VERDICTUM.IN

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

INCOME TAX APPEAL NO. 250 OF 2024
WITH
INCOME TAX APPEAL NO. 632 OF 2025
WITH
INCOME TAX APPEAL NO. 631 OF 2025

Sumitomo Chemical India Limited
(successor in interest of M/s Excel Crop Care Limited having PAN AAACW3810D), a company incorporated in India having registered office at Building No.1 Ground Floor, Shant Manor Co-op Housing Society Limited, Chakravarti Ashok 'X' Road, Kandivali (East), Mumbai 400 101
PAN AAECS3750L ...Appellant

Versus

The Deputy Commissioner of Income Tax, Circle 1(3)(1), having his office at Room No. 540, 5th Floor, Aaykar Bhavan, M. K. Road, Mumbai – 400020. ...Respondent

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Mr. Dharan V. Gandhi for Appellant.
Mr. Suresh Kumar for Respondent.

CORAM : G. S. KULKARNI &
DR. NEELA GOKHALE, JJ.
RESERVED ON : 21st AUGUST 2026
PRONOUNCED ON : 27th NOVEMBER 2026

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JUDGMENT: (PER DR. NEELA GOKHALE, J.)

1. By consent of the learned counsel for the parties, these appeals are taken up for hearing and final disposal. They are hence being decided by this common judgment, as they arise from a common order passed by the Income-tax Appellate Tribunal, Mumbai Bench "E" ('the **Tribunal**'), dated 9th January 2023, as also they involve common questions of fact and law.

2. By these appeals filed under Section 260A of the Income-tax Act, 1961 ('**IT Act**'), the appellant/assessee challenges common order dated 9th January 2023, passed by the Tribunal in ITA No. 7140/Mum/2014, ITA No. 4762/Mum/2015 and ITA No. 6665/Mum/2016 for Assessment Years ('**AY**') 2009-10, 2010-11 and 2011-12, respectively, whereby the Tribunal has upheld the Assessing Officer's ('**AO**') view of disallowance of expenditure on subscription charges, purportedly paid by the Appellant/assessee to protect and preserve the Appellant's business interest. By the impugned order, the Tribunal also decided ITA No.7934/Mum/2014, ITA No.3906/Mum/2015, ITA No. 6775/Mum/2016 and ITA No.395/Mum/2018. However, these were not challenged before this Court.

3. The assessment years are: 2009-10, 2010-11 and 2011-12.

4. By the impugned order, the Tribunal allowed the Revenue's appeals and reversed the order of the Commissioner of Income-tax (Appeals) ('**CIT**'),

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thereby restoring the decision of the AO in disallowing of subscription charges paid by the Appellant to Endosulfan Manufacturers and Formulators Welfare Association ('**EMFW Association**') and other trade bodies, and confirming disallowance of certain expenditure as prior-period expenditure as per the Orders of the AO.

5. The following questions of law are fomulated:

a) Whether, on the facts and in the circumstances of the case and in law, the Tribunal was justified in upholding the Orders passed by the AO, whereby the AO disallowed the subscription charges of Rs. 28,59,772/- for the AY 2009-10; Rs.3,45,71,462/- for the AY 2010-11; and Rs.28,58,620/- for the AY 2011-12, and rejecting the Appellant's contention that such expense was incurred solely to protect and preserve its business interest and was influenced by the consideration that the product in question is stated to be dangerous to the environment?

b) Whether, on the facts and in the circumstances of the case and in law, the subscription charges of Rs. 1,60,50,728/-, claimed as a deduction in AY 2010-11, should be allowed as a deduction for the said AY 2009-10 as prior-period expenses?

6. **The facts of the case, in brief, are as follows:**

6.1. The Appellant is a company incorporated in India and assessed to tax under the IT Act. The Appellant is the successor-in-interest to M/s. Excel Crop Care Limited ('**the Amalgamated Company**') pursuant to a scheme

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of amalgamation sanctioned by the National Company Law Tribunal vide order dated 27th June 2019, with effect from 1st April 2018. The Amalgamated Company was engaged in the manufacture and trading of agrochemicals, of which "**Endosulfan – a broad-spectrum generic insecticide**", used globally for approximately five decades, is stated to be the major product, contributing at least 40% of its business.

