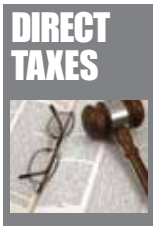
Legal Decisions[1]



Income-tax Act

LD/63/22

CIT-II

vs.

Shri Jyoti Prakash Dutta

25th July 2014 (BOM)

[Assessment Year 2007-08]

Section 80-IB of the Income-tax Act, 1961– Deductions-Profits and gains from industrial undertakings other than infrastructure developments

If cameraman, editor, sound technicians are engaged by the assessee and they used their own equipments for filming, processing, sound recording and mixing or machines are hired on contract basis but they do not transfer these equipments to assessee, argument that Assessee is disentitled to deduction should not be accepted.

Film production unit or a Company is an industrial undertaking and, therefore, Section 80IB can be invoked by it

The Revenue urges before this Court that firstly a film production unit or a Company is not an industrial undertaking within the meaning of Section 80IB. Assuming it is so and conceding that position, insofar as the present Assessee is concerned, now it is urged that the Assessee does not fulfill the condition which would make it eligible or qualified for deduction in terms of the above provisions.

In upholding the claim of the Assessee, the Commissioner also applies the law laid down by this Court in the case of *CIT vs. D.K. Kondke*, (1991) 192 ITR 128.

It is submitted by the assessee that there is no machinery or plant of the appellant and the business affairs are carried out with hired equipments and machinery. In such circumstances, the assessee is disentitled to the deduction. Section 80-IB applies to any industrial undertaking which fulfills all the conditions and in this case, the Assessee is not fulfilling a very vital condition. The assessee, submits that the Department is bound by the Tribunal's orders and in the case of the very same assessee for prior assessment years.

In the assessment year 1998-99, the Tribunal has extended the benefit and allowed the deduction.

[1] *Readers are invited to send their comments on the selection of cases and their utility at eboard@icai.in. For full judgment, write to eboard@icai.in*

That view was followed by the Tribunal for A.Y. 2001-02. It is that very order which is followed for the current Assessment Year.

The Bombay High Court held as follows:

Where the gross total income of the Assessee in profits and gains derived from any business referred to sub-Section (3) to (11), (11A) and (11B) (such business being hereinafter referred to as the eligible business) there shall, in accordance with and subject to the provisions of this Section, be allowed in computing the total income of the Assessee a deduction from such profits and gains of an amount equal to such percentage and for such number of assessment years as specified in this Section. For the deduction to be claimed under sub-Section (3) what is being urged is that the conditions which are specified and set out in sub-Section (2) would have to be fulfilled.

The Assessee fulfilled this condition meaning thereby it is not formed by the transfer to a new business of machinery or plant previously used for any purpose. The argument is rather extreme and that there is no plant and machinery. The argument has, also for some time, gone to another extreme that in film production unit, to qualify as 'industrial undertaking' the unit or company must possess plant and machinery of its own and it cannot be functioning on hired equipments. In the present case, Assessee has not demonstrated any such ownership.

In the present case, if cameraman, editor, sound technicians are engaged by the Assessee and who used their own equipments for filming, processing, sound recording and mixing or machines are hired on contract basis but they do not transfer these equipments to the assessee. In such circumstances, the argument that the assessee is disentitled to the deduction should not be accepted.

In the case of D.K. Kondke (*supra*) this Court held that the film production unit or Company is an industrial undertaking and, therefore, section 80IB of the Act can be invoked by it.

In earlier years, the Revenue brought appeals to this Court but the Appeals were not entertained. This Court held that the Appeals do not raise any substantial question of law.

Thus, the Revenue's appeal in instant case was to be dismissed.

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Customs Act

LD/63/23

Gira Enterprises & Anr.
vs.
Commissioner of Customs, Ahmedabad
21st August, 2014 (SC)

Section 14 of the Customs Act, 1962 read with Rules 4 & 5 of the Customs Valuation (Determination of the Price of Imported Goods) Rules, 1988-Valuation of goods for purposes of assessment

In the absence of any material produced by the Revenue in proof of the alleged comparable imports at a higher value, the impugned order of assessment valuing imported goods at a higher rate, cannot be sustained

The appellants imported two consignments of "2-4-6 Tricloro 1- 3-5 Triazine" aggregating 74.10 MT from China under two Bills of Entry, the cost of which is declared by the appellants to be SG $ 750/- PMT equivalent to US $ 500/- PMT. The goods were provisionally assessed and allowed clearance.

