IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 321 OF 2008

The Commissioner of Income Tax,
Mumbai City-II, Mumbai
Aayakar Bhavan, M.K. Road,
Mumbai – 400 020. ... Appellant

Versus

M/s. Tata Engineering & Locomotive
Company Ltd., Bombay House,
24, Homi Mody Street, Hutatma Chowk, ...Respondent
Mumbai -400 001.

WITH

INCOME TAX APPEAL NO. 2070 OF 2009

(Not on Board)

The Commissioner of Income Tax,
Mumbai City-II, Mumbai
Aayakar Bhavan, M.K. Road,
Mumbai – 400 020. ... Appellant

Versus

M/s. Tata Engineering & Locomotive
Company Ltd., Bombay House,
24, Homi Mody Street, Hutatma Chowk, ...Respondent
Mumbai -400 001.

Mr. Suresh Kumar *a/w. Ms. Samiksha Kanani, Advocates for Appellant-Revenue.*

Mr. Srihari Iyer, *Advocate for Respondent.*

CORAM: G. S. KULKARNI &
SOMASEKHAR SUNDARESAN, JJ.

Date : 30 July, 2024

Oral Judgment (***Per, Somasekhar Sundaresan, J.***) :

1. With the consent of the parties, Income Tax Appeal No. 2070 of 2009 (relating to Assessment Year 1987-88), which is not on Board but involves the very same question of law involved in Income Tax Appeal No. 321 of 2008 (relating to Assessment Year 1988-89), also is taken on Board for hearing and final disposal.

2. Both Appeals are directed against a common order dated 26th October, 2004 ("***Impugned Order***"), passed by the Income-tax Appellate Tribunal ("***Tribunal***"). In fact, the Impugned Order relates to the six assessment years between 1983-84 to 1990-91. Appeals filed by the Appellant-Revenue in respect of the other four assessment years 1983-84, 1984-85, 1986-87 and 1990-91 came to be withdrawn on the premise of the tax effect being below the thresholds stipulated for continuing with litigation.

3. The two Appeals that are being disposed of by this judgement involve identical questions of law. The amount of disallowance of expenditure involved in the two relevant assessment years, marginally varies.

4. By an order dated 16 October, 2008 passed by this Court in Income Tax Appeal No. 321 of 2008 and by an order dated 17 March, 2008, Income Tax Appeal (L.) No. 720 of 2006 (Registered No.. 2070 of 2009, the Appeals were admitted on common questions of law. For convenience, the questions of law in Appeal No. 321 of 2008 are extracted below:

> *"(A) Whether the ITAT was justified in law in upholding the action of the CIT(A) in deleting the disallowance of Rs.1,96,71,842/- **made under section 40A(9) of the Act** ?*
>
> *(B) **Whether a payment made under a memorandum of settlement** under the Industrial Disputes Act **can be said to be a payment required by or under any law** ?"*
>
> ***[Emphasis Supplied]***

5. The short point that arises for consideration is whether payments made to various institutions by the Respondent-Assessee under six heads, could have been treated as allowable expenses. The expenditure disallowed was Rs.1,91,18,284/- in respect of AY 1987-88, and Rs. 1,96,71,852/- in respect of AY 1988-89. For felicity, a chart summarizing

the payments disallowed across the six assessment years, as set out in the Impugned Order, is extracted below:

	Item	*AY.83-84 (Rs.)*	*AY.84-85 (Rs.)*	*AY.86-87 (Rs.)*	*AY.87-88 (Rs.)*	*AY.88-89 (Rs.)*	*AY.90-91 (Rs.)*
1.	*Payment to Jamshedpur blood bank*	*10800*	*10800*	*173460*	*138768*	*185076*	*277000*
2.	*Payment to Parivar Kalyan Sansthan*	*415000*	*1004929*	*1855820*	*2294754*	*2461898*	*2606532*
3.	*Payment to Gram Vikas Kendra*	*2476676*	*2511610*	*2765458*	*2621932*	*2808998*	*1873520*
4.	*Community Development expenses*	*560495*	*998000*	*758841*	*945836*	*1000027*	*1133924*
5.	*Educational Assistance*	*7506791*	*9706024*	*10890315*	*12666980*	*12610570*	*14326171*
6.	*Payment to Nav Jagrat Manav Samaj*	*---*	*150000*	*619084*	*450014*	*605283*	*658700*
	Total	***11066962***	***14478563***	***17059978***	***19118284***	***19671852***	***20875847***

6. While the core question was whether the aforesaid payments could be allowed as revenue expenditure under Section 37(1) of the Act, the disallowance canvassed by the Appellant-Revenue is based on the purported applicability of Section 40A(9) of the Act.