6.2. During the relevant previous years, Endosulfan was lawfully manufactured, sold, and exported by the assessee/amalgamated company despite adverse publicity, opposition from certain non-governmental organisations, and threatened restrictions in some jurisdictions. In response to this opposition, manufacturers of Endosulfan, including the Amalgamated Company, formed the Endosulfan Manufacturers & Formulators Welfare Association ('**EMFW Association**'), registered under the Societies Registration Act, 1860, and under Section 12AA of the IT Act. The assessee contended that the EMFW Association was constituted to protect and promote the collective business interests of its members and undertook activities including conducting scientific studies on Endosulfan residues, educating farmers on its safe use, defending litigation before the Supreme Court and other courts, addressing misconceptions regarding its toxicity profile, and making representations before governmental and international forums.

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6.3. The Amalgamated Company, as a member of EMFW Association, claims to have paid 'subscription charges' to the association to support these activities. For AY 2009-10, the total subscription expenditure claimed was Rs. 28,59,772/-, of which Rs. 12,35,243/- was paid to EMFW Association and the balance of Rs. 16,24,529/- to other trade and business-related organisations, including the Bombay Chamber of Commerce, Crop Care Federation, Crop Life India, and the Indian Chemical Council, which have no connection whatsoever with EMFW Association or Endosulfan. The total subscription expenditure claim for the subsequent assessment years are as follows:

Assessment Year	Contribution
2009-10	Rs.28,59,672/-
2010-11	Rs.3,45,71,462/-
2011-12	Rs.28,58,620/-

6.4. The AO, by orders dated 8th March 2013, 20th March 2023 and 27th February 2014 for AY 2009-10, AY 2010-11 and AY 2011-12 respectively, passed under Section 143(3) of the IT Act, disallowed the entire 'subscription' expenditure, holding that it was incurred not for the business of the Amalgamated Company but to 'convince government officials and the department' to promote the use of Endosulfan, a substance whose production, according to the AO, was 'suspected to be illegal' and was the subject matter of proceedings before the Supreme

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Court. The AO accordingly held the expenditure which was for lobbying, disallowable under Section 37(1) of the IT Act.

6.5. In appeal, the CIT, by orders dated 25th August 2014, 25th March 2015 and 26th August 2016 for the respective AYs, allowed the Amalgamated Company's claim in full. The CIT recorded categorical finding that EMFW Association was a trade association constituted to protect and promote the business interests of its members; that it was engaged in conducting scientific studies, educating farmers, defending litigation, making international representations, and addressing misconceptions concerning toxicity; and that it was EMFW Association, not the Amalgamated Company, that interacted with government officials. On this basis, the CIT held that the subscription expenditure was incurred wholly and exclusively for the preservation and protection of the Amalgamated Company's business interests, applying the principles laid down by the Supreme Court in ***Sree Meenakshi Mills Ltd. v. CIT***[1] ***and CIT v. Malayalam Plantations Ltd***[2].

6.6. A separate issue arose in AY 2010-11, when the CIT accepted, on merits, the allowability of subscription expenditure of Rs. 1,60,50,728/-, but disallowed it on the technical ground that it pertained to Financial Year 2008-09 and was therefore prior-period expenditure not deductible in AY 2010-11. Before the Tribunal, the Appellant raised an additional

[1] [1967] 63 ITR 207 (SC).

[2] [1964] 53 ITR 140 (SC).

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ground, which was admitted, claiming that, in the alternative, the said sum ought to be allowed as a deduction in AY 2009-10, since the liability crystallised only upon a decision of the EMFW Association Managing Committee dated 29th June 2009 revising the applicable rate.

7. Aggrieved by the CIT's order allowing the subscription expenditure, the Revenue preferred an appeal before the Tribunal. The Revenue assailed the Order passed by the CIT on the ground that the Appellant failed to establish that the expenditure was incurred wholly and exclusively for any lawful purpose, i.e., for the purpose of its business, and that the Appellant had never canvassed the nature and activities of the EMFW Association.

