee and it was required to return the land back to the lesser in the same condition and where the expenditure was incurred on leased land, such expenses were necessitated by the nature of business, which was being carried out by the assessee, which required to bring the environment back to its original state and that activity required pre-plantation etc. The Tribunal held that such expenditure cannot be treated to be capital expenditure with closed eyes because a tax authority must appreciate the manner and circumstances under which such expenditure is required to be incurred. So long as the expenditure has nexus with assessee's business, then the next step is to test the expenditure on the touch-stone of capital or revenue expenditure.

31. The Tribunal held that since the Commissioner has not given any reasoning while disallowing the said expenditure as deduction, therefore,

the matter was remitted by the Tribunal to the Assessing Officer to take a decision on merits. We do not find any error or perversity in the said approach adopted by the Tribunal. No substantial question of law arises in the matter as the Tribunal has not given any conclusive findings on this issue.

Social Welfare Expenses of Employees

32. The Commissioner held that so far as expenses towards welfare of employees like canteen, hostels, etc. and other welfare expenses are concerned, the expenditures had not been properly explained and that up keep can be capital expenditure and assessee had not explained as to whether the facilities were provided free of cost and whether every item of expenditure specific to canteen or hostel had not been provided. The expenditure was held to be disallowable because the Commissioner found that the assessee had not proved the genuineness of the expenditure.

33. The Tribunal held that the expenditure had been necessitated by National Coal Wage Agreement and the expenditure had been audited by the statutory auditors as well as by CAG. Therefore, the Tribunal allowed the expenditure for which the details and evidence were placed before the Assessing Officer and disallowed that part for which no evidence was placed before the Assessing Officer nor before the Tribunal. The said allowance of expenditure in-principle does not suffer from any illegality or perversity and so far as allowing of part expenditure is concerned, it is purely in the realm of facts and does not amount to any substantial question of law. Therefore, we answer this question in favour of the assessee and against the revenue.

Expenditure Towards providing LPG, Medical Camp, Transit Camp, etc.: -

34. The Tribunal held that the expenditure incurred in providing LPG to the employees in lieu of coal, medical camp, transit camp expenses etc. have been incurred on account of obligations as per National Coal Wage Agreement. The Tribunal held that the finding of the Commissioner that such expenditure had no direct nexus with the business of assessee cannot be sustained. The Tribunal held that the expenditure of medical facilities to the employees in the form of camps and other expenses as claimed were connected with the assessee's business, because such expenditure had been necessitated by obligations fastened on the assessee by National Coal Wage Agreement and therefore, as a matter of principle, the deductions were allowed. However, the order of the Commissioner was modified to the extent that the directions are to be complied in a reasonable manner and since the onus is on the assessee to prove the claim for reduction it must place on record whatever possible details it can in support of its claims for deductions.

35. The Tribunal also held that the expenses towards transit camp being revenue or capital nature and whether these are business expenses or these are the expenses, which can be said to be incurred on acquiring the lease or acquiring the rights on land so as would amount to capital expenditure need to be re-examined by the Assessing Officer to take a decision de-novo on merits after examining all the relevant material. As there is no mandatory order against the revenue or in favour of assessee at this stage and the matter has only been remanded to the Assessing Officer to re-examine the claims whether the amount to capital or revenue expenditure, after hearing

learned counsel for the parties. Therefore, we find that no substantial question of law arises in the matter on this issue.

Additional Depreciation for Machineries:-

36. The Tribunal has held that the assessee was entitled to additional depreciation, because the Nigahi Project of assessee was a separate industrial undertaking engaged in production of article or thing, i.e. Coal and such production during the year had increased for more than 20% and therefore, the assessee was entitled for additional depreciation, which was found to be as per the decision of the Hon'ble Supreme Court in the case of ***Sesa Goa Ltd. (2004) 271 ITR 331 and (1997) 107 ITR 195 (Textile Machinery Corporation Ltd. vs. C.I.T.)***. The Tribunal held that there is no infirmity in the order of Assessing Officer to allow claim of additional depreciation. Looking to the aforesaid reasoning adopted by the Tribunal, there is no infirmity in allowing deductions towards additional depreciation of machineries. The issue decided by the Tribunal is in conformity with settled principles of the Act, 1961 and no error is found in the aforesaid reasoning adopted by the Tribunal. Therefore, this question is also answered in favour of the assessee and against the revenue.

Overburden Removal:-

37. This is the main issue, which was the main thrust of arguments of the rival parties, i.e. the expenditure incurred towards over-burden removal, and this was the issue which was vehemently argued by the rival parties and this issue arises in most of the matters. The assessee has incurred expenditure on removal of over burden, which it has been claiming to be revenue expenditure in terms of Section 37 after claiming some part of it as capital expenditure in terms of Section 35-E till the stage the mine was

deemed to be a development mine and once the mine has reached 25% of its annual rated production capacity of coal, then the said mine has been treated to be a revenue mine and the entire expenditure towards over burden removal has been treated to be a revenue expenditure and claimed as deduction by the assessee.

38. The case of the assessee is that upto the stage of the mine reaching 25% of its annual production capacity, the mine would be a development mine and the expenditure on overburden removal would be capital expenditure and allowable as per Section 35-E but after reaching the said stage the expenditure would be allowable as a revenue expenditure, because the mine would be converted into a revenue mine.

39. It is also the case of assessee that overburden removal at the stage when the overburden is removed from surface to reach first seam of coal amounts to a development activity and the expenditure can be said to be capital activity leading to development of mine whereas once the first seam of coal has been exhausted and to reach the successive seams of coal the layers of overburden between the different seams have to be removed and for removal of those successive seams of overburden to expose successive seams of coal, it would be an activity in the matter of working of mine and it would amount to be an expenditure incurred for extraction of coal and not for development of the mine. Therefore, it is the contention of the assessee that the said removal of overburden should be deemed to be a revenue expenditure.

40. The Tribunal has accepted the accounting practice being adopted by the assessee in treating the expenditure incurred towards overburden removal till the stage mine reaches 25% of its annual production capacity as capital expenditure, because that stage is deemed to be a stage of

development of mine and to treat the mine as revenue mine after the said 25% annual production capacity has been reached and treat the expenditure on over-burden removal after that stage to be revenue expenditure and claimable as deduction from revenue/income generated from the mine as business expenditure.