Show cause notice was issued to the appellants by the Commissioner on the ground that the chemical name of the goods was verified and it was found to be "Cyanuric Chloride" as known in the International market. It is further stated in the show cause notice that on the basis of certain information obtained through a computer print out from the Customs House, Mumbai, the Commissioner of Customs, Gujarat noticed that a large number of Cyanuric Chloride(100) import transactions (between the months of June 1994 to November 1994) took place and the cost of the unit price in each one of those imports was US $ 1950/- PMT(CIF) as against the value declared by the appellants of US $ 500/- PMT.

The appellant argued that the copy of the alleged printout was not supplied to the appellant. Therefore, the appellant had no means of knowing as to whether any imports of comparable nature were made at the relevant point of time.

The Supreme Court held as follows:

It can be seen from Section 14 that the value of the imported goods is "deemed to be the price at which such goods are ordinarily sold, or offered for sale ……". The Section further stipulates that such

price of the imported goods is to be determined in accordance with the rules made in that behalf.

Rule 5 enables the Revenue to determine the value of the imported goods on the basis of the identical imported goods of comparable import transaction. Such a procedure/course of action is authorised notwithstanding the mandate of Rule 4(2) that the transaction value shall be accepted. Obviously, such an alternative mode of valuation is authorised as Rule 4 declares that the transaction value of the imported goods shall be the "price actually paid or payable". Necessarily, the rule implies the need of determination of the price actually paid or payable.

It is not necessary that in every case of import the importer declares the price actually paid by him or payable by him. Therefore, if in a given case the Revenue notices identical goods have been imported by other importers in comparable transactions at a different rate (normally higher rate) then Revenue is enabled by Rules 5 to reject the valuation made by the importer and determine the "price actually paid or payable" by the importer.

In the case at hand, no doubt the revenue claims to have some information based on certain alleged imports made at the Bombay port at the relevant point of time that the import in question took place. According to the revenue, those imports at Bombay were declared and valued at a much higher rate than the value declared by the appellants herein. Therefore, the valuation of the goods imported by the appellant was found unacceptable. Hence, the procedure under Rule 5 was resorted to.

However, the respondent (revenue) did not supply the information (alleged computer print out) which formed the basis of the conclusion that the appellants herein under-valued the goods imported. In such a situation, the appellants obviously cannot and did not have any opportunity of establishing that the claim of the revenue is unsustainable in law. If the information which formed the basis for the Revenue to reject the appellant's valuation is supplied to the appellants, the appellants perhaps will have an opportunity to dispute the comparability of the import transactions allegedly contained in the

computer printout on various counts may not be possible to catalogue.

The appellants, of course, admit that the goods imported by them are known commercially as 'Cyanuric Chloride' as specified in the show cause. Whether Cyanuric Chloride was imported at the relevant point of time by others in comparable transactions, *i.e.*, is "a sale at the same commercial level and in substantially the same quantity" *etc.* is a matter to be considered on the examination of the material relied upon by the Revenue. A reasonable opportunity must be given to the appellant to demonstrate (if at all) that the transactions relied upon by the Revenue are not comparable transactions.

In the absence of any material produced by the Revenue in proof of the alleged comparable imports at a higher value, the impugned order which eventually confirmed the original order of assessment by the Assistant Commissioner of Customs dated 31-03-2001 cannot be sustained for two reasons – (1) the mere existence of an alleged computer printout is not proof of the existence of comparable imports; (2) assuming such a printout exists and the contents thereof are true, the question still remains whether the transaction evidenced by the said computer printout are comparable to the transaction of the appellant. The appellant will have to be given reasonable opportunity to establish (if he can) that the transactions are not comparable.

The impugned order and the original assessment order are therefore, set aside.

Arbitration & Conciliation Act

LD/63/24

Sharad P. Jagtiani

vs.

Edelweiss Securities Ltd,

7th August, 2014 (DEL)

Chapter XI of the NSE By-laws, read with Sections 2(4) and 8 of the Arbitration and Conciliation Act, 1996 and Section 9 of the Securities Contracts (Regulation) Act, 1956–Reference to Arbitration

Where written statement filed is with strings attached by challenging the maintainability of the suit in view of the arbitration clause, said written statement could be treated as an application under Section 8 of the Arbitration and Conciliation Act, 1996

The appellant filed a suit on plea that representatives of the respondent stock broker met him with a request to open a brokerage account with the firm and to trade. He was assured 40% profit on trading. He opened a trading account and transferred ₹48,00,000 in the account. He pleaded that he did not invest the money under any portfolio management scheme. An account was opened in his name. He signed certain blank forms on the assurance that once filled up copies thereof would be sent to him. He raised a grievance that without his instructions 65 transactions (out of total 186 transactions) were effected by the respondent without any confirmed order or instruction from him. He also pleaded that the respondent was bound by the rules of the National Stock Exchange requiring trading members to ensure that confirmed order instructions were obtained from the members.