8. By the impugned order dated 9th January 2023, the Tribunal allowed the Revenue's appeal and reversed the order of the CIT. The Tribunal held that the CIT had allowed the assessee's claim solely on the basis of the form of the issue and on hyper-technical grounds, and therefore reversed the CIT's order granting a deduction for expenditure incurred for the furtherance of the product, which the Supreme Court of India had held to be a threat to human life. The Tribunal further held that the so-called subscription was contrary to the principle enunciated under section 37(1) for the grant of a deduction to the assessee. The Tribunal observed that it was immaterial whether the assessee produced evidence of incurring such expenditure. Thus, the Tribunal disagreed with the CIT and was not inclined to hold that

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expenses for promoting the company's product, considered a threat to human life, could be allowed as a deduction.

9. The Tribunal proceeded on the premise that, Endosulfan was banned by the Supreme Court by its Order dated 13th May 2011, all expenditure connected with the product was, *en masse*, incapable of being treated as incurred for business purposes, irrespective of the year to which such expenditure related or the position of law prevailing during the relevant assessment years. On the same reasoning, the Tribunal also disallowed the sum of Rs. 16,24,529/- paid to unrelated trade bodies, notwithstanding that neither the AO nor the CIT had recorded any adverse finding in respect of that amount.

Submissions on behalf of the Appellant

10. Mr Dharan Gandhi, learned counsel for the Appellant, submitted as under:

10.1. The Tribunal has proceeded on considerations wholly extraneous to the statutory test under Section 37(1) of the IT Act, substituting the requirement of 'commercial expediency' with its own subjective perception of the product's desirability.

10.2. The statutory test under Section 37(1) of the IT Act is whether the expenditure was incurred by the assessee in its capacity as a businessman and whether it had a nexus with the carrying on, protection, or

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preservation of the business, not whether the Tribunal considers the underlying product to be safe or socially desirable. The decision relies on ***Sree Meenakshi Mills Ltd. v. CIT*** *(supra),* ***CIT v. Malayalam Plantations Ltd*** *(supra),* and ***Delhi Cloth and General Mills Co. Ltd. v. CIT***[3]***.***

10.3. During the relevant assessment years, Endosulfan was lawfully manufactured, sold, and exported; the subsequent ban imposed by the Supreme Court in 2011 could not retrospectively alter the character of expenditure lawfully incurred in earlier years. Reliance is placed on the ad-interim and precautionary nature of the Supreme Court's order dated 13th May 2011, and on the subsequent order dated 13th December 2011, which permitted the export of existing stock and, in fact, resulted in income to the Appellant.

10.4. Explanation 1 to Section 37(1) of the IT Act applies only where the expenditure itself is incurred for a purpose that is an offence or prohibited by law. There is no finding, either by the AO or the Tribunal, that the payment of a subscription to EMFW Association was unlawful or prohibited; the AO's finding of 'lobbying' was based on a selective and unsubstantiated reading of the Appellant's submissions, without any independent inquiry, verification of EMFW Association's accounts, or evidence of any payment to any government official.

[3] (1972) 85 ITR 261 (Delhi).

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10.5. The Tribunal disallowed the entire amounts, including Rs. 16,24,529/- paid to unrelated trade bodies with no connection to EMFW Association or Endosulfan, without recording any independent finding on the nature or purpose of that expenditure. The Appellant contributed Rs.28,59,672/- during the AY 2009-10; Rs.3,45,71,462/- during the AY 2010-11; and Rs.28,58,620/- during the AY 2011-12. Admittedly, as also noted by the AO, no documents or materials have been placed before the AO to prove the said expenditure.

10.6. The Tribunal failed to address the detailed findings of fact recorded by the CIT and merely disagreed with the CIT on the single ground of the subsequent ban, without demonstrating any perversity in the CIT's findings or showing that the CIT had relied on irrelevant material or ignored relevant material.