7. Upon a careful perusal of the record, it is apparent that Respondent-Assessee had canvassed (among other arguments) that these payments could also be regarded as payments required to be made under

law, on the ground that the payments were envisaged under a Memorandum of Settlement dated 31st March, 1986 between the Respondent-Assessee and the trade union, namely, TELCO-Workers' Union, Jamshedpur ("Workmen's Union") of the workers employed by the Respondent-Assessee. The expenses were primarily defended as being revenue expenditure as expenses towards development and welfare of the local population in the vicinity of the factory with benefits flowing the business. Such expenditure was claimed to have helped the Respondent-Assessee getting the benefit of goodwill and local harmony in the conduct of its business operations in the local ecosystem, thereby justifying the claim that such expenditure should be allowed as revenue expenditure. Apart from these submissions the Respondent-Assessee also claimed that such expenditure, having been envisaged in the Memorandum of Settlement entered into with the Workmen's Union of the employees, the expenditure could also be defended as payments made under the law in terms of the settlement reached with the employees. Towards this end, the following extracts from the Memorandum of Settlement are relevant and set out below:-

> *9.17 COMMUNITY SERVICES/SOCIAL WELFARE*
>
> *9.17.1 The Company shall continue to discharge its social responsibilities for the development and welfare of the population residing in the Telco Township and the adjoining bustees. It shall continue to render assistance in providing facilities such as roads, drinking water, improved sanitation, maintenance and extension of*

school buildings etc. in the bustees mainly inhabited by the Company's workmen.

9.17.2 The Company shall continue to extend financial grants to --

9.17.2.1 ***GRAM VIKAS KENDRA, JAMSHEDPUR****, for planning and execution of* ***development programmes (agriculture, irrigation, health services, primary education, skill training, rural industries etc.) in some forty villages of three administrative blocks*** *(Chandil, Potka and Jamshedpur) of Singhbhum over 10 kilometers outside Jamshedpur.*

9.17.2.2 ***PARIVAR KALYAN SANSTHAN****, for* ***organising Family Welfare Camps every month at the newly constructed Operation Theatre Complex*** *at Plaza Dispensary grounds. Telco Town for* ***conducting Laparoscopic operation for women from rural areas and non-employees' families***.

9.17.2.3 ***NAV JAGRAT MANAV SAMAJ****, for* ***organising Leprosy relief and rehabilitation functions*** *in the seven leprosy patients' settlements (Ashrams) within the city and for conducting round-the-year Leprosy Education programmes in the educational and social institutions in the city* ***to remove any social stigma attached to leprosy***.

9.17.2.4 ***COMMUNITY DEVELOPMENT****, for* ***organising local committees which will plan and organise programmes for children, youth, women and aged in each bustee, making full use of the building facility provided, for creating an environment of harmonious living and a scope for development of local talents.*** *The local committees shall take initiative in mobilising local resources, that is, people's involvement and active participation in sharing the responsibility of work needed to improve sanitation, road communication and other infrastructures.*

9.17.2.5 The Company shall, in addition, continue to assist GRAM VIKAS KENDRA, Jamshedpur, in --

i) ***Forestry Development****;*

ii) Inputs service ***facilities to individual entrepreneurs****;*

iii) ***Marketing of goods produced by village craftsmen & artisans****;*

iv) Providing ***medical facilities to the residents of bustees/villages*** *through mobile medical vans.*

[Emphasis Supplied]

8. From a plain reading of the foregoing, it would become clear that the Respondent-Assessee had been expending various amounts towards "Community Services" and "Social Welfare" and this was recited in the Memorandum of Settlement, with a statement that such measures would continue. There is no commitment of any specific amount that would be spent under these heads of expenses. Owing to the linkage of the expenses with the settlement entered into with the Workmen's Union, the Appellant-Revenue has argued that Section 40A(9) would disallow deduction of such expenditure in the computation of income under the Act. Both, the Learned Commissioner of Income-tax, Appeals ("***CIT-A***") and the Tribunal have returned concurrent findings to state the nature of these expenses do not fall within the jurisdiction of Section 40A(9) and that they ought to be allowed under Section 37(1) of the Act.