In the written statement filed, apart from refuting the pleadings and affirming that all transactions were carried out under the instructions of appellant it was pleaded that the High Court lacks the necessary jurisdiction to entertain and decide the present Suit in view of Clause 13 of Part A of the Agreements dated 23.05.2008 entered into between the parties, wherein the parties have agreed to refer any claims/disputes arisen between the parties to be resolved by the mode of Arbitration, as per the Rules, Regulations and bye-laws envisaged by the respective stock exchange.

In the written statement neither specific prayer was made to refer the parties to arbitration nor any application was filed under Section 8 of the Arbitration and Conciliation Act, 1996.

The Delhi High Court held as follows:

Section 9 of the Securities Contracts (Regulation) Act, 1956 provides that any recognised stock exchange may, subject to the previous approval of Securities and Exchange Board of India (SEBI) make bye-laws for the regulation and control of contracts. Section 9(2)(n) of the Act provides the method and procedure for settlement of claims or disputes including settlement by arbitration. Under S.9(2)(n) the National Stock Exchange has framed Bye-Laws which have been approved by SEBI. Section 9(4) provides that the Bye-Laws made under Section 9 shall be subject to conditions with regard to previous publication, and the same shall

be published in the Gazette of India, and also in the Official Gazette of the State in which the principal office of the recognised Stock Exchange is situated, and shall have effect as from the date of publication in the Gazette of India.

Chapter XI of the Bye-Laws of the National Stock Exchange of India Limited specifically provides for reference to Arbitration. Thus, the arbitration under the National Stock Exchange Bye-Laws is Statutory Arbitrations would be covered under Section 2(4) of the Arbitration and Conciliation Act, 1996.

The phrase 'not later than when submitting his first statement on the substance of the dispute' in sub-Section (1) of Section 8 is to be highlighted. The requirement is to bring to the notice of the Court at a point not later than when submitting the first statement on the substance of the dispute that there exists an arbitration clause between the parties and that the subject matter of the action brought before the Court by way of the suit falls within the ambit of the arbitration clause.

Section 8 does not specify the manner in which the party has to submit its first statement on the substance of the dispute, and normally with respect to a suit, the first statement on the substance of the dispute by the defendant would be the written statement. Thus, if in the written statement filed it is brought to the notice of the Court that there exists an arbitration agreement between the parties which embraces the subject matter of the suit there would complete compliance with the mandate of the law and the Court would be obliged to refer the parties to arbitration if the plea in the written statement is made good.

On the facts of the instant case, it may be true that in the written statement filed a specific prayer has not been made to refer the parties to arbitration, but in the written statement filed a preliminary objection has been taken that the suit is barred in view of the arbitration agreement. The written statement filed is with strings attached by challenging the maintainability of the suit in view of the arbitration clause and therefore in such circumstance the said objection taken by Edelweiss contained in the written statement could be treated as an application under Section 8 of the Arbitration and Conciliation Act, 1996.

It is trite that it is the substance of a matter contained in a document which matters and not the form thereof.

For three reasons, the appeal has to be dismissed. Firstly the arbitration agreement in the instant case being the result of a statute, there being no estoppel against the statute, required by law to be held; secondly the view taken by us hereinabove relating to the interpretation of Section 8 of the Arbitration and Conciliation Act, 1996; and thirdly Section 89 of the Code of Civil Procedure, 1908 which empowers a Court to refer the parties to arbitration if in the opinion of the Court it appears that there exists element of a settlement which may be acceptable to the parties. There cannot be a better case where such element exists than a case where the parties themselves have agreed for referring the matter to arbitration at the time of entering into the contract itself.

Competition Act

LD/63/25

South Asia LPG Company (P.) Ltd.

vs.

Competition Commission of India

3rd September, 2014 (DEL)

Section 26 of the Competition Act, 2002– Procedure for inquiry under Section 19

At stage of Section 26(7) when an order is passed by CCI during course of investigation by DG, no notice of hearing is required to be given to the appellant-enterprise against whom information was given; further appellant-enterprise is not required to be heard by the CCI before passing the order; such order of CCI not being an order of conducting inquiry after recording satisfaction, is no higher than a prima facie view of contravention having been committed.

