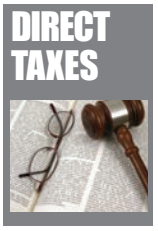
Legal Update

Legal Decisions[1]



Income-tax Act

LD/63/27

North Karnataka Expressway Ltd.
vs.
CIT
October 14, 2014 (BOM)

Section 32 of the Income-tax Act, 1961 - Depreciation

Where assessee, an infrastructure development company, constructed and maintained a toll road on the national highway on Build, Operate and Transfer (BOT) basis on the land owned by the Government, the claim of Depreciation on toll roads by the Assessee would be untenable in law.

The Appellant/Assessee is a company engaged in the business of infrastructure development in view of an agreement with the National Highway Authority of India (NHAI) constructed and maintained on Build, Operate and Transfer (BOT) basis on the land owned by the Government. In terms of this agreement, the Appellant had to construct the toll road and thereafter maintain and operate it for a period of 17 years and 6 months which is known as the concession period. It claimed depreciation at the rate of 10% on the capitalised cost of the toll road.

The Commissioner proposed to revise the assessment order as in his opinion the Assessing Officer had erred in allowing depreciation on the toll road constructed on Build, Operate and Transfer basis.

The High Court of judicature at Bombay held as follows:

A perusal of the different section of the National Highways Act would indicate as to how in furtherance of the National Highways Act, 1956 and the vesting of the National Highways in the Union, that the Central Government can issue a notification from time to time in the official Gazette so as to vest in, or entrust to the National Highway Authority of India, such National Highway or any stretch thereof as may be specified in such notification. It is, therefore, apparent that the superior or higher right of the union is, then, capable of being further entrusted or vested in such authority and which is a creation of the Central Government itself. Therefore, at best, a National Highway vesting in the Union may vest in such authority in terms of a notification under Section 11 but merely because the Central Government or a authority causes development and maintenance of the National Highway by involving a private entity or private party does not mean that the said private party can enjoy or claim the rights of the Central Government or this authority in the National Highway. This is apparent from a plain reading of these relevant statutory provisions. It is well settled that when the language of the statute is plain and clear, then, there is no scope for interpretation. The Court must apply such language and which is clear. That is what is called the rule of literal interpretation. Then, there is no scope for interpretation.

The functions that are to be discharged by the authority are enlisted from clause (a) to (f) and (i) to (l). However, that does not in any manner mean that this person who is engaged or entrusted with any of the functions by the authority can be said to be the owner of the National Highway. The ownership being that of the Union, it can never be said to be divested of that absolute right by engagement of any person or by entrusting any of the functions of the authority to him.

It would not be proper, therefore, to read into Section 32 of the Income-tax Act, 1961 something which is defeating and frustrating the mandate of these laws. It can never be intended by the legislature that the broad and wide definition of the term "owner" as appearing in the Income-tax Act, 1961 would interfere with or take away the absolute rights of the above nature conferred in the union of the National Highways. This is too well settled and to require a reference to any judgment. That a provision in one statute or a definition in one statute cannot be interpreted so as to defeat and frustrate another law or statute or any definition therein and when that another statute is a special legislation. The words and definitions in a general enactment can never be held to be contradicting, overriding the stipulations and provisions in a special statute. The National Highways Act and the National Highways Authority of India Act are, therefore, special statutes and when the concept of ownership and vesting therein is of absolute nature that cannot be said to be in any manner restricted or curtailed by a general definition or understanding of the term owner as appearing in the Income-tax Act, 1961. The term is defined widely and broadly in the Income-tax Act, 1961 so as not to allow anybody to escape the provisions thereof by urging that he has a limited right or which is not akin to ownership. Therefore, his income should not be brought to tax.

[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*

Similarly, if he can claim any deductions from his income which is comprising of profits and gain from his business, then, that deduction can be availed by him. It is for that limited purpose that the term 'owner' is defined in this manner Income Tax Act, 1961. However, as held above, that cannot control leave alone overreach The National Highways Act, 1956 or the National Highways Authority of India Act, 1988.

Merely, because the road is laid out does not mean that the Assessee is the owner thereof. He has laid it out for the purpose of the union and for its ultimate vesting in the public.

