Legal Decisions[1]

DIRECT TAXES

Section 147 of the Income-tax Act, 1961 – Income Escaping Assessment

Case being one where notice was issued beyond a period of 8 years, but within a period of 16 years, satisfaction of Board that it is a fit case for issue of notice is a prerequisite;, where a record stamp endorsement was made without assigning any reason and it was signed by under Secretary, satisfaction suffered from non-application of mind and would not meet perquisite condition for issuing notice beyond 8 years [Assessment Year 1965-66]

The Central India Electric Supply Co. Ltd. v. Income Tax Officer, January 28, 2011 (DEL)

Where the notice was issued beyond a period of 8 years, but within a period of 16 years, the satisfaction of the Board stating that it is a fit case for issue of such notice, is a prerequisite.

The satisfaction was stated to be contained in a proforma where against the column as to 'Whether the Board was satisfied of the reasons Recorded', an endorsement was made 'Yes. The Board is satisfied', which was signed by the Under Secretary and further this satisfaction was in the form of a rubber stamp and it was held that the endorsement suffered from non-application of mind apart from the fact that nothing had been placed on record to show that the Under Secretary had been authorised to record such satisfaction of the Board.

Rubber stamping of underlying material is hardly a process which can get the imprimatur of the Court as it suggests that the decision has been taken in a mechanical manner. The least, which is expected, is that an appropriate endorsement is made in this behalf setting out brief reasons. Reasons are the link between the material placed on record and the conclusion reached by an authority in respect of an issue, since they help in discerning the manner in which conclusion is reached by the concerned authority.

The 'rubber-stamp' reason given mechanically for the supersession of each officer does not amount to 'reasons for the proposed supersession'.

In Union of India v. M.L. Capoor AIR 1974 SC 87, the Supreme Court has held that the reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They should disclose how the mind is applied to the subject matter for a decision whether it is purely administrative or quasi-judicial. They should reveal a rational nexus between the facts considered and the conclusions reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable. Where this is absent, there has not been proper application of mind by the Board.

Section 148 of the Income-tax Act, 1961– Income Escaping Assessment – Issue of Notice

In matters of enhancement of compensation where none could contemplate in advance as to what would be fate of appeal proceedings and final picture emerged only when Supreme Court pronounced its judgment and on receipt of enhanced compensation, appellant disclosed same in its return, it was unjust to say that assessee had failed to disclose amounts in both returns originally filed [Assessment Year 1965-66]

The Central India Electric Supply Co. Ltd. v. Income Tax, January 28, 2011 (DEL)

Two units of the appellant-assessee company, engaged in the generation and supply of electricity, was acquired by the State Government in 1964. The compensation for compulsory acquisition was fixed. The assessment was completed at the behest of the assessee at a total loss of ₹56,611 for the assessment year 1965-66 which was not allowed to be carried forward due to closure of business. The appellant company made a claim for higher compensation for land. The matter was taken up to arbitrator, umpire, the High Court and the Supreme Court one by one. In 1985, the Supreme Court modified the Order of the High Court by reducing the amount of compensation awarded by the High Court.

The assessee received some payment in the previous year 1978-79. Since the amount of enhanced compensation was deposited by the assessee in a nationalised bank, the benefit of Section 54E was claimed by the assessee. The benefit of section 54E was not available in assessment year 1965-66. A notice under Section 148 of the IT Act was issued. The assessee filed its return in 1982 declaring a loss of ₹56,611 as assessed

[1] *Readers are invited to send their comments on the selection of cases and their utility at eboard@icai.org.*

originally on 13.01.1969. It was claimed by ITO that since income had accrued to the assessee company under the head of 'Long Term Capital Gains' (LTCG) on transfer of assets in respect of its two units, it was liable to tax in the same assessment year when the transfer took place and escaped assessment. The ITO found that the assessee failed to disclose the aforesaid amounts in both the returns filed on 07.10.1965 and 16.02.1967 and computed a sum of ₹8,91,746/- under Section 143(3) as the income chargeable to tax.

The High Court of Delhi held that the ITO did not have reason to believe that income chargeable to tax had escaped assessment. All the necessary facts were, in fact, set out and the factum of the litigation pending and reference to the Award formed a part of the Report of the Board of Directors, which was filed along with the returns. What would be the final compensation to be determined in the matter as the issue was *sub judice*. There had been modifications of the Awards by the Courts and the matter only culminated into a final quantification when the Supreme Court decided the matter.