41. To understand the dispute relating to over burden removal, it is first necessary to discuss the nature of open-cast mining of coal and the manner in which over burden is created or rather, encountered by the miner of coal and has to be removed. There is no question of any over burden in the case of underground coal mines because in underground coal mines deep pits are dug in the ground to reach the coal and then coal is extracted from such mines. However, where the coal is found in different layers or seams in the ground then the mining operation takes place by open cast method. In such cases underground mining of the coal is not possible. Over burden exists at the surface, which is loose soil, rocks, etc. and after removal of over burden first layer or seam of coal is exposed. After exhaustion of first layer of coal, again a layer/seam of loose soil, rocks, etc. is encountered, which are the material that are normally found in soil or ground apart from coal. This material like soil, rock and tree debris etc. have to be again removed from to access the next seam of coal and once the next seam of coal is reached, it is extracted by the mining company. In this manner, after exhausting each seam of coal again a layer of soil, rock etc. is found, is again must be removed to reach next seam of coal. In this manner successively, successive seams have to be reached and the open mining pit keeps on getting deeper and deeper as the mining progresses after removal of each seam of overburden to access the next seam of coal after exhausting one seam of coal. After each seam/layer of coal, again seam of over burden has to be removed to access the next seam of coal.

42. In nutshell, the case of the revenue that when over burden is removed, it amounts to development of mine because without removal of over burden, the seam of coal cannot be reached and at every stage of removal of over burden, i.e. whether it is the first time removal of surface over burden to reach the first seam of coal or whether it is the 10^{th} or 20^{th} seam of over burden, it does not make any difference because while removing the over burden to reach the next seam of coal, it would always remain a activity of development of mine and therefore it would always be a capital expenditure because it shall amount to reviving or developing the mine rather than operating the mine so that it could be covered as an expenditure for the purpose of business or profession of the assessee. By placing reliance on Section 37 (1) of the Income Tax Act 1961, the learned counsel for the revenue argues that the said provision is corresponding to Section 10 (2) (xv) of the Income Tax 1922 and it categorically mentions that any expenditure which is not expenditure of the nature described in Section 30 to 36 and not in the nature of capital expenditure or personal expenditure of the assessee and spent wholly and exclusively for the purpose of business or profession of the assessee would be allowed in computing the income chargeable under the head of profit and gains of business. It is therefore, argued that once the stage under Section 35 (E)(2) is over, then also the successive expenditure incurred on removing successive seam of over burden shall be capital expenditure and shall not be revenue expenditure so as to seek deduction under Section 37(1) of Income Tax Act.

43. It is vehemently argued by Mr. Siddharth Sharma learned counsel for revenue that after removal of initial over burden at the surface, first seam of coal is reached and such process has to be repeated again and again to access the successive seams of coal and therefore, it does not really make a

difference that whether first seam of over burden is removed or a successive seam of over burden is removed because after the seam of coal available below a particular seam of over burden is exhausted, then the mine is exhausted. Therefore, removal of next seam of over burden to access the next seam of coal would amount to reviving or developing the mines rather than operating the mines. Therefore, it is argued that substantial question of law has arisen in the matter and the said question of law must be answered in favour of the revenue.

44. *Per contra*, Shri C.S. Agrawal, learned senior counsel for the assessee has vehemently argued that no substantial question of law really arises in the matter and by placing reliance on judgment of Supreme Court in the case of ***Management of Fertilizer Corporation of India Vs. The workmen 1970 (3) SCC 867***, it is vehemently argued that in case of corresponding procedure of stowing which is adopted during the process of underground mining of coal, the same has been held to be revenue expenditure by the Hon'ble Supreme Court. It is further submitted that the Income Tax Appellate Tribunal (ITAT) has properly considered all the aspects of the matter and the ITAT while passing the impugned order has rightly considered the judgment of Calcatta High Court in the matter of removal of over burden and the said expenditures have been found to be revenue expenditure and therefore, the ITAT has rightly allowed deduction of the said expenditure as revenue expenditure and there are no ingredients of capital expenditure in the said process.

45. Learned senior counsel for the assessee further argued that the revenue mines are those mines that have reached 25% of their rated capacity and until that stage they are considered as development mines. It is argued that stage upto reaching 25% of annual rated coal production

capacity has been rightly treated by the assessee as capital activity and expenditure upto that stage of over burden removal has been claimed as capital expenditure and the expenditure incurred after that stage has been rightly claimed as revenue expenditure It is argued that it is the consistent practice going on since many assessment years and was earlier accepted by the assessing officer but now the Commissioner has taken a totally contrary view and held that even after the mine which crosses 25% of its rated annual capacity, the expenses for removal of over burden should continue to be capital expenses which is not valid as per law.

46. Learned counsel for the assessee further argued that the method of mining of the assessee is mechanized open cast mining method and coal seams are reached and worked in phases. The entire over burden cannot be removed at once and it must be removed in phases meaning the process of over burden removal is continuous and on-going process. The removal of over burden looking to the nature of mine being worked and in the manner it is being worked is a continuous expenditure to be incurred from time to time in phases depending on the extent to which the mining work is being carried out. It is contended that such finding of ITAT is a pure finding of fact and cannot be interfered by this Court in limited jurisdiction of appeal which has to be exercised only on occurrence of substantial question of law whereas in the present case the questions raised are questions of fact and not of law.

47. It is further argued that there are layer of material like rock and soil between two or more coal seams at the same place which are required to be removed before extraction of coal takes place and such removal of over burden when taking place after the mine reaches the stage of revenue mine i.e. 25% of its annual rated capacity, then the expenses of over burden

removal should be treated to be revenue expenditure and not capital expenditure because the mine has crossed the stage of development mine and has reached the stage of revenue mine and all such expenditure after reaching the stage of revenue mine has to be treated as revenue expenditure not capital expenditure. It is argued that without removal of over burden the next seam of coal cannot be accessed and therefore, it is a necessary step for mining and extraction of coal and it is not a step for development of mine or making of mine and therefore, the ITAT has correctly held that the assessee is entitled to get benefit of over burden removal expenses as revenue expenses and deducted from its profits and loss account as business expenditure.