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LD/63/28

The Jindal Aluminium Limited
vs.
Deputy Commissioner of Income Tax
June 16, 2014(KAR)

Section 32AB of Income-tax Act, 1961 – Investment deposit account

Where assessee did not agree with levy of customs duty and moved to High Court and High Court did not set aside said order and merely stayed recovery of levy subject to condition of payment of 25% of duty, even if in profit and loss account said 25% had been deducted, as it is a contingent liability and not ascertained liability, it has to be added while computing profit under Section 32AB

The entire raw material imported by the assessee manufacturer of aluminium extrusions, was consumed in the production within the accounting period. The Department of Customs levied duty. The assessee did not agree with the levy and moved to the High Court. The High Court did not set aside the order levying the duty, it merely stayed the recovery of the levy subject to certain conditions, and one of them was the due payment of 25% of the duty. That 25% of the duty amounts to ₹32,33,067. The assessee claimed deduction under Section 32AB. While computing the profit under Section 32AB, the assessee did not deduct ₹32,33,067 out of the profit. The Revisional Authority was of the view that the assessee ought to have debited to the profit and loss account this amount of ₹32,33,067 according to the accountancy principles.

The High Court of Karnataka held as follows:

Section 32AB provides an incentive to an assessee who is carrying on business or profession, a deduction out of the total income 20% of the profits and gains of business or profession.

The profits of business or profession of an assessee for the purposes of sub-Section (1) is to be arrived at on the basis of the profits computed in accordance with the requirements of Part II of Sixth Schedule to the Companies Act. Therefore, it is clear, the said profits of business or profession is not computed in accordance with the provisions of the Income-tax Act. Further, it provides, for deduction of an amount equal to the depreciation computed in accordance with the provisions of sub-Section (1) of Section 32 from the amounts of profits computed in accordance with the requirements of Part-II of Sixth Schedule to the Companies Act. To that income, the amounts mentioned in clauses (i) to (vii) has to be added. One such amount to be added is the amount or amounts set aside as the provisions made for meeting liabilities, other than ascertained liabilities. Therefore, the contingent liability or unascertained liability has to be added to the profits for the purpose of Section 32AB.

Part II of Sixth Schedule to the Companies Act deals with the requirements as to profit and loss account. Clause (3) of Part-II provides that the profit and loss account shall set out the various items relating to the income and expenditure of the company arranged under the most convenient heads; and in particular, shall disclose the information mentioned therein in respect of the period covered by the account. One such information to be disclosed is the expenditure incurred on the items mentioned therein, separately for each item which includes rates and taxes, excluding taxes on income. Therefore, the requirement of law is, profit and loss account should disclose the information regarding expenditure incurred in respect of rates and taxes. It does not provide that the rates and taxes incurred as expenditure is to be deducted from the income.

The scheme of the Income -tax Act read with Part-II of Sixth Schedule of the Companies Act makes it clear that both of them are not dealing with the deductions at all. The provisions of the Companies Act expressly states what the assessee is expected to do is to disclose the information. What is deductable out of rates and taxes is the ascertained liability. If the liability is disputed and still the amount is paid in terms of the court order, that is the amount to be added under sub-Section (3) of Section 32AB for the purposes of determining the profits of business or profession for the purposes of Section 32AB. Therefore, computation of profits under the Income Tax Act is totally different from the computation of profit under the Companies Act.

While deciding the benefit to which the assessee is entitled to under Section 32AB of the Act, the Assessing Officer has only power to examine whether the books of account are certified by the authorities under the Companies Act as having been properly maintained in accordance with the Companies Act. Therefore, he cannot apply the principles under the Income-tax Act for the purpose of determining the profit of the assessee from business or profession for the purpose of Section 32AB. In other words, there cannot be two incomes one for the purpose of Companies Act and another for the purpose of Income Tax Act maintained under the same Act for the purpose of Section 32AB. After arriving at profits of business or profession of the assessee, as stipulated in sub-Section (3) of Section 32AB, the said provision also provides for addition to such income as stipulated therein. After such additions, the authority has to determine the profits of business or profession for the purpose of extending the benefit under Section 32AB.