The twin condition of the satisfaction of the ITO, i.e., (i) there must be a reason to believe that income chargeable to tax has escaped assessment; and (ii) the ITO must also have reason to believe that such escapement of income from assessment is by reason of omission or failure on the part of the assessee to disclose fully and truly material facts necessary for assessment of that year, have to be satisfied.

In the present case, there was no lack of disclosure by the assessee. This was, of course, apart from the fact that the assessee could hardly disclose as to what would be the compensation, which he might get ultimately if the plea of enhancement was sustained.

It is not the duty of the assessee to pin-point what inferences have to be drawn by the assessing authority as long as full, complete and truthful disclosure has been made of 'primary facts', which, in fact, was made in the present case. Thus, there was nothing, which was not set out, which ought to have been set out as the factum of appeal pending was disclosed.

There is no finality emerging in matters of enhancement of compensation as none of the parties could contemplate in advance as to what would be the fate of the appeal proceedings. The facts of the present case showed that the Award was interfered with in appeal and again by the Supreme Court. The final picture emerged only when the Supreme Court pronounced its judgment. On receipt of the enhancement compensation, the appellant disclosed the same in its return. That was the stage when enhanced compensation had to be included in the assessment year in question, which was done by the appellant. The appellant had made the relevant disclosure in the returns for the relevant assessment year when the enhanced compensation was received. The amount was invested by the appellant in Bonds, which entitled it to certain benefits in view of the provisions of Section 54E. Just because such benefit was available to the appellant for that year in question, which might not have been available for the assessment year 1965-66, could not be a reason for the assessing authority to re-open the assessment for the year 1965-66.

Therefore, the notice issued under section 148 was to be quashed.

Section 254 of the Income-tax Act, 1961 – Appellate Tribunal – Orders of

Where delay in disposal of relevant appeals is not attributable to assessee, Tribunal has power to extend stay beyond period of 365 even after insertion of Third proviso to section 254(2A) w.e.f. 1.10.2008 [Assessment Years 2000-01 to 2002-03]

Tata Communications Ltd. v. CIT, March 29, 2011 (ITAT-MUM) (SB)

As a result of dismissal of the appeal filed by the revenue and upholding of the order passed by the Tribunal, the question referred to in the case of Ronak Industries Ltd. (S.A.No. 137/M/09, dated 22-5-2009) has been answered by the Bombay High Court holding that the Tribunal even after the 2008 amendment has the power to grant the stay beyond the period of 365 days in the cases where the delay is not attributable to the assessee and this is the ratio which has been laid down in the said decision by the jurisdictional High Court, which is binding on this Special Bench.

Respectfully following the said decision of the Bombay High Court in the case of Ronak Industries Ltd., (supra), it was to be held that in the case like the one in hand where the delay in the disposal of the relevant appeals is not attributable to the assessee, the Tribunal has the power to extend the stay beyond the period of 365 even after the insertion of Third proviso to section 254(2A) w.e.f. 1.10.2008.

Section 255 of the Income-tax Act, 1961– Appellate Tribunal – Procedure of

When matter is referred to Special Bench, entire appeal is open before Special Bench and it is not confined only to question framed (e.g., a question of law framed) [Assessment Years 2000-01 to 2002-03]

Tata Communications Ltd. v. CIT, March 29, 2011 (ITAT-MUM) (SB)

In appeal, the Special Bench of Tribunal decided the question of law referred to it and thereafter proceeded to decide the case on merit. The revenue objected to it and argued that the Special Bench should be confined only to the question framed.

While constituting this Special Bench, the President, ITAT had not only referred the stay applications filed by the assessee but even the corresponding appeals pending before the Tribunal to the Special Bench with a liberty to either consider and decide only the question referred or even to dispose of the stay applications and the appeals. While constituting this Special Bench, the President, ITAT had passed a specific order whereby the stay applications had also been referred to the Special Bench for hearing and disposal.