48. It is further argued that as per Section 35(E) (2) of the Act of 1961, the deduction claimed cannot be disallowed since expenditure has been incurred. Claim is made after commencement of commercial production which is carried out since the year 1967-68 and the present matter arises from assessment year 1997-98 which is way beyond the time-line of 10 years. Learned senior counsel for the assessee has relied upon various judgments to buttress his submission to defend the order of the ITAT on the issue of over burden removal expenditure being revenue expenditure and not capital expenditure.

49. Upon going through the rival submissions of the parties, on the issue of over burden removal expense, we find that the concept of over burden removal is not at all disputed between the parties. It is not disputed that over burden is a belt or layer of soil and rock and other organic or inorganic material between two coal seams/layers. This position is not at all in dispute and therefore, it is not a factual dispute at all, but it is purely a dispute of law whether over burden removal expenses amount to expenses

in the nature of capital expenditure or in the nature of revenue expenditure so as to claim deduction under Section 37(1) of the Act of 1961.

50. Therefore, the contention of learned senior counsel for the assessee that the issue or question involved in the matter of over burden removal expenses is a pure question of fact and is not a question of law, much less a substantial question of law, holds no ground and deserves to be and is hereby rejected. It is held that the said question is a pure question of law rather a substantial question of law whether removal of layer of useless material called over burden between two coal seams in case of open cast mining would be a step in operating the mines so as to deem it as an revenue or business expenditure or a step towards reviving or developing the mines so as to constitute a capital expenditure.

51. As per Section 35-E certain deductions for expenditure or prospecting for minerals or extraction or production of minerals are allowed deduction to extent of an amount equal to $1/10^{th}$ of amount of such expenditure. As per Section 35-E (2) the said expenditure is incurred by the assessee after the date specified in that sub-section at any time during the year of commercial production and any one or more of the four years immediately preceding the year of commercial production or on development of a mine and other natural deposits of any such mineral. As per proviso to Section 35-E (2) it is provided that from such expenditure any portion which is met directly or indirectly for sale, salvage, compensation or insurance money shall be excluded. It is further provided by Section 35-E (3) that expenditure on acquisition of mine or source of mineral or acquisition of deposits of minerals or of any right over such deposit or of capital nature in respect of building, machinery, plant and furniture (that are depreciable ion nature) shall not be deemed to be

expenditure incurred by the assessee for the purposes prescribed in Section 35-E (2).

52. What is allowable as per Section 35-E is deduction equal to 1/10 amount of such expenditure and further expenditure of capital nature which are depreciable, are excluded from the operation of section 35-E (2).

53. By Section 37 of the Act of 1961, it is provided that once an expenditure does not fall within the nature described in Section 30 to 36 and not being capital expenditure or personal expenditure of the assessee shall be allowed in computing the income chargeable from profit and gain account, if spent wholly or exclusively for the purpose of business or profession. Therefore, the question has arisen in the present case whether the expenditure incurred in over burden removal is a revenue expenditure or a capital expenditure to be claimed under Section 37 of Act of 1961.

54. The Tribunal has relied on the judgment of High Court of Calcutta reported in the case *of* ***Amalgamated Jambad Syndicate Pvt. Ltd. [1978] 117 ITR 698 (Cal)*** and in ***Commissioner of Income Tax Vs. Katras Jharia Coal Co. Ltd., (1979) 118 ITR 6 (Cal)***. In the aforesaid cases it has been held by the High Court of Calcutta that removal of over burden and wining of coals are both continuous processes and work being carried out simultaneously from year to year and removal of over burden cannot be compared to opening of new pit because once a pit is already open the same confers a permanent benefits on the mine and can be used for wining coal at different seams and for the purpose of reaching new seam. The over burden resting on the surface of a particular area if removed would enable the company only to reach coals under that and not any further. The Calcutta High Court in the aforesaid case has made a distinction between removal of over burden in the already existing pit of open cost coal mines

and opening of new pit of open cost coal mine and has held that once a new pit has not been dugout then mere removal of successive layer of over burden in an existing pit would amount to expenses arising in course of working of mines and would not amount to the capital expenditure rather it would be a revenue expenditure because it does not bring into existence a new asset bringing any enduring profit or benefit to the assessee but is simpliciter working of existing assets therefore, the Calcutta High Court has held that the removal of successive layer of over burden from existing pit of open cost mine would be revenue expenditure and not capital expenditure.

55. In the first case decided by Calcutta High Court in the case of ***Amalgamated Jambad (supra),*** the Calcutta High Court did not consider the earlier case decided by Hon'ble Supreme Court in the case of ***Pingle Industries Vs. CIT, reported in 1960 SCC Online SC 127***. When the said judgement was brought to notice of the subsequent Division Bench in the case of ***Katras Jharia (supra)***, the same was distinguished in view of the judgement of the Supreme Court *in* ***CIT v. Kirkend Coal Co. [1970] 77 ITR 530***, that related to stowing operations, and the earlier view in ***Amalgamated Jambad (supra)*** was again followed. Therefore, we find that a substantial question of law does arise in the matter because the judgement of the Calcutta High Court on which the Tribunal based its decision, was on stowing operations, and stowing has been taken to be akin to over-burden removal by the Calcutta High Court. Therefore, a substantial question of law arises that requires an answer from this Court.

56. The learned Tribunal while deciding the issued in favour of the assessee has mentioned in its order that it went through the slides and video of coal mining process and first understood that what is open cast

mechanized mining method of coal and how coal seams are reached and worked in phases. It considered that the coal mines are divided into units and it may be that in one unit commercial production is in full swing and coal seams are reached in phases in different directions by removing over burden over one area and thereafter obtaining the coal and selling it and then moving to other area of mine to carryout identical activities.

57. The Tribunal held that the judgment of Calcutta High Court holding removal of over burden expenses to be expenses arising in course of working of mine has to be followed and accordingly followed the said view and held that the expenses for removal of over burden are required to be treated as revenue expenditure.