10.7. Regarding the prior-period expenditure of Rs. 1,60,50,728/-, the liability crystallised only upon the EMFW Association Managing Committee's decision dated 29th June 2009, which revised the subscription rate. It was therefore allowable in the year of crystallisation, in accordance with the principles laid down in ***CIT v. Mahanagar Gas Ltd.***[4] and ***Saurashtra Cement and Chemical Industries Ltd. v. CIT***[5]. Alternatively, since the Amalgamated Company is taxed at a uniform rate, no prejudice arises to

[4] (2014) 221 Taxman 80 (Mag.) / 42 taxmann.com 40 (Bom.) (HC).

[5] (1995) 213 ITR 523 (Guj).

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the Revenue in allowing the expenditure in AY 2009-10, in accordance with the principle laid down in ***CIT v. Nagri Mills Co. Ltd.***[6]

Submissions on behalf of the Respondent

11. Mr Suresh Kumar, learned counsel for the Respondent, submitted as under:

11.1. For AY 2009-10, the claim of Rs. 28,59,772/- for subscription paid to EMFW Association was rightly disallowed by the AO under Section 37(1)(c) of the IT Act. He submits that the Appellant's own "note dated 8th January 2013", on which the AO's finding at paragraph 3.4 of the assessment order is premised, was never challenged before the CIT. The expenditure was thus admittedly incurred to persuade government officials and the department to promote the use of Endosulfan, a product banned in several countries and the subject matter of a pending Special Leave Petition before the Supreme Court, and no expenditure incurred for lobbying with, or persuading, a government servant, whether directly or through an agency, can ever be allowed as a deduction.

11.2. The question of law (e) framed in ITXA No. 250 of 2024, relating to the subscription charges of Rs. 1,60,50,728/- claimed as a deduction in AY 2010-11 and disallowed as prior-period expenditure, does not arise in AY 2009-10, as the orders of the AO, the CIT, and the Tribunal make it clear that this claim was never raised by the Appellant in that year.

11.3. For AY 2010-11, the Appellant claimed Rs. 3,45,71,462/-, which the AO disallowed in full. The CIT, at paragraph 4.3 of its order, correctly bifurcated the claim into Rs. 1,85,20,734/- for Financial Year 2009-10,

[6] (1958) 33 ITR 681 (Bom).

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which was allowed, and Rs. 1,60,50,728/- for Financial Year 2008-09, which, being prior-period expenditure, was rightly disallowed and was neither challenged nor reversed. The Tribunal correctly restored the disallowance of the entire claim. It is further submitted that the claim of Rs. 5,06,22,190/- now raised in the question of law is inflated and finds no support in the original claim of Rs. 3,45,71,462/- made before the AO.

11.4. For AY 2011-12, the Appellant claimed Rs. 28,58,620/- as subscription expenditure paid to EMFW Association. For the same reasons recorded by the AO at paragraph 3.5 of the assessment order, namely that the expenditure was incurred to persuade government officials and the department to promote the use of Endosulfan, the claim was rightly disallowed under Section 37(1)(c) of the IT Act. The Tribunal correctly reversed the CIT's order allowing the claim.

11.5. It is submitted that the claim for prior-period expenditure of Rs. 1,60,50,728/- has, in effect, been made twice; once in the question of law for AY 2009-10, though never raised in that year, and again in AY 2010-11, where it was in fact considered and disallowed by the CIT. In view of the foregoing, Mr Suresh Kumar urged us to dismiss the appeals.

Analysis

12. The AO who dealt with the matter at the initial stage refused to allow the expenditure purportedly labelled as 'Subscription' for the reason that such expenditure was not incidental to the business of the assessee. The AO

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called upon the Appellant to submit proof of the expenditure during the assessment proceedings and to show cause with justification for the allowability of the said expenditure in view of the relevant provisions of the law. Notably, the AO observed that the Appellant did not submit any proof of the incurrence of such expenditure. On such backdrop, the AO refused to allow the said expenditure. At the outset, the Appellant's failure to furnish proof of the incurrence of the expenditure towards subscription itself was a sufficient enough reason to disallow any deduction of such amounts.