The Tribunal held that even the provisions of section 255(3) specifically provides that the President, ITAT may for the disposal of any particular case constitute a special bench consisting of three or more members. The Delhi Special Bench of the ITAT in the case of National Thermal Power v. IAC, 24 ITD 1 held that the entire appeal, however, is open before the Special Bench and it is not confined to the question framed like a question of law framed and referred to the High Court under section 256. The special bench of the Tribunal at Mumbai in the case of ACIT v. DHL Operations, BV (2007) 13 SOT 581 held that section 255(3) further provides, inter alia, that the President, ITAT, may constitute a Special Bench for disposal of a particular case and it is, therefore, clear that it is the bench so formed which will exercise the powers of the Tribunal unless, of course, reference to the special bench itself restricts the powers of such a special bench, as may be expedient and necessary, to deal only with a limited aspect of the appeal. Keeping in view these two decisions of the special bench of this Tribunal, the provisions contained in section 255(3) and the order of the President, ITAT referring, inter alia, the stay applications filed by the assessee to the Special Bench, there is no merit in the objection raised by the Revenue. Overruling the same, the stay applications filed by the assessee in the present case could be decided on merits.

INDIRECT TAXES

Sales Tax

Entry IV(1)(a) of the Second Schedule to the Tamil Nadu General Sales Tax Act, 1959 – Condemned Articles

Where plants and machineries became condemned articles, sale of same would be liable to tax at 4 per cent, and not at 15 per cent plus surcharge

Commissioner of Commercial Taxes v. Chitrahar Traders, March 16, 2011 (SC)

Neyveli Lignite Corporation set up a plant to produce Leco, which is a form of lignite in the year 1965. The said plant, however, was having frequent breakdowns and was incurring huge losses. Consequently, an effort was made to upgrade the plant which, however, turned out to be a failure due to which the entire plant was closed down on 4.4.2001 as unviable. Thereafter the company proceeded to dispose of the entire plant and machinery as according to the company, the plant was of not marketable value and also because it had lost its use and outlived its utility and had no value except as scrap. The said company thereafter appointed MSTC, who is engaged in the business of scrap to arrange for disposal of condemned plant. The plant and machinery, which became scrap as obsolete and unviable, was sold through the process of e-auction and the respondent offered its bid which came to be accepted by the MSTC.

The dispute arose thereafter as to whether sales tax was leviable and payable on the said articles @ 4% as the plant and machinery was sought to be sold as scrap or whether the respondent was liable to pay sales tax @ 12% with 5% surcharge also.

The Supreme Court held that the agreement between Neyveli Lignite Corporation and MSTC clearly proved and established that what was sought to be sold was iron and steel scrap and rejected/condemned and obsolete secondary arisings, etc. What was being sold through the e- auction was scraps and secondary arisings. In the acceptance mentioned the goods sold as plant and machineries but it was also indicated therein that it was sale of plant and machineries as per the terms and conditions of the e- auction. Terms and conditions of e-auction indicated from the agreement indicated that what was being sold was scrap. The said position was also reiterated in the said acceptance letter when it referred to the total value of the scrap, in the clarification issued by the Department itself, at one stage. It was clearly mentioned that if the plant and machineries had been sold as scrap and the bidder was asked to dismantle and transport as scrap, such sales of scrap would be taxable @ 4% without surcharge.

There was yet another important factor which should not be lost sight of and that was using of explosives by the respondent for removing the aforesaid scrap from the premises in question. An application was submitted by the respondent to the District Collector for using explosives for the purpose of dismantling the machinery. The District Collector permitted the use of explosives consequent upon which machineries were dismantled by using the explosives and were transported out of the premises in trucks as steel scrap.

Further, the sale in question was also made by a public sector undertaking and the said sale was conducted for and on behalf of another public sector undertaking. The selling agent was also engaged in the business of metal scraps.

The sale has taken place after about 36 years of the purchase of the machineries and the affidavit of the Neyveli Lignite Corporation clearly proved and establishes that those machineries have become obsolete and the plant and machineries had become condemned articles. All these contemporaneous documents and factual

position made it abundantly clear that what was sold and purchased by the respondent were nothing else but scrap and, therefore, there was no reason to interfere with the findings and conclusions arrived at by the Madras High Court, that sales tax was leviable @ 4 per cent.