58. The Tribunal also upheld the accounting methodology adopted by the assessee in which the assessee treats the over burden removal expenses upto the stage the mining reaches 25% of its annual rated capacity as capital expenses but from the next financial year the mines are treated as revenue mines and all expenditure incurred upto that date is capitalized and grouped under fixed assets while the successive expenses are treated as revenue expenditure on over burden removal expenditure and the mine is treated as revenue mine.

59. We note that the aforesaid methodology of treating a mine reaching 25% of its annual rated capacity is only a accounting methodology adopted by assessee and is nowhere to be found either in the Income Tax Act or any other enactment in force which declares that a mine when reaches 25% of its commercial production capacity becomes a revenue mine and ceases to be a development mine and that the stage of revenue mine is achieved on achieving 25% production. The cut off of revenue mine or a development mine is not backed by any statutory provision and it is only an accounting

practice and tradition and nothing else. The Commissioner while holding the issue against the assessee held that this principle has been adopted by the assessee for its own convenience without any sanctity of law and held that if the expenditure is capital in nature then it has to be capital till the coal seam is reached and once the coal seam is reached then there does not remain any question of over burden removal and it would arise only after exhausting the existing coal seam. Therefore, the tribunal adopted the logic that once over burden is removed and coal seam is reached then the expenditure incurred in extracting the coal from the coal field would be revenue expenditure but once the coal field is exhausted and again a layer of over burden is encountered by the mining company then again over burden removal would be capital expenditure.

60. In our opinion once a layer of over burden is removed and coal seam is reached then the entire expenditure incurred in exhausting the coal seam would be a revenue expenditure because it would be a expenditure in the nature of working of mines or producing the product of the mine which is the mineral (Coal). However, once the seam is exhausted then the mine comes to an end either in that pit or in that unit, but the fact is that no further mining of coal is possible unless the next seam of over burden is removed. Therefore, to reach the next seam of coal it would be a development activity of mine whereby the mine would be revived and restored, and not an activity of working the mine. The activity of working the mine would be extraction of coal only when the coal is exposed. When the coal is not exposed and a surface of over burden is encountered by the mining company, then the removal of that surface or seam of over burden would amount to a capital activity because it will create asset for the company and increase the value of the mine because otherwise the mine has been exhausted.

61. In our opinion the logic adopted by the Commissioner of Income Tax that treating a mine before reaching 25% of its rated capacity amounts to be a capital mine or development mine and thereafter being a revenue mine is an artificial distinction being projected by the assessee without any sanctity of law. Therefore, in our opinion, the view of the Tribunal does not seem to be correct that the expenses incurred in removal of overburden after the mine reaches the stage of 25% of its rated annual capacity would amount to revenue expenditure and not capital expenditure.

62. We may also take analogy from Mineral Conservation and Development Rules, 1988 and succeeded by the Rules of 2017 framed by drawing authority from Mines and Minerals Development and Regulation Act, 1957. Though the said rules do not apply to coal mines by virtue of Clause-2 (ii) of the said Rules, but the definition of "development" as laid down in Clause 3(k) of the said Rules can be looked upon to draw an analogy. As per said provision, the activity of development of mine is as under :-

> *(k) "development" means the driving of an opening to or in an ore-body or seam or removing overburden or unproductive or waste materials as preparatory to mining or stoping;*

The aforesaid definition in Rule 3 (k) of 2017 Rules corresponds to Rule 3 (i) of 1988 Rules.

63. The aforesaid definition duly establishes that the activity of removal of overburden or unproductive waste material is preparatory to mining and is a development activity. Thus, the said Rules duly lay down that removal of overburden is an activity preparatory to mining and not is an activity of mining. Even independent of this provision of Rule 3(i) we have held above that activity of removal of overburden is a development activity or

activity of capital nature and even Rule 3(i) leads to the same conclusion, though the said Rules are not applicable as such to coal mines.

64. The learned counsel for the assessee had heavily relied on judgment in the case of ***Kirkend Coal Company (supra)*** wherein it has been held that the activity of stowing is allowable as revenue expenditure. However, the activity of stowing takes place in underground coal mine and not in open cast coal mines. By activity of stowing, when reaching the further underground coal in underground mining then the hollows created by extraction of coal in the mine just below the surface and successive thereto have to be filled up by non-combustible material which is for twin purpose. First purpose is that once the mine has been opened up then filling of non-combustible material in hollows created by mining avoids fire accidents and wastage of coal by fire. Secondly it is also required to prevent the mine from caving in so that heavy machinery can operate over the ground and ground does not subside as hollows are created underground due to extraction of coal. The said activity of stowing in a contiguous coal belt which is being exploited in underground coal mine is certainly an activity for winning the coal and not for making the mine or an activity preparatory to extraction. The extractable value of mineral in mine and capital value of mine would be the same whether the hollows are filled up or not and filling up of hollows by non-combustible material would only enable the mining companies to lift the coal from a further underground portion of the mine and is therefore a part and parcel of mining activity and is obviously and undoubtedly a revenue expenditure activity because it only enables the mining companies to lift the coal and is an activity in the course of working of mine. Whereas, as already noted by us above, removal of overburden once the coal seam has been exhausted amounts to creation of capital asset in as much as the next seam of coal is exposed by removal of the

overburden. Unless the overburden is removed, then the mine stands exhausted and cannot work till the next layer of overburden is removed which is lying above the coal layer or seam. Therefore, there is no real difference whether the overburden removal is in initial stages of coal seams or is in later stages of exploiting the coal seams because after exhaustion of every coal seam mine comes to an end and it is to be developed and revived again to create a capital asset by exposing the coal seam. It cannot be equated with the activity of removal of waste material or impurities in the ore which have to be removed or set aside while extracting the ore because overburden is not mixed with the coal. Rather, it exists in layers alternating with the coal layers. After exhausting every layer of coal unless overburden is removed mine stands closed and exhausted which is not in the case where impurities are mixed with the ore.

