

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

CIVIL APPEAL NOS.4666-4675 OF 2005

M/S. SANDUR MANGANESE & IRON ORES LTD. Appellant (s)

VERSUS

COMMISSIONER OF INCOME TAX Respondent(s)

(With prayer for interim relief)

With S.L.P. (C) No.16478 of 2011

Date: 18/09/2012 These Matters were called on for hearing today.

CORAM :

HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE MADAN B. LOKUR

For Appellant(s) Mr. G. Sarangan, Sr. Adv.

In civil appeals: Mr. Sanjay Kunur, Adv.

Mr. Ramesh Keshwani, Adv.
for M/s. Keswani & Co., Adv.

In SLP:

Mr. K.V. Mohan, Adv.
Mr. R.K. Raghavan, Adv.
Mr. K.V. Balakrishnan, Adv.

For Respondent(s) Mr. R.B. Bhatt, Sr. Adv.

Mr. Rahul Kaushik, Adv.
Mr. Vikas Malhotra, Adv.
Ms. Anil Katiyar, Adv.

UPON hearing counsel the Court made the following
O R D E R

Civil Appeal Nos.4666-4675 of 2005:

Heard learned counsel on both sides.

The civil appeals filed by the assessee are allowed,
subject to payment of costs of Rs.20,000/- to the Department, as
condition precedent.

...2/-

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S.L.P. (C) No.16478 of 2011:

Place this special leave petition on 26th September,
2012, as first item on Board.

The Court wants to know what is the amount reimbursed by
the assessee to the school promoted by it towards the deficit. The
amount shall be certified by the Chartered Accountant.

[T.I. Rajput]
A.R.-cum-P.S.

[Indu Satija]
Court Master

[Signed order in appeals is placed on the file]

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.4666-4675 OF 2005

M/s. Sandur Manganese and Iron Ores Ltd. ...Appellant(s)

Versus

Commissioner of Income Tax ...Respondent(s)

O R D E R

Heard learned counsel on both sides.

These civil appeals filed by the assessee pertain to Assessment Years 1985-1986, 1986-1987, 1989-1990, 1990-1991 and 1992-1993.

The assessee is a limited Company engaged in the business of extraction of manganese and iron ore. The assessee is also a mine owner. For Assessment Year 1985-1986, the assessee filed its Return of Income on 30th October, 1985 declaring a loss of Rs.8,65,97,200/-. Subsequently, the Company filed its revised Return of Income declaring a loss of Rs.12,83,16,800/-.

One of the claims made for deduction by the assessee was under Section 37(1) of the Income Tax Act, 1961 ['Act', for short]. The assessee claimed that it had spent a sum of Rs.11,40,641/- as welfare expenses towards providing education to its employees' children. During the course of discussion with the Assessing Officer, the Company stated that it had made payments to other educational institutions where the children of its employees were studying. At this stage, it is important to note that assessee has established Sandur Residential School and Sandur Education Society for imparting education to students in that area.

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Before us, it has been argued on behalf of the assessee that these payments were made by way of reimbursement to cover the deficit which the school incurred during the relevant accounting year. In that connection, reliance was placed on the findings given by the Income Tax Appellate Tribunal ['ITAT', for short] and the High Court. However, what we find from the assessment order for Assessment Year 1985-1986 and from the Order of Commissioner of Income Tax (Appeals) ['C.I.T. (A)' for short] is that the assessee has made payments to schools other than Sandur Residential School and Sandur Education Society, which fact has not been discussed either in the Order of ITAT or in the Order of the

High Court. In fact, before the Assessing Officer as well as before C.I.T. (A), we do not find the argument of the assessee that these were reimbursements. As stated above, we are concerned with Assessment Years 1985-1986, 1986-1987, 1989-1990, 1990-1991 and 1992-1993.

The interpretation of Section 40A(9) of the Act clearly brings out a dichotomy between 'contribution' and 'reimbursement'. Section 40A(9) of the Act was inserted by Finance Act No.2 of 1984. In the Explanatory Memo to the Finance Bill, 1984, the following explanation indicates the reasons why the word 'contribution' finds place in Section 40A of the Act. We quote hereinbelow Paragraphs 35, 36 and 37 of the Memorandum:

"35. Sums contributed by an employer to a recognised provident fund, an approved superannuation fund and an approved gratuity fund are deducted in computing his taxable profits. Expenditure actually incurred on the welfare of employees is also allowed as deduction. Instances have come to notice where

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certain employers have created irrevocable trusts, ostensibly for the welfare of employees, and transferred to such trusts substantial amounts by way of contribution. Some of these trusts have been set up as discretionary trusts with absolute discretion to the trustees to utilise the trust property in such manner as they may think fit for the benefit of the employees, without any scheme or safeguards for the proper disbursement of these funds. Investment of trust funds has also been left to the complete discretion of the trustees. Such trusts are, therefore, intended to be used as a vehicle for tax avoidance by claiming deduction in respect of such contributions, which may even flow back to the employer in the form of deposit.

36. With a view to discouraging the creation of such trusts, the Bill seeks to make a provision that no deduction shall be allowed in the computation of taxable profits in respect of any sums paid by the taxpayer as an employer towards the setting up of, or as contribution to, any fund or trust for any purpose, except where such sum is paid or contributed (within the limits laid down under the relevant provisions) to a recognised provident fund or an approved gratuity fund or an approved superannuation fund or for the purposes of and to the extent required under any other law.

37. With a view to avoiding litigation regarding the allowability of claims for deduction in respect of contributions made in recent years to such trusts, the proposed amendment is being made retrospectively from 1st April, 1980, and will, accordingly, apply in relation to the assessment year 1980-81 and subsequent years."

It appears that Section 40A(9) of the Act was inserted as a measure for combating tax avoidance. Suffice it to say that the application of Section 40A(9) of the Act, in the present case, would come into play only after the assessee has established the basic facts. In the present case, we do

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not know how the ITAT and the High Court have come to the conclusion that these payments made by the assessee constituted reimbursement. As stated above, for the Assessment Year 1985-1986, the Assessing Officer records that an amount of Rs.11,40,641/- has been incurred by payments to other educational institutions and not by way of payments made to

school or the society promoted by the assessee. For each assessment year, therefore, the ITAT will have to record a separate finding as to whether the claim for deduction is being made for payments to the school promoted by the assessee or to some other educational institutions/schools and thereafter apply Section 40A(9) of the Act which has not been done in the present case.

We, therefore, set aside the impugned judgments of the High Court as well as of the ITAT and we direct the ITAT to consider the matter de novo for each of the above assessment years by giving a clear bifurcation between payments made by the assessee to Sandur Residential School and Sandur Education Society and payments made to schools other than Sandur Residential School and Sandur Education Society. We refrain from going into the scope and applicability of Section 40A(9) of the Act when proper foundation of the facts has not been laid.

Accordingly, the civil appeals filed by the assessee are allowed, subject to payment of costs of Rs.20,000/- to the Department, as condition precedent.

.....CJI.
[S.H. KAPADIA]

.....J.
[MADAN B. LOKUR]

New Delhi,
September 18, 2012.
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