OTHER ACTS

Banking Laws

Section 142 read with Section 138 of the Negotiable Instruments Act, 1881 – Cognizance of Offence

The law stands crystallised to the effect that a person can maintain a complaint provided he is either a "payee" or "holder in due course" of the cheque; where appellant failed to prove that he was sole proprietor of payee firm, he could not maintain complaint for dishonour of cheque due to insufficiency of fund

Milind Shripad Chandurkar v. Kalim M. Khan, March 3, 2011 (SC)

The proprietary firm Vijaya Automobiles had supplied a huge quantity of diesel to respondent no.1 who made the payment vide Cheque . The bank returned the said cheque mentioning "unpaid" with a Memorandum "funds are insufficient".

The Trial Court convicted the respondent no.1 to suffer simple imprisonment and to pay compensation. The Sessions Judge dismissed the appeal of the respondent no.1. However, the High Court allowed the appeal of the respondent no.1 only on the ground that the appellant could not produce any evidence to establish that he was the sole proprietor of the proprietary concern in question.

The Supreme Court held that the appellant/complainant could not produce any document to show that he was the proprietor of Vijaya Automobiles in spite of the fact that the issue had been agitated by the respondent no.1/accused at every stage. It is also evident from the documents on record that in the list of witnesses the complainant had mentioned the name of his banker as a witness; however, the said banker was not examined.

It may also be pertinent to mention here that appellant did not make any attempt to adduce additional evidence at the appellate stage also. No document has ever been filed to substantiate his averment in this regard.

In a case of this nature, where the "payee" is a company or a sole proprietary concern, such issue cannot be adjudicated upon taking any guidance from Section 142 but the case shall be governed by the general law i.e. the Companies Act, 1956 or by civil law where an individual carries on business in the name or style other than his own name. In such a situation, he can sue in his own name and not in trading name, though others can sue him in the trading name. So far as Section 142 is concerned, a complaint shall be maintainable in the name of the "payee", proprietary concern itself or in the name of the proprietor of the said concern.

The law stands crystallised to the effect that a person can maintain a complaint provided he is either a "payee" or "holder in due course" of the cheque.

In the instant case, it was evident that the firm, namely, Vijaya Automobiles, had been the payee and that the appellant could not claim to be the payee of the cheque, nor could he be the holder in due course, unless he establishes that the cheques had been issued to him or in his favour or that he was the sole proprietor of the concern and being so, he could also be payee himself and thus, entitled to make the complaint. The appellant miserably failed to prove any nexus or connection by adducing any evidence, whatsoever, worth the name with the said firm, namely, Vijaya Automobiles. Mere statement in the affidavit in this regard, was not sufficient to meet the requirement of law. The appellant failed to produce any documentary evidence to connect himself with the said firm. It was evident that the firm had a substantial amount of business as in one month it sold the diesel to respondent no. 1 - a single party, for a sum of ₹7 lakhs. The appellant would, in addition, have also been carrying out business with other persons. Thus, a person with such a big business must have had transactions with the bank and must have been a payee of income tax, sales tax etc. In such a fact-situation, there would be no dearth of material which could have been produced by the appellant to show that he was the sole proprietor of the said firm. The appellant failed to adduce any evidence in this regard, nor made any attempt to adduce any additional evidence at the appellate stage, in spite of the fact that the respondent was raising this issue from the initiation of the proceedings.

In view of the above, there was no cogent reason to interfere with the impugned judgment and order of the High Court.

Companies Act

Section 456 of the Companies Act, 1956 – Winding Up – Custody of Company's Properties

Ordinarily, Court is loathe to accept offer made by any bidder or a third party after acceptance of highest bid/offer given pursuant to an advertisement issued or an auction held by a public authority; however, in peculiar facts of a case, a departure from this rule can be made

Shradhha Aromatics (P.) Ltd. v. Official Liquidator of Global Arya Industries Ltd, May 24, 2011 (SC)

Ordinarily, the Court is loathe to accept the offer made by any bidder or a third party after acceptance of the highest bid/offer given pursuant to an advertisement issued or an auction held by a public authority. However, in the peculiar facts of the case, a departure from this rule can be made.

The total area of the land of the company-in-liquidation advertised by the committee was 12,500 square meters. The land was situated in an important district of Gujarat. The area had been substantially developed in last four years. The initial offer made by one P was of ₹83 lakhs and the highest revised offer given before the Company Judge was of ₹127 lakhs. After acceptance of the revised offer by the Company Judge, the appellant stepped in and made an offer to pay ₹141 lakhs. The first application filed by it was dismissed but the second application was allowed and the increased offer of ₹151 lakhs was accepted by the Company Judge. That order did not find favour with the Division Bench, which restored the first order passed by the Company Judge. On appeal before the Supreme Court, the appellant further enhanced its bid to Rs. 2 crores. At last, fresh bids were asked from parties and at that stage intervenor-cum-promoter offered Rs. 7.55 crores.