13. The AO also noted that the expenditure was not for business purposes but was a contribution to the EMFW Association to 'convince' the government officials and departments to promote the use of its product, namely Endosulfan. The AO observed that the product itself was banned in several countries and that the Supreme Court of India was in seizin of the case involving the issue of banning the said product in India. The AO, thus, construed the term 'convincing' to mean 'lobbying' government officials and government departments.

14. Thus, the Appellant's claim must be considered on the touchstone of the statutory provisions contained in Section 37(1) of the IT Act, which reads as follows:

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

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> Explanation 1.—For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or **which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure.**"
>
> (emphasis supplied)

15. Consequently, the test for determining deductibility is to ascertain whether the expenditure has been laid out or expended wholly and exclusively for the purpose of the Appellant's business in the present case as also whether the same would fall within the exception as carved out in Explanation 1. In such context, we may at the outset refer to the decision of the Supreme Court in **Commissioner of Income Tax v. Malayalam Plantations Limited** (supra) wherein, the Supreme Court has set out the scope of this expression and observed as follows:

> "...The expression "for the purpose of the business" is wider in scope than the expression "for the purpose of earning profits". Its range is wide: it may take in not only the day to day running of a business but also the rationalization of its administration and modernization of its machinery; it may include measures for the preservation of the business and for the protection of its assets and property from expropriation, coercive process or assertion of hostile title; it may also comprehend payment of statutory dues and taxes imposed as a pre-condition to commence or for carrying on of a business; it may comprehend many other acts incidental to the carrying on of a business. **However wide the meaning of the expression may be, its limits are implicit in it. The purpose shall be for the purpose of the business, that is to say, the expenditure incurred shall be for the carrying on of the business and the assessee shall incur it in his capacity as a person carrying on the business.…**" (emphasis supplied)

16. Against this backdrop of the statement of law, on the allowability of a particular item as a deduction under the statutory provisions referred to

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above, the question raised in the present case can be decided.

17. According to the Appellant, the expenditure on contribution to the EMFW Association was a consequence of adverse publicity by several NGOs, which generated public opinion that Endosulfan was poisonous and toxic. The EMFW Association was formed to represent Endosulfan manufacturers before government forums; protect and promote the collective business interests of its members; and undertake activities, including conducting scientific studies, educating farmers on its safe use, and defending litigation before the Supreme Court and other Courts. The Appellant contributed Rs.28,59,672/- during the AY 2009-10; Rs.3,45,71,462/- during the AY 2010-11; and Rs.28,58,620/- during the AY 2011-12. Admittedly, as also noted by the AO, no documents or materials have been placed before the AO to prove the said expenditure.

18. Thus, the vital question for consideration is whether there is any direct connection between the object of contribution and the Appellant's business interest. A case against the manufacture of Endosulfan, is whether the manufacture was against public health/public interest or illegal, was before the Supreme Court. By its ad-interim Order dated 13th May 2011, the Supreme Court directed an immediate ban on the production of Endosulfan throughout India and further directed the statutory authorities to seize the permits granted to Endosulfan manufacturers until further orders. The Supreme Court observed as follows:

> "1. This writ petition is moved in **public interest highlighting the harmful**

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effects caused by the continued use of Endosulfan on human beings and on the environment. Endosulfan is now used as a pesticide for the production of crops like paddy, sugarcane, cotton, mango, cashew, etc. Few studies have been conducted in this area and its adverse effects on human health and environment has been reported. Some of the studies also indicate that Endosulfan is significantly associated with neuro-behavioural disorders, cognitive disorders, hydrocephalus, mental retardation, cortical blindness, seizure disorders, Parkinson's disease, etc.

2. The petitioner submits that it is a serious health hazard and the Court has got an obligation to protect human life, which is guaranteed under Article 21 of the Constitution of India. Further, it was pointed out that its ill-effects have been clearly felt in the State of Kerala and its use has been completely banned in that State.

3. We have gone through the report published by the Government of Kerala and the photographs appearing therein are highly disturbing. Right to life, guaranteed under Article 21 of the Constitution of India, is the most fundamental of all human rights, and any decision affecting human life, or which may put an individual's life at risk, must call for the most anxious scrutiny.