Dealing with the provision for tax liability when the same is disputed, it is observed that where a company disputes its liability on valid and bona fide reasons in regard to the tax demand raised, it is not probable that a liability has been incurred on the balance sheet date; and it is not necessary to provide for the liability. A disclosure thereof by way of a note to the accounts would be sufficient. A note regarding disputed tax liability can be explanatory in nature if the auditor is satisfied about the validity of the reasons of the company for contesting the liability.

In the instant case, even if in the profit and loss account a sum of ₹32,22,067/- paid as customs duty had been deducted by virtue of sub-Section (3) of Section 32AB as it is a contingent liability and not ascertained liability, it has to be added. In the instant case, as the said amount was not deducted, the question of adding would not arise. The Assessing Authority was justified in upholding the claim of the assessee who had not excluded the same from the profit of business of profession. Hence, the orders passed by the Revisional Authority as well as the Appellate Authority are not in accordance with law.

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LD/63/29
CIT
vs.
V and V Caplease Pvt. Ltd.
September 8, 2014 (GUJ)

Section 37(1) of Income-tax Act, 1961–Business Expenditure–Allowable as

Where loss from business of commodity and future trading was allowed in similar circumstances, loss arising out of trading of future and option was also to be allowed

The assessee claimed trading loss of ₹14 lakh from trading of future and options. On the ground that the assessee had colluded with connected and interested parties to create an artificial loss, the assesseing Officer disallowed the said loss. On appeals, the Commissioner (Appeals) and the Tribunal allowed the loss claimed by the assessee.

The Gujarat High Court held as follows:

In the case of the assessee, when it claimed loss in Commodity Future Trading in the appeal preferred by the Revenue, it was held to be essentially based on factual matrix, by detailed reasons, which is not found necessary to ingeminate at this stage and The High Court had dismissed such appeal. Since the facts in this appeal were also similar in nature, there was no reason to interfere. There arose no question of law much less any substantial question of law to interfere. Hence, the Tax Appeal was, resultantly, dismissed.

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LD/63/30
CIT – Central-I, New Delhi
vs.
Vatika Township Private Limited
September 15, 2014 (SC)(FB)
[Block Period April 1, 1989 to February 10, 2000]

Section 113 of the Income-tax Act, 1961-Block assessment of search cases-Tax in case of

Proviso appended to Section 113 which was inserted in this Section by the Finance Act, 2002 is to operate prospectively; it is neither clarificatory nor curative in nature and, therefore, has no retrospective operation

The position prior to the amendment of Section 113 of the Act whereby the proviso was added,