The Supreme Court held that if the order of the Division Bench was sustained, the creditors of the Company were bound to suffer because the amount available for repayment of the dues of the creditors would be a paltry sum of ₹127 lakhs. As against this, if the offer made by the intervenor-*cum*-promoter was accepted, the Official Liquidator would get an additional amount of more than ₹4.25 crores. The availability of such huge amount will certainly be in the interest of the creditors. Therefore, it was not possible to approve the order passed by the Division Bench of the High Court. In a somewhat similar case of *FCS Software Solutions Ltd. v. La Medical Devices Ltd.* [2008] 85 SCL 401 (SC) this Court approved the acceptance of revised bid of ₹3.5 crores given by the appellant with a direction to compensate the earlier highest bidder by payment of the specified amount. Similar order was to also to be passed in the instant case.

Section 456 read with section 621 of the Companies Act, 1956 – Winding Up – Custody of Company's Properties

Where sale proclamation was recalled on statement of the ex-director of company that there was no ascertained claim leave alone debt of a single bank, which was found to be a false and misleading statement, criminal contempt notice to be issued to ex-director under Contempt of Courts Act, 1971

Elephanta Oil & Vanaspati Industries Ltd, *In re*, February 2, 2011 (DEL)

The High Court issued a sale proclamation for property of respondent-company-in-liquidation as well as for plant and machinery installed in the said premises. Before the sale could be conducted, applications were filed by the ex-director of the company-in-liquidation. The sale proclamation was recalled upon conditions that the ex-director would deposit ₹1.15 crores with the official liquidator within two months. After the order was passed, the ex-director deposited only a sum of ₹25 lakhs and subsequently, prayed for some more time to deposit the remaining amount.

The Delhi High Court held that the sale proclamation was recalled on the false and misleading statement of the ex-director of the company that there was no ascertained claim leave alone debt of a single bank. Further, the order was recalled subject to the ex-director depositing not only ₹2 lakhs towards expenses incurred in publication but also depositing an amount of ₹1.5 crores within two months. Admittedly, since the deposit of ₹1.5 crores had not been made within the stipulated time and as the ex-director had already filed an application that he was unable to deposit the said amount, the order dated 27-5-2008 needed to be recalled forthwith.

The ex-director by filing application and by making false, misleading and mischievous statements and submissions before this Court had interfered with and/or attempted to interfere with the administration of justice as well as prejudiced the due course of judicial proceeding in the present case. By his conduct, he had also scandalised and/or attempted to scandalise as well as lower the reputation of the Court. Accordingly, criminal contempt notice was to be issued to the ex-director under the Contempt of Courts Act, 1971.

Section 621 of the Companies Act, 1956 – Offences against act to be cognizable only on complaint by Registrar, Shareholders or Government

Where accused had not only duped bank, but on plea of purchase of machinery they had also availed of depreciation on machinery, which was never purchased and used by them, causing loss to exchequer, a serious economic offence against society, criminal proceedings could not be quashed; It was not a fit case for exercise of jurisdiction by the High Court under Section 482 of the Cr.P.C. as also by this Court under Article 142 of the Constitution of India.

Sushil Suri v. CBI, May 6, 2011 (SC)

The Company, the Executive Director of the Company along with others conceived a criminal conspiracy and executed it by forging and fabricating a number of documents, like photographs of old machines, purchase orders and invoices showing purchase of machinery in order to support their claim to avail hire purchase loan from Punjab and Sind Bank (PSB) on the strength of these false documents. PSB parted with the money by issuing pay orders and demand drafts in favour of the Company. The accused opened six fictitious accounts in different banks to encash the pay orders/bank drafts issued by PSB in favour of the suppliers of machines, thereby directly rotating back the loan amount to the borrower from these fictitious accounts, and in the process committed

a systematic fraud on the PSB and obtained pecuniary advantage for themselves.