4. We have heard learned Senior Counsel Mr Krishnan Venugopal appearing for the petitioner, Mr Gopal Subramanium, Solicitor General of India and Mr Mukul Rohatgi, learned Senior Counsel appearing for the Pesticides Manufacturers and Formulators Association of India and others.

5. The learned Solicitor General of India referred to the various reports and the findings recorded therein on the use of Endosulfan. After referring to those reports, we are of considered opinion that a detailed study on all-India basis needs to be undertaken by an Expert Committee, so that its ill-effects on human health and environment can be better addressed.

6. We, therefore, appoint a Joint Committee headed by the Director General of ICMR and the Commissioner (Agriculture) to conduct a scientific study on the question whether the use of Endosulfan would cause any serious health hazard to human beings and would cause environmental pollution. The Committee can also co-opt experts from the field of environment as well as public health and also other allied areas. The Committee would submit its interim report within eight weeks from today and also would suggest any

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> alternative to Endosulfan. **Till the report is submitted, keeping in mind the various judgments of this Court under Article 21 of the Constitution of India, particularly keeping in mind the precautionary principle, we hereby pass an ad interim order to immediately ban the production, use and sale of Endosulfan all over India and we further direct the statutory authorities to seize the permit given to the manufacturers of Endosulfan till further orders.**
>
> 7. Place this matter in the second week after the ensuing summer vacation."
>
> (emphasis supplied)

19. In the teeth of these orders passed by the Supreme Court, the Appellant's case is that substantial contributions were made to the EMFW Association to persuade government authorities to take steps to reverse the ban. Despite the matter being before the Supreme Court, the purpose of the contributions was to persuade government authorities to continue manufacturing, i.e., to incentivise a policy shift. The members of the EMFW Association believed that these monetary contributions would play a major role in persuading government authorities to urge the Supreme Court to vacate the ban and/or to make out a case supporting the manufacture of the chemical. This is akin to donations made to a political party to influence policy decisions. The question of donations to a political party has come up for consideration before almost all the High Courts in the country. The Calcutta High Court, in the matter of ***Re: Indian Iron and Steel Company Limited***[7], pointed out as follows:

> "To the cynic it appears to be a plea of the company to have a legal sanction to bribe the Government of the day, to induce policies that will help the company in its business. A company's policy should be determined by its shareholders who subscribe to its capital, and carried out by its board of

[7] (1957) 27 Comp Cas 361, 364 (Cal).

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> directors, who manage the company. Such policy should, therefore, stand on its own merits and on the convictions and conscience of its shareholders. To induce the Government of the day by contributing money to the political funds of political parties, is to adopt the most sinister principle fraught with grave dangers to commercial as well as public standards of administration. The object is stated plainly to be ' to contribute to the funds of political parties which will advance policies conducive to the interest of the company'. Persuasion by contribution of money lowers the standard of administration even in a welfare state or democracy. To convert convictions and conscience by money is to pervert both democracy and administration. Its dangers are manifold. Joint stock companies are not intended to be adjuncts to political parties and possible sources of revenue for these parties. They are statutory bodies working under statutory conditions for different purposes. Secondly, it will induce the most unwholesome competition between business companies by introducing the race, who could pay more to the political funds of political parties. In that competition business interest is bound to suffer in the long run. In the bid for political favouritism by the bait of money the company who will be the highest bidder may secure the most unfair advantage over its rival trader companies. Thirdly, it will mark the advent and entry of the voice of the big business in politics and in the political life of the country. The individual citizens although in name equal will be gravely handicapped in their voice because the length of their contribution cannot ever hope to equal the length of the contribution of the big companies. The man who pays the piper will then call the tune. The tune of political life, therefore, is liable in the long run to become the tune of the big trading companies and concerns. That will be bad for both business and politics. It will be alike bad for public life as well as commercial life."