The appellant challenged the order of CCI on the ground that the same had been passed without issuing notice to and without hearing the appellant.

The Delhi High Court held as follows:

Section 26 as it stood prior to amendment w.e.f. 20-05-2009, in Sub-Section (5) thereof, provided for giving of an opportunity to the "complainant" to rebut the findings of the DG of there being no contravention. Similarly, Section 26(7) as it stood prior to the said amendment, provided for hearing the complainant before further investigation.

The Statement of Objects and Reasons of the Competition (Amendment) Bill, 2007 given for the amendment does not list any such reason. It thus appears that the reason which prevailed with the legislature to so amend Section 26 was not to provide for notice or hearing to the person/enterprise informed/referred against, before directing further investigation. In the absence of any such reason having been given by the Legislature, we have to interpret the language of the statute as it stands post amendment and on which interpretation, we have concluded that 'parties concerned' would at the stage of investigation not include the person/enterprise informed/referred against.

Yet another facet which may be noticed is that Section 26(7), besides the expression "further investigation" also uses the expression "further inquiry" either by the DG or by the CCI itself.

The scheme of the Act, the opinion/investigation report of the DG is not binding on the CCI.

The procedure to be followed after the Section 26(1) stage, is as under:-

(I) If the report of the DG referred to in Section 26(3) recommends that there is no contravention, the CCI is to invite objections either from the referring Government/ Statutory Authority if the proceedings under Section 26(1) were commenced on such reference or from the informant if the proceedings under Section 26(1) were commenced on receipt of information and formation of a *prima facie* opinion thereon. [Section 26(5)]

(II) CCI on consideration of the aforesaid objections, may agree with the report of the DG and close the case (see para 24 of *Steel Authority of India Limited*). [Section 26(6)]

(III) However, if the CCI on the basis of the material collected by the DG and the objections, forms an opinion different from that of the DG, the nature of the proceedings changes from 'investigation' to adjudicatory and it is such proceeding which has been labelled by the Supreme Court in Steel Authority of India Limited (supra) as 'inquiry' and of which inquiry notice will have to be issued to the person/enterprise informed/referred against.

(IV) However CCI, if on the basis of the material collected by the DG and after consideration of the objections, is neither able to close the

case nor able to proceed from investigative to the inquiry stage, and is of the opinion that there are lacunae/deficiencies in the report of the DG, may give directions for 'further investigation'. For issuing such directions, no hearing has to be given to the person/ enterprise informed/referred against.

(V) A direction, under Section 26(7), of "further investigation", within the meaning of (IV) above, is distinct from "causing further inquiry to be made in the matter or itself proceed with further inquiry....". While at the time of ordering "further investigation", CCI has not formed an opinion of the statute having been contravened, before "causing further inquiry" to be made, formation of opinion (as distinct from *prima facie* opinion under Section 26(1)) by the CCI of the statute having been contravened, is a must. It was so held by the Supreme Court in para 24 of the *Steel Authority of India Limited* by observing that if the CCI is of the opinion that there is contravention of any of the provisions of the Act, it may order further inquiry into the matter.

The order of the CCI does not record any satisfaction having been reached or opinion having been formed by the CCI, of contravention having been committed by the appellant. The same is indicative of the order being merely an order of further investigation in continuation of which investigation the report of 'no contravention' was submitted by the DG, and not being an order of conducting inquiry after recording satisfaction, higher than the *prima facie* view under Section 26(1), of contravention having been committed.

Section 53A(1) though provides for appeal against a direction/decision under Section 26(2) and (6) *i.e.* the decision of the CCI on receipt of reference/information that there is no *prima facie* case and the decision of the CCI on consideration of the report of the DG of no contravention and the objections and suggestions invited thereon, of closure of the case, but not against directions under Section 26(7) for further investigation. For this reason also direction for further investigation under Section 26(7) is not in exercise of adjudicatory but of preliminary/departmental/administrative/ inquisitorial functions.

The challenge by the appellant to the order of the CCI on the ground of the same having been passed without giving any opportunity of hearing to the appellant, which is the enterprise informed against, has no merit.