9. It would be seen from Paragraph 9.17 from the Memorandum of Settlement, that the very heading of the recitals of the local welfare measures was that of "community services" and "social welfare". Such expenses were already being incurred and the Memorandum of Settlement recorded that it would continue to be incurred. It will be seen from Paragraph 9.17.2.1 of the Memorandum of Settlement, that the expenditure under that head, was towards planning and execution of agriculture, irrigation, health services and primary education in forty

villages across three administrative blocks in the vicinity of Jamshedpur. Likewise, under Paragraph 9.17.2.2, it is apparent that expenditure would cover laproscopic operation for women from rural areas and non-employees' families. Similarly, one of the heads of expenditure was towards leprosy patients' settlements in the vicinity and for conduct of education programmes in the city to increase awareness and to remove social stigma attached to leprosy.

10. It is apparent that the expenditure on community services and social welfare, in the context of the Respondent-Assessee's business in that region, was being undertaken even before the execution of the Memorandum of Settlement. The document merely recited that the Company would continue to spend on such measures. Indeed, employees and their extended families would have benefited from such expenditure, which is why it finds mention in the Memorandum of Settlement. However, as seen above, the expenses were not aimed at employee welfare alone but formed part of the Company making its presence felt by discharging a wider range of social responsibilities in the area of its operation. To consider whether Section 40A(9) is at all attracted, it would be instructive to examine its provisions, which are set out below :

> *40A. Expenses or payments not deductible in certain circumstances--*

> *(9) **No deduction shall be allowed** in respect **of any sum paid by the assessee as an employer** towards the setting up or formation of, or as contribution to, any fund, trust, company, association of persons, body of individuals, society registered under the Societies Registration Act, 1860 (21 of 1860), or other institution for any purpose, **except where such sum is so paid, for the purposes and to the extent provided by** or under clause (iv) or clause (iva) or clause (v) of sub-section (1) of section 36, **or as required by or under any other law** for the time being in force.*
>
> *[Emphasis Supplied]*

11. A plain reading of the Section 40A(9) would show that the subject matter of what is positively disallowed under the provision is payments made by an assessee "as an employer". The very core ingredient to attract the jurisdiction of the provision is that the payment ought to have been made by the assessee in the capacity of an employer. The payments that are disallowed under Section 40A are payments made towards setting up, forming or contributing to any fund, trust, company, association of persons, body of individuals, society or other institution for any purpose, but in every case, in the capacity as an employer. Even for such payments, there is an exception in relation to payments that positively fall within the scope of clauses (iv), (iva) and (v) of Section 36(1), which are essentially payments towards contribution to provident fund, pension scheme, and gratuity fund. These are specifically legislated as allowable expenses and have therefore been kept out of the mischief of Section 40A(9). Yet, it cannot be overlooked that for any payment to first fall within the mischief

of what has to be positively disallowed under Section 40A(9), the payment ought to be have been made by the assessee "as an employer".

12. We are unable to see how the payments under the heads listed in the table extracted earlier in this judgement could be regarded as payments made by the Respondent-Assessee in its exclusive capacity as an employer. The payments in question are made towards wider local welfare measures that would boost its presence in the local ecosystem and enable harmonious conduct of its factory and business operations in the vicinity. Merely because a commitment to continue such welfare measures is recited in the Memorandum of Settlement with the Workmen's Union, these payments would not partake the character of payments made under the Memorandum of Settlement or payment required to be made under labour law, or for that matter, payment that is made "as an employer".