Additionally, by allegedly claiming depreciation on the new machinery, which was never purchased, on the basis of forged invoices etc., the accused cheated the public exchequer as well. As afore-stated, in the chargesheet, the accused were alleged to have committed offences punishable under Section 120B, read with Sections 420, 409, 468 and 471 IPC.

The Supreme Court held that at this preliminary stage of proceedings, it would neither be desirable nor proper to return a final finding as to whether the essential ingredients of the said sections are satisfied. For the purpose of the present appeal for admission of proceedings, it would be suffice to observe that on a conspectus of the factual scenario, *prima facie*, the Chargesheet had disclosed the commission of offences by the appellant under the afore-noted Sections. The essential ingredient of the offence of "criminal conspiracy", defined in Section 120A IPC, is the agreement to commit an offence. In a case where the agreement is for accomplishment of an act which by itself constitutes an offence, then in that event, unless the Statute so requires, no overt act is necessary to be proved by the prosecution because in such a fact-situation criminal conspiracy is established by proving such an agreement. In other words, where the conspiracy alleged is with regard to commission of a serious crime of the nature as contemplated in Section 120B read with the proviso to sub-section (2) of Section 120A IPC, then in that event mere proof of an agreement between the accused for commission of such crime alone is enough to bring about a conviction under Section 120B and the proof of any overt act by the accused or by any one of them would not be necessary.

Similarly, the definition of "forgery" in Section 463 IPC is very wide. The basic elements of forgery are: (i) the making of a false document or part of it and (ii) such making should be with such intention as is specified in the Section viz. (a) to cause damage or injury to (i) the public, or (ii) any person; or (b) to support any claim or title; or (c) to cause any person to part with property; or (d) to cause any person to enter into an express or implied contract; or (e) to commit fraud or that fraud may be committed.

As stated above, in the instant case more than sufficient circumstances existed suggesting the hatching of criminal conspiracy and forgery of several documents leading to commission of the aforementioned sections.

Resultantly it was not a fit case for exercise of jurisdiction by the High Court under Section 482 of the Cr.P.C. as also by the Supreme Court under Article 142 of the Constitution of India. As noted above, the accused had not only duped PSB, they had also availed of depreciation on the machinery, which was never purchased and used by them, causing loss to the exchequer, a serious economic offence against the society. Therefore, the criminal proceedings could not be quashed.

Securities Laws

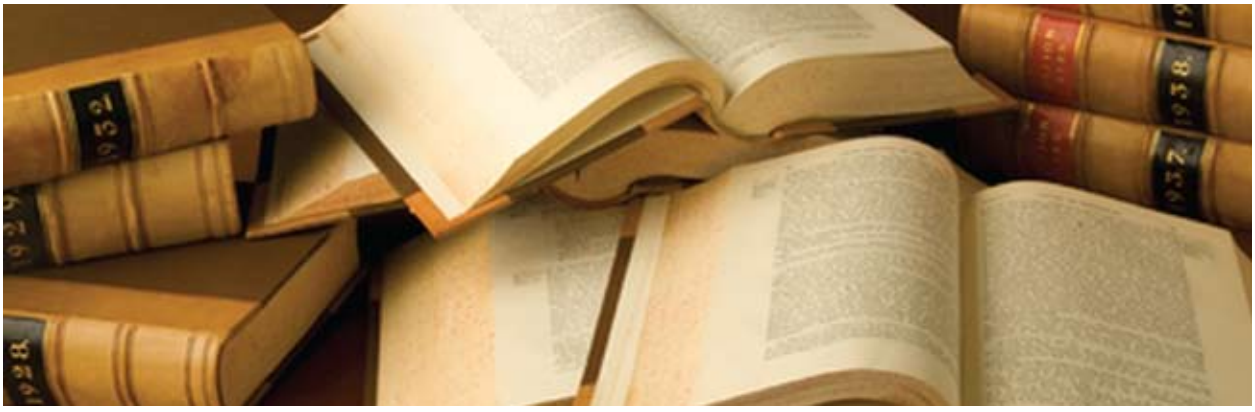
Regulation 18 of the SEBI (Mutual Funds) Regulations, 1996 – Constitution and management of mutual fund and operation of trustees, etc – Rights and obligation of Trustees

Where changes were made in mutual fund scheme by which duration of investments therein was altered from 5/7 years to a period not exceeding 15 year, same would affect fundamental attributes of scheme and also affected interest of unitholders and when it was so done without complying with regulation 18(15A), investors should be provided with an exit route

Subramanian R. Venkat v. Securities and Exchange Board of India, May 3, 2011 (SAT-MUM)

The power of the fund manager to bring about changes in any scheme as stipulated in the combined offer document cannot be disputed but if such changes alter the fundamental attributes of a scheme or modify the same affecting the interest of the unitholders, the fund and its managers would have to comply with the provisions of Regulation 18(15A) of the Regulations. It is the non-compliance with this provision which is the root cause of the grievance made by the appellants.