20. Strong words, indeed. But implicit in them, lies a strong common sense. Although it is not necessary for us, in the context of the present matter, to decide whether a contribution to political parties can be allowed as a deduction under Section 37(1) of the IT Act, however as a matter of principle and the logic which needs to be derived therefrom, it can be

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understood from the said decision that a nexus or link must be established between the contribution and the business carried on by the assessee.

21. In ***J.K. Cotton Spg. & Wvg. Mills Co. Ltd. v. Commissioner of Income Tax***[8], the assessee company paid Rs. 56,000/- to the Congress parliamentary board for its expenditure in the general elections and claimed it as a business expenditure on the ground that, with the changing pattern of the economic structure of society, it was in the interest of the company to keep the ruling party in power. The Court, after referring to the Tribunal's finding, observed as follows:

> "In these circumstances, the facts found do not indicate any nexus between this contribution to the Congress parliamentary board and expenditure incurred for the purpose of the business. When there is no direct nexus between the business of the company and this contribution, it appears to be impossible to hold that the assessee-company discharged the burden of proof which lay on it to show that this expenditure was wholly and exclusively for the purpose of the business."
>
> (emphasis supplied)

22. The decision of this Court in ***Commissioner of Income Tax v. Elphinstone Spinning and Weaving Mills Co. Ltd.***[9] concerned a donation of Rs.21,000/- to the Bombay Provincial Congress Committee. The object clause of the assessee company's memorandum of association permitted such donations. The Court followed the decisions of the Calcutta High Court in ***Indian Steel and Wire Products Ltd. v. Commissioner of Income Tax***[10] and of the Delhi High Court in ***Orissa Cement Ltd. v. Commissioner of Income Tax***[11], and

[8] (1966) 62 ITR 813 (ALL).
[9] (1975) 100 ITR 139 (Bom).
[10] (1968) 69 ITR 379 (Cal).
[11] (1969) 73 ITR 14 (Del).

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negatived the claim for deduction.

23. In the present case, the admitted position is that the quantum of the contribution was determined based on the quantity of Endosulfan produced by the members of the EMFW Association, including the Appellant. For example, for AY 2009-10, the assessee's contribution was Rs. 3/- per kg of actual production of Endosulfan technical; for AY 2011-12, it was Rs. 1.5/- per kg, and so on.

24. The Supreme Court banned the manufacture of Endosulfan as it is dangerous and toxic to public health. The endeavour of the assessee and other members of the EMFW Association was to build a narrative conducive to the manufacture of Endosulfan, as the anti-publicity campaign by NGOs affecting public opinion had already commenced. Against the backdrop of the Supreme Court's observations in its ad-interim Order dated 13th May 2011, the assessee's promotional campaign and that of other members of the Association appear to be against public policy. After the Supreme Court's ad-interim ban, no amount of favourable publicity or canvassing of public authorities could have affected the Supreme Court proceedings.

25. It is pertinent to note that neither the Memorandum of Association of the assessee company, which states that building public opinion in favour of the manufacture of its products and/or persuading public authorities in that regard is the object of the company, nor any other document proving expenditure made towards the pro-Endosulfan campaign was placed before

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the AO. There was also nothing on record to indicate that the expenditure was incurred to resist or contest the proceedings before the Supreme Court. In these circumstances, the AO was justified in refusing to allow the expenditure under the provisions of law.

26. Furthermore, the word 'subscription' is defined in Black's Law Dictionary as follows:

> "An oral or a written agreement to contribute a sum of money or property, gratuitously or with a consideration, to a specific person or for a specific purpose."

27. Strictly on the Appellant's own admission, the contribution was a subscription. The Karnataka High Court in its decision in the matter of **J. K. Panthaki & Co. vs. ITO**[12] has held that the expenditure must be laid out wholly and exclusively for the purposes of business, and must not be capital or personal expenditure. No deduction is allowed for expenditure incurred for a purpose which is an offence or which is prohibited by law. The Karnataka High Court in **Panthaki** (supra) observed as under:

> "10. "Expenditure" is equal to "expense" and "expense" is money laid out by calculation and intention. But the idea of "spending in the sense of "paying out or away" money is the primary meaning. Expenditure' is thus what is "paid out or away' and is something which is gone irretrievably. To be an allowance within clause (xv), the money paid out or away must be (a)paid out wholly and exclusively for the purpose of the business and further (b) must not be (i) capital expenditure, (ii) personal expense, or (iii) an allowance of the character described in clauses (i) to (xiv). But whatever the character of the expenditure, it must be a paying out away. It is not enough that the disbursements are made in the course of or arise out of or are concerned with or made out of the profits of the business, but they must also be for the purpose of earning the profits of the business. It must be a commercial loss and in its nature must be contemplable as such. The mere fact that the assessee establishes the existence of an agreement between him and his agents and the fact of actual payment, the discretion of the Income-tax

[12] 2010 SCC Online Kar 5143

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Officer to consider whether the expenditure was made exclusively for the purpose of the business is not taken away.

11. The expenditure incurred must be for commercial expediency. In applying the test of commercial expediency for determining whether an expenditure was wholly and exclusively laid out for the purpose of the business, reasonableness of the expenditure has to be adjudged from the point of view of the businessman and not of the Revenue. The expression "commercial expediency" is an expression of wide import and includes such expenditure as a prudent businessman incurs for the purpose of business. The expenditure may not have been incurred under any legal obligation, but yet it is allowable as a business expenditure, if it was incurred on the grounds of commercial expediency.

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20. Yet another way of looking at things is, there is a clear case of collusion between the directors of the company and the assessee. In the tender which is floated, they have submitted prices which are higher than the normal price. Accordingly, the payment is made. After awarding the contract, they have reduced the price and agreed to receive the difference of price in their name. The assessee has obliged them. It is obvious that it is a kick back or bribe. It is an illegal gratification. It is a scheme adopted to siphon out the money belonging to the company. They want to lend respectability to it by calling it as a "commission". Therefore, seen from any angle, it cannot be construed as an expenditure at all, let alone commission.

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37. The Explanation to section 37 declares that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure.

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40. Infraction of the law is not a normal incident of business. Only such disbursements can be deducted as are really incidental to the business itself. They cannot be deducted if they fall on the assessee in some character other than that of a trader. It is well settled that contracts which are prohibited by statute, the prohibition being either express or implied, would be illegal and unenforceable if they are entered into in contravention of the statute. Where a contract is expressly or by implication forbidden by statute, no court will lend its assistance to give effect to such contract. A distinction is sometimes made between contracts entered into with the object of committing an illegal act and contracts expressly or impliedly prohibited by statute. The distinction is that in the former class one has only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract. In the latter class, one has to consider not what act the statue prohibits, but what contracts it prohibits. Any agreement which tends to be injurious to the public or against the public good is invalidated on the grounds of public policy. The question whether a particular agreement is contrary to public policy is a question of law to be determined like any other question of law by the proper application of legal principles and prior decisions."

28. Thus, it is clear that the expenditure purportedly labelled by the Appellant

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as "Subscription" viewed from any perspective cannot be said to be incidental to the Appellant's business. The true position appears to be that the expenses which are claimed as deductions have a direct and proximate connection with an act which is in contravention of the law.

29. Likewise, the distinction drawn by the CIT between the Appellant and members of the Association, on the one hand, and the EMFW Association, on the other, is superficial. The CIT's observation that it is not the Appellant but the association that is meeting and convincing government officials to counter adverse publicity against Endosulfan is unacceptable. Furthermore, the quantum of the contribution is also quite unconscionable which speaks volumes about the object to be achieved.

30. In view of the aforesaid discussion, we have no hesitation in answering the question of law (a) in the affirmative and against the assessee.

31. In respect of the question of law (b), we agree with the Tribunal's finding that the additional ground raised by the assessee regarding the prior-period expenses debited to the profit and loss account in AY 2010-11, amounting to Rs. 1,60,50,728/-, which were disallowed for AY 2009-10, has become academic in light of the aforesaid discussion.

32. In view of the above, the appeals are dismissed. No costs. Pending applications, if any, stand disposed of.

(DR. NEELA GOKHALE, J.) **(G. S. KULKARNI, J.)**

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