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SEBI

LD/63/26

I. P. Holding Asia Singapore (P.) Ltd.
vs.
SEBI
20th August , 2014 (SC)

Regulation 20(8) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 - Offer Price

Ordinarily when there is a gap of 25% between the consideration paid to the outgoing promoters and the non-compete fee, SEBI ought not to conduct any inquiry. However, this cannot be treated an absolute proposition and if it appears ex facie, without any searching questions being asked or any intricate reasoning, that it appears to SEBI that the difference between the offer price and the non-compete fee is less than 25% but that is nevertheless a disguise or a camouflage for reducing the cost of acquisition through a public offer, then SEBI can certainly delve further into the matter.

The appellants entered into two agreements with the Bangur group. In terms of the first agreement, a share purchase agreement, the appellants and the Bangur group agreed that the appellants would acquire the shares of the target company held by the Bangur group by purchasing 2,12,60,008 fully paid up equity shares of ₹10/- each forming 53.46 % of the share capital of the target company. The agreed price per share was ₹523 and the aggregate amount payable to the Bangur group was about ₹1111.9 crores.

The second agreement entered into between the appellants and the Bangur group was a non-compete and business waiver agreement. In terms of this agreement the appellants agreed to pay to the Bangur group an amount of about ₹277.95 crores, inter alia, for refraining from competing with the business of the target company either on their own or through their affiliates for a period of three years, the business of the target company being manufacturing, sale and trading of pulp and paper.

In terms of Regulation 10 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (for short the Takeover Code) the appellants gave an open offer through publication in newspapers on 1st April, 2011 for the acquisition

of up to 85,67,521 fully paid up equity shares of the target company from the existing shareholders representing 21.54% of the voting capital. As per the public announcement, the appellants fixed the price of each fully paid up equity share at ₹544.20 (₹523/- + ₹21.20). The public announcement received an overwhelming response.

SEBI informed the appellants through their merchant banker to revise the offer price to the public shareholders from ₹544.20 to ₹674.93. This figure was arrived at by adding to the original offer price of ₹554.20 a sum of ₹130.73 per share. The figure of ₹130.73 per share was arrived at on the basis that the non-compete fee paid to the Bangur group being about ₹277.95 crore would work out to ₹130.73 per share held by the Bangur group. The veiled insinuation was that the non-compete fee of ₹130.73 per share was in fact a part of the negotiated price per share payable by the appellants to the Bangur group. That being so, SEBI required that amount be added to the offer price of ₹544.20 per share to all public shareholders.

SEBI for adding the non-compete fee calculated on a per share basis to the offer price were as follows:-

(1) Of the 20 promoter entities comprising the Bangur group, only 5 of them were eligible to get the non-compete fee.

(2) Of the remaining 15 promoter entities, 2 individuals Yogesh Bangur and Ms. Surbhi Bangur were not eligible to the non-compete fee since they did not have any experience or expertise in the area of operation of the target company and hence they were not capable of offering any competition. They were being given a non-compete fee only because they were shareholders of the target company.

As regards the 13 companies who were promoter entities of the Bangur group, SEBI was of the opinion that none was eligible for getting a non-compete fee since they were not in the business of the target company. Furthermore, according to SEBI these 13 promoter entities did not even have, in their object clause, the business of pulp and paper manufacturing.

(3) The merchant banker was not able to give sufficient justification for the payment of non-compete fee to the 15 promoter entities mentioned above.

(4) Since the exclusivity fee was being paid to the Bangur group and also to the public shareholders, there was no reason why the public shareholders were not given the non-compete fee also.

The Supreme Court of India held as follows:

Regulation 20(8) of the Takeover Regulation provides that any payment made to persons other than the target company in respect of a non-compete agreement in excess of 25% of the offer price arrived at under sub-Regulation (4) or (5) or (6) shall be added to the offer price.

A bare reading of Regulation 20(8) of the Takeover Code makes it quite clear that the jurisdiction of the Tribunal gets triggered only when the non-compete fee is in excess of 25% of the offer price. If the non-compete fee is less than 25% of the offer price (as in the present case), the jurisdiction of SEBI would be exercisable only in an extremely rare case and only if SEBI was in a position to *ex facie* conclude that the transaction involving the takeover of the target company was not *bona fide*.

We say this because it is imperative to give sufficient elbow room to commercial entities for entering into a business transaction. There are a host of considerations that go into business relations and transactions between different entities. This applies, perhaps more equally, to the takeover of a target company by another corporate body. It was observed in *G. L. Sultania vs. Securities and Exchange Board*[6] that "For the acquirer the decision to acquire shares is a commercial decision" and in our opinion, that decision must be respected unless there are good reasons not to do so.