whether surcharge was payable in respect of block assessment or not, was totally ambiguous and unclear. Some assessing officers had taken the view that no surcharge is leviable. Others were at a loss to apply a particular rate of surcharge as they were not clear as to which Finance Act, prescribing such rates, was applicable. It is a matter of common knowledge and is also pointed out that the surcharge varies from year to year. However, the assessing officers were in-determinative about the date with reference to which rates provided for in the Finance Act were to be made applicable. They had four dates before them *viz.*: (i) Whether surcharge was leviable with reference to the rates provided for in the Finance Act of the year in which the search was inititated; or (ii) the year in which the search was concluded; or (iii) the year in which the block assessment proceedings under Section 158 BC of the Act were initiated; or (iv) the year in which block assessment order was passed. The position which prevailed before amending Section 113 of the Act was that some Assessing Officers were not levying any surcharge and others who had a view that surcharge is payable were adopting different dates for the application of a particular Finance Act, which resulted in different rates of surcharge in the assessment orders. In the absence of a specified date, it was not possible to levy surcharge and there could not have been an assessment without a particular rate of surcharge. There were four different dates which were bothering the assessees as well as the Department. The choice of a particular date would have material bearing on the payment of surcharge. Not only is the surcharge different for different years, it varies according to the category of assessees and for some years, there is no surcharge at all. Further, the rate at which the tax is to be imposed is an essential component of tax and where the rate is not stipulated or it cannot be applied with precision, it would be difficult to tax a person. In absence of certainty about the rate because of uncertainty about the date with reference to which the rate is to be applied, it cannot be said that surcharge as per the existing provision was leviable on block assessment *qua* undisclosed income. Therefore, it cannot be said that the *proviso* added to Section 113 defining the said date was only clarificatory in nature. Choice of date has to be formed as in some of the years, there would not be any surcharge at all. During the Conference, Chief Commissioners accepted the position, in no uncertain terms, that as per the language of Section 113, as it existed, it was difficult to justify levy of surcharge. It was also acknowledged that even if Section 113 empowered to levy surcharge, since block assessment tax is levied on the undisclosed income of the block period, absence of specific assessment year in the block assessment would render the levy suspect. In view of the aforesaid difficulties pointed out by the Chief Commissioners in their Conference, it becomes clear that as per the provisions then enforced, levy of surcharge in the block assessment on the undisclosed income was a difficult proposition. It is for this reason retrospective amendment to Section 113 was suggested. Notwithstanding the same, the legislature chose not to do so, as is clear from the discussion hereinafter. "Notes on Clauses" appended to Finance Bill, 2002 while proposing insertion of proviso categorically states that "this amendment will take effect from 1st June, 2002". These become epigraphic words, when seen in contradistinction to other amendments specifically stating those to be clarificatory or retrospectively depicting clear intention of the legislature. It can be seen from the same notes that few other amendments in the Income-tax Act were made by the same Finance Act specifically making those amendments retrospectively. For example, clause 40 seeks to amend S.92F. Clause iii (a) of S.92F is amended "so as to clarify that the activities mentioned in the said clause include the carrying out of any work in pursuance of a contract." This amendment takes effect retrospectively from 01.04.2002. Various other amendments also take place retrospectively. The Notes on Clauses show that the legislature is fully aware of 3 concepts: (i) prospective amendment with effect from a fixed date; (ii) retrospective amendment with effect from a fixed anterior date; and (iii) clarificatory amendments which are retrospective in nature. Thus, it was a conscious decision of the legislature, even when the legislature knew the implication thereof and took note of the reasons which led to the insertion of the *proviso*, that the amendment is to operate prospectively. Learned counsel appearing for the assessees sagaciously contrasted the aforesaid stipulation while effecting amendment in Section 113 of the Act, with various other provisions not only in the same Finance Act but Finance Acts pertaining to other years where the legislature specifically provided such amendment to be either retrospective or clarificatory. In so far as amendment to Section 113 is concerned, there is no such language used and on the contrary, specific stipulation is added making the provision effective from 1st June, 2002. (e) There is yet another very interesting piece of evidence that clarifies the provision beyond any pale of doubt,

viz. understanding of CBDT itself regarding this provision. It is contained in CBDT circular No. 8 of 2002 dated 27th August, 2002, with the subject "Finance Act, 2002–Explanatory Notes on provision relating to Direct Taxes". This circular has been issued after the passing of the Finance Act, 2002, by which amendment to Section 113 was made. In this circular, various amendments to the Income Tax Act are discussed amply demonstrating as to which amendments are clarificatory/retrospective in operation and which amendments are prospective. which amendments are clarificatory/ retrospective in operation and which amendments are prospective. When it comes to amendment to Section 113 of the Act, this very circular provides that the said amendment along with amendments in Section 158BE, would be prospective *i.e.* it will take effect from 1st June, 2002. (f) Finance Act, 2003, again makes the position clear that surcharge in respect of block assessment of undisclosed income was made prospective. Addition of this *proviso* in the Finance Act, 2003 further makes it clear that such a provision was necessary to provide for surcharge in the cases of block assessments and thereby making it prospective in nature. The charge in respect of the surcharge, having been created for the first time by the insertion of the proviso to Section 113, is clearly a substantive provision and hence is to be construed prospective in operation. The amendment neither purports to be merely clarificatory nor is there any material to suggest that it was intended by Parliament. Furthermore, an amendment made to a taxing statute can be said to be intended to remove 'hardships' only of the assessee, not of the Department. On the contrary, imposing a retrospective levy on the assessee would have caused undue hardship and for that reason Parliament specifically chose to make the proviso effective from 1.6.2002. 40. The aforesaid discursive also makes it obvious that the proviso cannot be treated as clarificatory and hence it cannot be given retrospective effect.

Note: Conclusion of Division of the SC in CIT-Central II vs. Suresh N. Gupta, (2008) 4 SCC 362, overruled.