The grievance of the appellants was that after they invested in the short-term plan of the scheme, respondents 2 to 5 fund manager mutual fund carried out material changes in the scheme by winding up the long-term plan and converted the short term plan for investment for 5 to 7 years into a long term plan for investment for 15 years. This, according to them, affected the fundamental attributes of the scheme and, in any case, modified the scheme affecting the interest of unitholders and, therefore, the respondents ought to have complied with the provisions of Regulation 18(15A) of the Regulations whereunder every unitholder



on the date of the change including the appellants should have been given a right to exit the scheme at the then prevailing NAV. Further grievance of the appellants was that even though the Board on their complaint had found that material changes were brought about in the scheme which affected the rights of the unitholders, it had erred in not issuing directions to respondents 2 to 5 to comply with the provisions of Regulation 18(15A) and give a right to exit to every unitholder who on the date of the change was a member of the scheme.

The Securities Appellate Tribunal held that a reading of section 18(5) leaves no room for doubt that the trustees cannot bring about a change in the fundamental attributes of any scheme or any other change therein which would modify the scheme and affect the interest of unitholders unless a written communication about the proposed change is sent to each unitholder and an advertisement is given in the newspaper as prescribed in the Regulation and the unitholders are given an option to exit the scheme at the prevailing NAV without any exit load.

Having regard to the changes made in the scheme by which the duration of the investments therein was altered from 5 to 7 years to a period not exceeding 15 years, this change was one which affected the fundamental attributes of the scheme and also modifies the same affecting the interest of the unitholders. The words "fundamental attributes" have not been defined in the regulations and, therefore, they have to be understood according to their ordinary dictionary meaning. Fundamental is something which is basic or serves as a foundation or goes to the root of the matter. In the context of an investment scheme, one of the important factors that an investor looks at is the duration for which the investments are going to be made in that scheme. In this sense, the duration of the investment constitutes one of the fundamental attributes thereof. In the instant case when the scheme was launched it had two plans - short term plan and long term plan the duration of both was different and the investors took an informed decision in investing in one or the other plan. As already observed, the appellants chose the short term plan as, in their perception the said plan would give better returns. It is the case of respondents 2 to 5 fund managers that the long term plan which had a long average maturity period had to be wound up as they could not muster even a minimum of 20 investors so as to continue with the said plan. It was on the winding up of the long-term plan that the duration of investments in the short term plan was altered from 5 to 7 years to a period not exceeding 15 years. It is, thus, clear that there were no takers for the long-term plan and what respondents 2 to 5 did was after winding up the long-term plan, they increased the duration of the short term plan to a long term without informing the investors. This was most unfair. Since the duration of the investments was substantially increased, there was no doubt that one of the fundamental attributes of the scheme was altered. Even the whole time member had recorded a finding in the impugned order that the change in the duration virtually modified the short-term plan into a long-term plan.

Besides, the scheme got modified which affected the interest of the unitholders. The name of the scheme was also changed and the words 'short term' were dropped. This is another indicator of the substantial change made in the scheme. The fact that the bench mark index of the scheme was changed from "I sec Si-Bex" to "I sec composite index" also supported the view that there was a fundamental change in the attributes of the scheme which necessitated respondents 2 to 5 fund managers to change the methodology to measure the success of the modified scheme. The whole time member himself had recorded a finding that the changes affect the interest of the unitholders of the scheme.

Respondents 2 to 5 fund managers had brought about changes in the scheme which affected the interest of the unitholders. This being so they were obliged to comply with the provisions of Regulation 18(15A) which they had not and the grievance of the appellants was justified that the Board failed to issue appropriate directions in this regard. A direction was, therefore, to be issued to respondents 2 to 5 to comply with Regulation 18(15A) of the Regulations qua the appellants and provide them with an exit route. ■