65. In the case of ***R.B. Seth Moolchand Suganchand Vs. Commissioner of Income Tax, reported in 1973 (3) SCC 257*** the Hon'ble Supreme Court has held that in case of mining of minerals the empirical test could be that where minerals have to be won, extracted and brought to surface by mining operations, the expenditure incurred for acquiring such a right would be of capital nature but where the mineral has already been gotten and is on the surface then the expenditure incurred for obtaining the right to acquire the raw material i.e. the mineral would be a revenue expenditure. The Supreme Court was dealing with the case of mica mines and it held that mica pillars which have been exposed by mining operations of other private companies have no doubt enhanced the value of the right though the appellant therein still had to carry out mining operations to extract the pillars from the minerals which were embedded in the land. The Supreme Court therefore held that exposing the mineral for further exploitation amounts to enhancing the value of asset of mine and therefore, it would amount to

expenditure of capital nature and not revenue nature. The Hon'ble Supreme Court held as under:-

> ***"5.*** *This Court in Pingle Industries Ltd. v. CIT [40 ITR 67 : (1960) 3 SCR 681 : AIR 1960 SC 1034] had occasion to examine exhaustively the relevant Indian and English cases for determining what is a capital expenditure and what is a revenue expenditure. That was also a case of mining where the assessor obtained leases for excavating Shahabad stones for a period of twelve years for which an annual payment of Rs 28,000 was agreed upon. The majority of judges, Kapur, J., and Hidayatullah, J., (as he then was) (S. K. Das, J., dissenting) held that the assessee acquired by his long-term lease the right to win stones, that the stones in situ were not its stock-in-trade in a business sense but a capital asset from which after extraction it converted the stones into its stock-in-trade It was also held that the payment was neither rent nor royalty but a lump payment in instalments for acquiring a capital asset of enduring benefit to its trade; the amounts being outgoings on capital account, were therefore not allowable deductions. The proposition as qualified by Lord Cave in Atherton v. British Insulated and Halsby Cables Ltd. [(1926) AC 205, 213 : 10 TC 155 (HL)] that, in the absence of any special-circumstances leading to the opposite conclusion, when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or advantage for the enduring benefit of a trade, has been applied, explained and varied from time to time as the circumstances of the particular case required. The application of these principles to the various cases and the conclusions reached by courts in those cases often lead to irreconcilable results. It is because the topic itself is a troublesome one and is not rendered any the less difficult by resorting to principles. "It is not always easy", observed Romer L.J. in Golden Horse Shoe (New) Ltd. v. Thurgood [18 TC 280, 300] "to determine whether a particular asset belongs to the one category or the other" nor does it depend in any way "on what may be the nature of the asset in fact or any law". In our own court this difficulty has been put very tersely, if we may say so with respect, by Hidayatullah, J. (as he then was) in Abdul Kayoom v. Commissioner of Income Tax, [64 ITR at 703 : 1962 Supp 1 SCR 518] when he said:*
>
> > *"... none of the tests is either exhaustive or universal. Each case depends on its own facts, and a close similarity between one case and another is not enough, because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide*

cases (as said by Cordozo [The Nature of the Judicial Process, page 20]) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, its broad resemblance to another case is not at all decisive. What is decisive is the nature of the business, the nature of the expenditure, the nature of the right acquired, and their relation, inter se, and this is the only key to resolve the issue in the light of the general principles, which are followed in such cases."

6. *The determining factor will depend largely on the nature of the trade in which the asset is employed. The several cases which do not deal with the mining leases but are concerned with different assets are of little help in the same way as in Mohanlal Hargovind v. CIT [17 ITR 473] cases relating to the purchase or leasing of mining quarries or deposits of brick earth were considered not to be of assistance by the Privy Council in the case of a contract for collecting and removing tendu leaves. The principles enunciated for determining the nature of the expenditure have been sought to be applied to different situations arising on the facts of each case, but the difficulty in matching them with the seeming irreconcilability are perhaps explicable only on the ground that the determination in any particular case is dependent on the character of the lease or agreement, the nature of the asset, the purpose for which the expenditure was incurred and such other factors as in the facts and circumstances of that case would indicate. If we confine our attention to the mining leases, what appears to us to be an empirical test is that where minerals have to be won, extracted and brought to surface by mining operations, the expenditure incurred for acquiring such a right would be of a capital nature. But, where the mineral has already been gotten and is on the surface, then the expenditure incurred for obtaining the right to acquire the raw material, that is, the mineral, would be a revenue expenditure laid out for the acquisition of stock-in-trade. An expenditure incurred for acquiring a right to take away sand from the surface of river beds has been treated as if the sand was stock-in-trade — M. A. Jabbar v. CIT [68 ITR 493 : (1968) 2 SCR 413 : AIR 1968 SC 745] in the same way as tendu leaves have been treated by the Privy Council in Mohanlal Hargovind case [17 ITR 473] . In the former case, Bhargava, J., indicated a number of factors which led to the conclusion that the expenditure incurred by the assessee in obtaining the lease was revenue expenditure for the purpose of obtaining stock-in-trade and not capital expenditure which were: (1) that the lease was for a very short period of eleven months only; (2) that the sole right which was acquired by the assessee under the lease deed was to take away the sand lying on the surface of the leased land where no question of*

raising, digging or excavating for the sand before obtaining it was involved. In other words, no operations had to be performed on the land itself and "is not a case where the gravel in any true sense" as pointed out in Golden Horse Shoe (New) Ltd. case, "was won from the soil ... it is merely shovelled up where it lies". In the latter case the Privy Council said that the leases for the right to collect and remove; tendu leaves under which a certain sum was payable by instalments as a consideration for the grant of that right was a revenue expenditure. It pointed out that the contracts were short-term contracts, that the picking of the leaves had to start at once or practically at once and to proceed continuously and that under the contract it is tendu leaves and nothing but tendu leaves that are acquired. At p. 478, while comparing that case with the case of Kauri Timber Co. Ltd. v. CIT, [1913 AC 771] where the company's business consisted in cutting and disposing of timber and it had in some cases acquired timber-bearing lands and in other cases it purchased the standing timber, the lease itself being for ninety-nine years, the Privy Council observed:

> *"In the present case the trees were not acquired: nor were the leaves acquired until the appellants had reduced them into their own possession and ownership by picking them. The two cases can, in Their Lordships' opinion, in no sense be regarded as comparable. If the tendu leaves had been stored in a merchant's godown and the appellants had bought the right to go and fetch them and so reduce them into their possession and ownership it could scarcely have been suggested that the purchase price was capital expenditure. Their Lordships see no ground in principle or reason for differentiating the present case from that supposed."*

14. *In our view the principles which have been applied in the Pingle Industries' case [40 ITR 67 : (1960) 3 SCR 681 : AIR 1960 SC 1034] are equally applicable to the facts and circumstances of this case. The test for ascertaining whether the amount spent is of a capital nature is, whether it was spent for obtaining a right of an enduring character which in the case of mining leases is to acquire rights over land for winning the mineral. In other words, where the mineral is part of the land and some mining operations have to be performed to extract it from the earth, the amount paid to acquire a right over or in the land to win that mineral is of an enduring character and, hence, a capital expenditure. In this case the mica pillars which have been exposed by the mining operation of other private companies had no doubt enhanced the value of the right which was leased to the appellant but nonetheless the appellant still had to carry out some mining*

operations to extract the mineral from the pillars which was embedded in the land. If the private companies before the mica was exposed had taken the lease, they would have paid a much lesser amount which nonetheless would have been a capital expenditure. It is the labour and expense which the private companies expended that has enured for the benefit of the Government and enhanced the capital value of the lease. This is not a case, as is contended, of mica having been gotten so as to form part of the stock-in-trade of the assessee as in the case of Golden Horse Shoe (New) Ltd. v. Thurgood [18 TC 280, 300] . In that case the company had acquired rights in certain dumps of "tailings" or residuals that remained after the extraction of gold from ore taken from certain gold mines. It was contended on behalf of the revenue that the company's rights in tailings and dumps were part of the undertaking which the company was formed to acquire and any sum paid therefor was capital expenditure, and that the company's rights in the dump was the purchase of the wasting asset. This contention was negatived and it was held that the purchase price of the tailings was an admissible deduction in computing the company's profits for income tax purposes. Lord Hanworth, M.R., at p. 298, observed:

> *"After careful consideration of the present case, in the course of which my mind has fluctuated on either side, I think it is to be decided upon its own facts — that none of the tests suggested affords a strict rule of guidance. It seems, then, that the company bought these dumps — which were no longer in a natural but in an artificial condition; which were in such a state that they would not have passed under a lease of 'beds opened, or unopened, or minerals', see Boileau v. Heath [(1898) 2 Ch D 301] for the purpose of treating them as their stock-in-trade, lying stored and ready to their hand, at a fair price of £, 1,22,750, and their intention was to use them up and make what they could of them by and after treatment. They had not to win them from the soil; they had been gotten already. If the metaphor of working a mine be applied, it might be said that the purchase of the dumps was a capital outlay. If the metaphor of making gas or coke from coal, or of a miller making flour from wheat, be applied, it may be said that it was an outlay to be placed in the profit and loss account. But, metaphors do not provide exact definitions and are often misleading. It is safer to give an interpretation to the facts of this case as found in the case stated, and upon the law relevant to them."*

66. The Hon'ble Supreme Court earlier had the occasion to consider the difference between capital and revenue expenditure in relation to mining activity. In the case of ***Pingle Industries (supra) reported in 1960 SCC OnLine SC 127 = (1960) 40 ITR 67***, the Supreme Court in its majority view held that the question whether in expenditure is capital or revenue in character is one of the common occurrence. The Supreme Court held that there are already three tests in the matter first of which may be capital expenditure is a thing which is going to be spent once and for all and revenue expenditure is a thing which is going to recur every year. The proposition of enduring benefit of a trade was considered by the Hon'ble Supreme Court. Another test considered by the Supreme Court was that difference between fixed capital and circulating capital i.e. where the character of expenses shows that what has resulted in something which is to be used in the way of business. Third test which was considered by the Supreme Court was that if expenditure is part of working expenses in ordinary commercial trading it is revenue expenditure and not commercial expenditure. In addition to the aforesaid three tests, it was considered that there are some supplementary tests like outlay made for initiation of business, extension of business, for substantial replacement of equipment etc. which are necessary to resume the business and such expenses were held to be capital expenditure. The said was held in para-28 of the aforesaid judgment which is as under:-

> ***28.*** *In addition to these three tests, the last of which was applied again by the Judicial Committee in Mohanlal Hargovind case [(1949) 17 ITR 473 (PC)] there are some supplementary tests, which have frequently been alluded to. Lord Sands in Commissioners of Inland Revenue v. Granite City Steamship Co., Ltd. [(1927) 13 TC 1, 14] characterised as capital an outlay made for the initiation of a business, for extension of a business, or for a substantial replacement of equipment. In that case, there was extensive damage to a ship, and repairs were necessary to resume trading, such expense being held to be capital expenditure. The questions which Lord Clyde posed in Robert Addie &*

Sons Collieries Ltd. v. Commissioners of Inland Revenue [(1921) 8 TC 671, 676], namely:

> *"Is it part of the Company's working expenses, is it expenditure laid out as part of the process of profit earning? — or, on the other hand, is it capital outlay, is it expenditure necessary for the acquisition of property or of rights of a permanent character, the possession of which is a condition of carrying on its trade at all?"*

influenced the Privy Council in Tata Hydro-Electric Agencies, Ltd., Bombay v. CIT [(1937) 64 IA 215 : 5 ITR 202] (at p. 209), and the latter part of the question is the test laid down by Lord Sands, to which we have referred.

In the present case, as we have already held above, though Coal may be available in the Coal mine, but once a seam/layer of Coal has been extracted, then the mine stands exhausted and it has to be revived by removing the overburden, therefore, for the resumption of actual mining work. Therefore, it is a preparatory activity to resume mining, and not mining, per se.