LD/63/31

Royal Bank of Scotland, In re
May 9, 2014 (AAR)

Section 192 read with, 17 of the Income-tax Act, 1961–Deduction of tax at source

Where applicant bank established a superannuation scheme for purpose of providing pension to its eligible employees and amount standing to credit of funds would continue to remain invested till employees become entitled to receive it and vesting right to receive any amount under said scheme did not occur, no tax is required to be deducted at source under Section 192 by the Applicant on contribution to superannuation fund as perquisite

The Indian branch of the Applicant Dutch bank has established a superannuation scheme ('the Scheme') for the purpose of providing pension to its eligible employees. The aforesaid Scheme, which is a *defined benefit* plan has been approved by the Commissioner of Income-tax under Rule 2(1) of the Part B of the Fourth Schedule of the Act, on 26 December 1975. Employees who have joined the Applicant up to 31 December 2004 are eligible for the pension benefit under the aforesaid Scheme. Employees, who have completed 10 years of continuous services, are eligible for pension on resignation/retirement.

Advance Ruling was sought on question as to whether tax is required to be deducted at source under section 192 of the Act, by the Applicant on the contribution to the superannuation fund (for an amount exceeding one lakh rupees per employee) as perquisite and where the same is not so deducted, whether the Applicant would be treated as a 'assessee in default'.

The Authority for Advance Rulings held as follows:

The emploees do not get a vested right at the time of contribution to the fund by the employer. The amount standing to the credit of the funds like the pension and fund account, social security of medical or health insurance would continue to remain invested till the employees become entitled to receive it. The vesting right to receive the amount under the scheme or plan did not occur.

The judgment of the Supreme Court in *CIT vs. L. W. Russel, AIR 1965 SC 49* applies to the facts of the present case. There, it was held that one cannot be said to allow a perquisite to an employee if the employee has no right to the same. It cannot apply to contingent payments to which the employee has no right till the contingency occurs. The employee must have a vested right in the amount. In this context, the decision of the Delhi High Court in *CIT vs. Mehar Singh*

Sampuran Singh Chawla, [1973] 90 ITR 219 (Delhi) can be noted, where it was held that the contribution made by the employee towards a fund established for the welfare of the employees would not be deemed to be a perquisite in the hands of the employees concerned as they do not acquire a vested right in the sum contributed by the employer. Similar view was expressed in *Yoshio Kubo vs. Commissioner of Income Tax, [2013] 36 Taxman Con. 1.* The Supreme Court in Russel's case (*supra*) spelt out a wider and fundamental principle, *i.e.* when the amount does not result in a direct present benefit to the employee who does not enjoy it, but assures him a future benefit, in the event of contingency, the payment made by the employer, does not vest in the employee. The new Act does not make any significant departure from this aspect.

Therefore, no tax is required to be deducted at source under Section 192 of the Act by the Applicant on the contribution to the superannuation fund as perquisite and the Applicant would not be treated as a 'assessee in default'.

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Inerest-tax Act

LD/63/32

CIT

vs.

Golden Investments Ltd.

September 10, 2014 (MAD)

[Assessment Years 1993-94 and 1994-95]

Section 2(7), read with Section 4, of the Interest-tax Act, 1974 - Interest

Where two companies amalgamated to form a new company and new company issued debentures in respect of shares held by assessee in one of the amalgamated company as well as in respect of interest earned on debentures held in amalgamated company, latter amount related to (interest on debentures) would not form part of chargeable interest

The assessee was engaged in the business of investment and share broking. They held shares in a company called Sona distillers, which got amalgamated with Herbertson Limited. On such amalgamation, debentures were issued by the new company in respect of the interest earned on debentures held by the assessee in Sona Distilleries.

The assessee was also allotted convertible debentures in the above company in respect of shares held by the assessee in Sona Distilleries. The assessee claimed exemption in respect of interest on the ground that the nature of new investment was not chargeable under the Interest-tax Act. The Assessing Officer declined to accept such a claim and included the interest on debentures in the chargeable interest.

The Madras High Court held as follows:

The contention of the Department that interest earned on debentures was liable to interest did not hold good any more. A faint plea was made by the Revenue that post 1st October, 1991, consequent to amendment, interest under Section 2(7) would include interest from debentures as well. Such an argument had also been considered by the Supreme Court against the Revenue.