It is for this reason that the Takeover Code as originally framed in 1997 did not contain any provision relating to the payment of non-compete fee. The issue was reconsidered by the Reconvened Committee of Substantial Acquisitions of Shares and Takeovers with Justice Bhagwati as the Chair. On the recommendation of the Reconvened Bhagwati Committee, the Takeover Code was amended in September, 2002 providing, *inter alia*, for a regulatory framework for payment of non-compete fee. That regulatory framework is to be found in clause (8) of Regulation 20 which was introduced in the Takeover Code with effect from 9th September, 2002.

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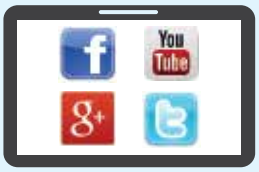

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Moving Towards New Frontiers

While looking into this issue, the Reconvened Bhagwati Committee felt that it is possible that in some cases the offer price per share does not truly reflect the actual consideration paid and this could be used as a ploy for reducing the cost of acquisition through a public offer.

From Bhagwati Committee's report it is quite clear that ordinarily when there is a gap of 25% between the consideration paid to the outgoing promoters and the non-compete fee, SEBI ought not to conduct any inquiry. However, this cannot be treated an absolute proposition and if it appears ex facie, without any searching questions being asked or any intricate reasoning, that it appears to SEBI that the difference between the offer price and the non-compete fee is less than 25% but that is nevertheless a disguise or a camouflage for reducing the cost of acquisition through a public offer, then SEBI can certainly delve further into the matter.

In so far as the present case is concerned, on an *ex facie* reading of the share purchase agreement and the non-compete agreement between the appellants and the promoter entities, no such conclusion is apparent, nor was it canvassed or pointed out. In our opinion therefore, there was no occasion for SEBI to carry out a searching enquiry into the payment of non-compete fee to the Bangur group.

It is nobody's case that the valuation of the shares by the appellants was detrimental to the interests of the shareholders, except to the extent that the shareholders in the public offer were denied the benefit of the non-compete fee paid to the Bangur group. There is no allegation that the valuation of the shares was not in conformity with Regulation 20(5) of the Takeover Code.

The second fundamental error by SEBI was in splitting the non-compete agreement between the appellants and 5 members of the Bangur group on the one hand and 15 members of the Bangur group on the other. If the non-compete agreement was a sham as held by the Tribunal, then the entire agreement would have to be held as a sham and the entire transaction would require to be held as a sham transaction. It cannot be, on a reading of the non-compete agreement as a whole, that a part of it is a sham in respect of some of the contracting parties and it is a genuine agreement in respect of the other contracting parties. There is absolutely no indication given in the non-compete agreement that it is severable or that there was any intention to split it into two or more distinct parts.

The absurdity resulting in splitting-up the non-compete agreement can be better appreciated from a hypothetical example. What if the Tribunal had partially agreed with the appellants and held that the non-compete agreement was valid in respect of say ten or twelve of the promoter entities instead of five? This could happen if the genuineness of the non-compete agreement is examined in relation to each promoter entity, as has been done by SEBI. Does it not, therefore, mean that the non-compete agreement has to be split in twenty ways to decide whether it is genuine or sham in respect of five or ten or twelve of the promoter entities? Can this be said to be a reasonable construction of the non-compete agreement? We are afraid that this surely cannot be the correct way of reading the non-compete agreement and that is why we are of the view that the Tribunal committed a fundamental flaw in holding only a part of the non-compete agreement as a sham. The Tribunal should have either held the entire non-compete agreement as a sham or it ought to have held the entire non-compete agreement as a genuine agreement. The question of a half-way house simply does not arise.

One other minor issue was raised by SEBI, namely, that the non-individual entities did not have the business objectives of manufacturing, sale and trading of pulp and paper in their main object clause. This is only stated to be rejected since the memorandum of association of a corporate entity can always be altered in accordance with the procedure under the Companies Act, 1956.

For completeness, we may mention two events that have occurred since the non-compete agreement was entered into on 29th March, 2011. Firstly, the non-compete period of three years has expired, in a sense rendering this exercise academic. Secondly, the Takeover Code has been repealed with effect from 23rd October, 2011 and substituted by the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. The new Takeover Code does away with the concept of a separate non-compete fee, the amount being included in the offer price in terms of Regulation 8 thereof.

On a consideration of the entire facts of the case, that the appeal deserves to be allowed and accordingly it is allowed. The directions and orders passed by SEBI and the Securities Appellate Tribunal are set aside. ■