13. Expenditure not covered by Section 30 to Section 36, and expenditure made for purposes of business shall be allowed under Section 37(1) of the Act. At all times, relevant to these appeals, as Section 37 then stood, such expenses was not disallowed under Section 37. We have given our careful consideration to the analysis in the orders passed by the CIT-A and the Tribunal, concurrently finding in favour of the Respondent-

Assessee and against the Appellant-Revenue. It is apparent that both forums have found that the payments had a commercial linkage to the business and led to benefits for the conduct of the business of the assessee in those years. Both forums relied upon a judgment of the Supreme Court in *Sri Venkata Sathyanarayana Rice Mill Contractors Co. Vs. Commissioner of Income Tax*[1], in which the Supreme Court was dealing with an assessee that was involved with rice exports from Andhra Pradesh, claiming allowance of contributions made to a local welfare fund, without which, it was claimed, the District Collector would not issue the requisite permits to export rice. The fund had been set up by the rice millers association in coordination with the District Collector. The Tribunal had agreed that such expenses were allowable. The High Court held that view to be wrong. The Supreme Court reversed the view, holding that the contribution to a public welfare fund, if connected with or related to a carrying on the assessee's business, or if it results in benefits to the assessee's business, should be an allowable deduction. In the words of the Supreme Court:-

> *"From the aforesaid discussion it follows that* ***any contribution made by an assessee to a public welfare found which is directly connected or related with the carrying on of the assessee's business or which results in the benefit to the assessee's business has to be regarded as an allowable deduction under Section 37 (1) of the Act****.* ***Such a donation, whether voluntary or at the instance of the authorities concerned****, when made to a*

[1] *(1997) 223 ITR 101 (SC)*

> *Chief Minister's Drought Relief Fund or a District Welfare Fund established by the District Collector or any other Fund* ***for the benefit of the public and with a view to secure benefit to the assessee's business, cannot be regarded as payment opposed to public policy****. It is not as if the payment in the present case had been made as in illegal gratification. There is no law which prohibits the making of such a donation.* ***The mere fact that making of a donation for charitable or public cause or in public interest results in the government giving patronage or benefit can be no ground to deny the assessee a deduction of that amount under Section 37 (1) of the Act when such payment had been made for the purpose of assessee's business."***
>
> ***[Emphasis Supplied]***

14. In the instant case too, the payments made by the Respondent-Assessee were for public causes in the locality of the business operations and benefits flowed from it to the business of the Assessee. In our view, if at all the Memorandum of Settlement is relevant, it would be to show that there was a nexus between such social welfare activity undertaken by the Respondent-Assessee and the business of the Respondent-Assessee. The local harmony and goodwill that the social welfare and community expenses generated, benefited the Respondent-Assessee's conduct of business. That such expenses were being incurred was acknowledged and recited as a continuing commitment. Thus, merely because such expenditure finds a place in the Memorandum of Settlement, the nature and character of such expenditure would not be altered, so as to fall under Section 37(1), or to attract Section 40A(9). Therefore, the two concurrent

views expressed by the CIT-A and the Tribunal need not be faulted. This Court, in appellate jurisdiction on substantial questions of law should not substitute an alternate view, merely because another view is possible, unless the views expressed in the concurrent findings are not at all a plausible view.

15. In any case, we have already found above that Section 40A(9) has no application to the facts of the case. But for adjectival arguments about such payments being stretched into the realm of payments made under law governing industrial disputes, in our opinion, there was no scope for considering the relevance of Section 40A(9) to the matter at hand. In these circumstances, also taking into account that the distance of time has already led to four appeals against the same Impugned Order being withdrawn owing to low tax impact, we see no reason to interfere with the two concurrent findings by considering substituting an alternate view.

16. As a sequel to the above discussion, in our opinion, insofar as question (A) is concerned, the Tribunal was indeed justified in law in upholding the view of the CIT-A in deleting the disallowance made by the Assessing Officer (who had relied upon Section 40A(9) of the Act), of the

amounts expended towards the six heads of payments made in the respective assessment years. Insofar as question (B) is concerned, the payments made in the facts of this case were not payments required to be made under the Industrial Disputes Act or payment required by or under any other law, but the same is irrelevant for the matter at hand since Section 40A(9) was not at all attracted. Unless it was attracted, there was no necessity to rely on the exception in that section in relation to payments required to be made or under any law.

17. Consequently, we answer the two questions of law on which theses Appeals were admitted as follows:-

a) The question (A) is answered against the Revenue and in favour of the Assessee and;

b) The question (b) is also answered against the Revenue and in favour of the Assessee.

18. Disposed of in the above terms. No costs.

(SOMASEKHAR SUNDARESAN, J.) **(G. S. KULKARNI, J.)**