67. The Hon'ble Supreme Court took into consideration various other tests in the matter and held that the aim and objective of expenditure to determine the character of expenditure; whether it is capital expenditure or revenue expenditure. The source or manner of payment would be inconsequential and if the expenditure is part of fixed capital of business it would be nature of capital expenditure and if it is part of circulating capital it would be in the nature of revenue expenditure and also held that the tests have to be applied to the facts of each particular case. Ultimately the Supreme Court in the aforesaid case held that in that particular case the assessee acquired by long term lease a right to win stones and the lease conveyed to him a part of the land. The stones were not his stock of trade but a capital asset from which after extraction he converted the stones into his stock of trade and therefore, it was held that it was for acquiring a capital asset of enduring benefit to his trade and upheld the order of High Court in treating the expenditure against the capital account.

68. Recently the Hon'ble Supreme Court in the case of ***Commissioner of Income Tax Delhi Vs. Bharti Hexacom Limited, reported in (2024) 7 SCC 621*** has considered in detail the difference between capital and revenue expenditures. In para-84 of the aforesaid judgment the Hon'ble Supreme Court while considering the judgment of the Madras High Court in the case of ***CIT Vs. Sarada Binding Works reported in 1973 SCC OnLine Madras 288*** has ultimately held in para 107 of the aforesaid judgment that capital expenditure is one with a view to bring into existence an asset for enduring benefit of trade though it cannot be applied in every case and the nature of advantage acquired has to be considered in commercial sense. It is further held that when expenditure is made for extension of business then it is a capital expenditure. It is further held that when the expenditure is to bring into hands of assessee a necessary ingredient of their existing business then the expenditure is to be debited to the revenue account. It is further held that where expenditure relates to operation or working of the existing apparatus the expenditure would be revenue one. It is further held that the question has to be judged in every case in the context of business necessity and expediency and whether the expenditure is a part of assessee's working expenditure or part of profit earning and further enquiry is required that whether the expenditure was necessary to acquire a right of permanent character the possession of which is a condition precedent for carrying on a particular trade in the event the answer to the first question is in negative and the second question is in the positive then the expenditure is capital in nature. The Supreme Court has held as under:-

> ***107.*** *It may be useful at this juncture, to attempt to cull out the broad principles/tests that have been forged and adopted by this Court from time to*

time, while determining whether a given expenditure is capital or revenue in nature:

107.1. *Capital expenditure is one met with a view to bring into existence an asset for the enduring benefit of the trade. However, this rule is not applicable in every case. The nature of the advantage acquired has to be considered in the commercial sense and only when the advantage is in the capital field, deduction on the said expenditure could be disallowed by applying the enduring benefit test. If the advantage consists merely of facilitating trading operations or enabling the management or conduct of business more effectively or profitably, while leaving the fixed capital untouched, the said expenditure would be on revenue account, though the advantage may endure for an indefinite period, vide Empire Jute Co. [Empire Jute Co. Ltd. v. CIT, (1980) 4 SCC 25 : (1980) 124 ITR 1] Therefore, the enduring benefit test is not conclusive and cannot be mechanically applied without considering the commercial aspect of the transaction involving the expenditure in question.*

107.2. *Where the expenditure is made for the initial outlay or for extension of a business, or a substantial replacement of the equipment, it is capital expenditure. If the expenditure is for running the business or working it with a view to produce profits, it is revenue expenditure, vide Assam Bengal Cement Co. [Assam Bengal Cement Co. Ltd. v. CIT, (1954) 2 SCC 672 : (1955) 27 ITR 34] What also follows from this test is that expenditure which relates to the very framework or structure or edifice of the taxpayer's business is capital expenditure.*

107.3. *The fixed and circulating capital test provides that where the expenditure is to bring into the hands of the assessee a necessary ingredient of their existing business, which is important but still ancillary to the business, the expenditure is to be debited to the circulating capital (revenue account) rather than to the fixed capital (capital account).*

107.4. *Where there is no enlargement of the permanent structure or of capital assets and the expenditure essentially relates to the operation or working of the existing apparatus, such an expenditure would be on revenue account, vide Empire Jute Co. [Empire Jute Co. Ltd. v. CIT, (1980) 4 SCC 25 : (1980) 124 ITR 1]*

107.5. *The question as to whether an expenditure is capital or revenue in nature is to be judged in every case in the context of business necessity or expediency.*

The first aspect to be considered is whether, the expenditure is a part of the assessee's working expenditure or a part of profit earning. Further, an inquiry must be made as to, whether, the expenditure was necessary to acquire a right of permanent character, the possession of which is a condition precedent for carrying on a particular trade. In the event that the answer to the first question is in the negative and the second question is in the affirmative, the expenditure is inarguably capital in nature. In this context, we are of the view that the decision of this Court in Alembic Chemical Works Co. [Alembic Chemical Works Co. Ltd. v. CIT, (1989) 3 SCC 329] must turn on its own peculiar facts.

107.6. *Thus, the aspect to be considered is whether the expenditure is incurred for the purpose of the existing day-to-day business of the assessee, or with a view to commence an entirely new venture. Where the expenditure incurred is merely to enhance the productivity or profitability of an existing business, without making significant changes to the structure of the assessee's profit-making apparatus, the same is revenue in nature. Alembic Chemical Works Co. [Alembic Chemical Works Co. Ltd. v. CIT, (1989) 3 SCC 329] was decided on the above premise.*

107.7. *It is not necessary that in all cases, once and for all payment would result in an enduring benefit, nor it is a firm rule that periodical payment would not carry with it an enduring benefit.*

107.8. *Mere payment of an amount in instalments does not convert or change a capital payment into a revenue payment. Similarly, lump sum payment can represent revenue expenditure if it is incurred for acquiring circulating capital though payment is made once and for all. Likewise, payment made in instalments can be for acquiring a capital asset, the price of which is paid over a period of time. Therefore, what is relevant is the nature of the original obligation and whether the subsequent payment made in instalments relates to or has a nexus with such original obligation or not. Where the subsequent payments, are towards a purpose which is identifiably distinct from the original obligation of the assessee, the same would constitute revenue expenditure. However, where each of the successive instalments relate to the same obligation or purpose, the cumulative expenditure would be capital in nature.*

107.9. *The general principle that expenditure on the creation of a capital asset is on capital account applies only where the capital asset belongs to the assessee. An amount spent by the assessee may be deductible on revenue*

account even if it results in the acquisition of a capital asset by a third party, vide L.B. Sugar Factory & Oil Mills (P) Ltd. v. CIT [L.B. Sugar Factory & Oil Mills (P) Ltd. v. CIT, (1981) 1 SCC 44 : (1980) 125 ITR 293] .

***107.10.** Another pertinent question to consider is, whether, the expenditure is incurred towards purchase of an asset, or merely of the right to use the asset for a given period of time on payment of a certain consideration for the period of intended use, vide Devidas Vithaldas & Co. [Devidas Vithaldas & Co. v. CIT, (1972) 3 SCC 457 : (1972) 184 ITR 277] Where the asset is not purchased or is not vested with the assessee, but the assessee has simply acquired a right to use the asset, the payment would be of revenue nature, vide CIT v. Modi Revlon (P) Ltd. [CIT v. Modi Revlon (P) Ltd., 2012 SCC OnLine Del 4463] ("Modi Revlon").*

69. Therefore, as already considered by us above, removal of layer of overburden to expose the next coal seam after the mine has closed upon exhausting earlier coal seam amounts to revival and extension of business because otherwise the business has to be closed down. It is not an expenditure in the nature of extraction of coal or working of mine but it is an expenditure in the nature of further development of mine or extension and revival of mine.

70. The judgment in the case ***Empire Jute Company Vs. CIT reported in (1980) 4 SCC 25*** was vehemently relied by the rival parties in favour of their respective cases. It has been held therein that the tests have evolved from time to time to distinguish between capital and revenue expenditure but no test is conclusive and there is no formula which can provide a quick fix solution in each case and each case has to be decided on its own facts keeping in mind the broad picture of whole operation in respect of which the expenditure has been incurred. It has been held that the benefit must have no endurance at all to be a revenue expenditure even though the test of enduring profit is not conclusive but it is one of the tests. In the present case before us, the removal of over-burden layer between two Coal seams

undoubtedly brings into picture and exposes the next coal seam which can be exploited by extraction of coal and is therefore a benefit which has some endurance benefit to the business of coal mine because now the miner would be able to exploit the next coal seam which may be thin layer or thick layer which is immaterial because it will now open up the mine for further exploitation which otherwise got closed due to encountering the layer of overburden.

71. The reliance placed by the Tribunal on the judgments of the High Court of Calcutta as referred above, in our opinion, was not legally sustainable because the High Court of Calcutta in aforesaid cases though considered judgment of Supreme Court in the case of ***Empire Jute Company (supra)*** but held that mine development would mean only when a new pit is opened up but removing successive layers of overburden would not amount to development of mine but would only amount to running the business and nor for bringing into existence any new asset or advantage. The said judgement of Calcutta High Court has persuasive value to us. However, we are unable to agree with the aforesaid proposition of the High Court of Calcutta. In the first case decided by Calcutta High Court in the case of ***Amalgamated Jambad (supra)***, the Calcutta High Court did not consider the earlier case decided by Hon'ble Supreme Court in the case of ***Pingle Industries Vs. CIT, reported in 1960 SCC Online SC 127***. When the said judgement was brought to notice of the subsequent Division Bench of Calcutta High Court in the case of ***Katras Jharia (supra)***, the same was distinguished in view of the judgement of the Supreme Court in ***CIT v. Kirkend Coal Co. [1970] 77 ITR 530***, that related to stowing operations, and the earlier view in ***Amalgamated Jambad (supra)*** was again followed. However, as already discussed by us above, stowing in case of underground coal mining is totally different from Over-burden removal in case of open-

cast Coal mining. The purpose and nature of the two is totally different and as discussed in detail above. Stowing would be an activity in working of mine, whereas over-burden removal is not. The difference between stowing carried out in case of underground coal mining and overburden removal carried out in the case of open cast coal mining has already been discussed by us above and it has already been discussed that stowing of hollows created by underground coal mining is in the nature of working of mine because it prevents fire incidents in the underground mine and secondly it saves the ground from collapsing so that heavy machinery can be installed and operated, otherwise Coal was available for exploitation but by stowing, safety is ensured and collapse is prevented, that keeps the mine workable. Therefore, there is a fundamental difference between the said operations because in case of underground mine there is no concept of mine being exhausted and then to be re-exposed for the purpose of further mining which would undisputedly enhance the capital value of the mine.

72. In view of the judgment of the Supreme Court in the case of ***Pingle Industries (supra)***, wherein in the case of Mica Mining it has been held that exposure of mica pillars by some previous mining operators has enhanced the capital value of the mine. Applying the same analogy exposing the next coal seam enhances the capital value of the mine by exposing the mine for further exploitation which otherwise was not possible as the layer of overburden which had been encountered had led to closure of mine.

73. Therefore, in our opinion, the distinction accepted by the Tribunal in treating overburden expenses incurred till the stage of mine reaching 25% of its annual rated capacity, has no sanctity in law and is an artificial distinction only based on accounting practice of the respondent assessee

and nothing else. Therefore, we answer this substantial question of law in favour of the revenue and against the assessee and hold that expenses for removal of overburden at any stage of mine after it has been allotted to the mining company would amount to an expenditure in the nature of capital expenditure and not an expenditure in the nature of revenue expenditure and therefore, it would be allowed only as a capital expenditure.

74. Consequently, these appeals are disposed of in the above terms and the questions arising in the aforesaid appeals are answered in the above terms. The question as to nature of over-burden removal expenses is answered in favour of the Revenue by holding it to be an expenditure of capital nature irrespective of the stage of mining, while all other questions are answered in favour of the assessee.

75. The matters would now go back to the assessing officer to carryout assessment in terms of the answers to the questions of law given by us.

76. WP No. 5424/2020 which is pending for adjudication along with this bunch of income tax appeals is filed by the assessee for quashing the demand notices. The demand notices impugned in the said petition are also formally set aside and the matter would now go back to the assessing officer to re-determine the assessment as per the questions answered by us in this judgment, by following the laid down procedure.

77. Let the assessment proceedings be carried out and completed within a period of two months from the date of production of certified copy of this order. Appeals and writ petition are accordingly ***disposed of***.

(SURESH KUMAR KAIT)
CHIEF JUSTICE

(VIVEK JAIN)
JUDGE

Nks/rj/MISHRA