Therefore, the Tribunal was right in law in following the judgment rendered in the case of *CIT vs. Lakshmi Vilas Bank, (1997) 228 ITR 697 (MAD)* and in holding that interest on debentures will not form part of chargeable interest.

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Section 2(7), read with section 4 of Interest Tax Act, 1974 - Interest

Notional Interest cannot be considered as part of chargeable interest

The assessee had given money to 4 companies for issue of shares. While computing the chargeable interest, the Assessing Officer added interest receivables to it. The Commissioner (Appeals) came to the clear conclusion that the notional interest brought to tax under Interest Tax Act has never been considered as part of interest accrued or arisen in the books of account, namely, profit and loss account and therefore, the question of adding notional interest was declined

The Madras High Court held as follows:

It can be found from the objects and reasons of the Interest Tax Act, 1974 and from the definition of "interest" under Section 2(7) of the Interest Tax Act, that the word "notional interest" does not figure any where. Therefore, the Commissioner of Income Tax (Appeals) was correct in deleting the addition of notional interest. Unless the statute provides for adding notional interest for the purpose of tax, it cannot be made applicable by implication. The Revenue has not shown any provision whereby, notional interest can be included for the purpose of tax. Therefore, the Tribunal was not right in law in holding that addition of notional interest are to be reckoned with for the purpose of calculating the chargeable interest under the Interest Tax Act.

Securities Laws

LD/63/33

Raj Kumar Gursahani
Vs.
Securities & Exchange Board of India
October 16, 2014 (DEL)

Section 10 of the Securities Contracts (Regulation) Act, 1956, read with Section 34 of the Arbitration and Conciliation Act, 1996 – SEBI to make or amend bye-laws of recognised Stock Exchanges

Circular No. PR No. 03/2011 dated 06.01.2011 issued by SEBI advising recognised stock exchanges to make amendments in their relevant byelaws, rules and regulations to ensures that period for invoking arbitration clause is in conformity with settled law, was valid

The petitioner impugns the Circular No. PR No. 03/2011 dated 06.01.2011 issued by the respondent (SEBI). The grievance of the petitioner is that the impugned circular (PR No. 03/2011) modifies the period of limitation for invoking the arbitration from six months to three years.

According to the petitioner, the circulars issued by SEBI are detrimental to the interest of the investors and have been issued at the instance of brokers and thus, are contrary to the object of the 'SEBI Act'.

The High Court of Delhi held as follows:

A plain reading of the impugned circular also indicates that the increase in the period of limitation is available to both parties and is not limited only to claims made by brokers against their clients. Thus, no mala fides can be attributed to SEBI in framing the impugned circular. In *Biba Sethi v. Dyna Securities Ltd. 2009 (112) DRJ 512,* a Single Judge of this Court had held that Byelaws of the National Stock Exchange of India (NSE) prescribing a limitation period of six months for making a reference of disputes/claims to arbitration were

void as the relevant byelaw restricting the period of limitation would run contrary to the provisions of Section 28 of the Indian Contract Act, 1972.

In this view, the impugned circular issued by SEBI which advises the recognised stock exchanges to make amendments in their relevant byelaws, rules and regulations only ensures that the period for invoking the arbitration clause is in conformity with the settled law. Thus, there is no infirmity with the impugned circular.

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LD/63/34

Suresh Gupta

vs.

Securities and Exchange Board of India

September 1, 2014 (DEL)

Section 11B, read with sections 15Y, 20A and 21 of the Securities and Exchange Board of India Act, 1992 – Powers and Functions of the Board – Power to issue directions

Certain shares held by petitioner in dematerialized form were transferred to respondent no. 2 investment company who was not registered as a broker/sub-broker with SEBI and transactions were not relating to securities markets as all these transactions were not transacted on any of recognised Stock Exchange but "off market transactions" and thus these shares transfer was private arrangement between two parties; SEBI was justified in not entertaining complaint of petitioner

The petitioner alleged that it had entered into certain transactions whereby certain shares held by the petitioner in dematerialised form were transferred to respondent no. 2 investment company. The petitioner's complaint alleged that respondent no.2 had purportedly acted as a sub-broker. The complaint made by the petitioner before the SEBI was for imposition of penalty upon respondent no. 2. SEBI declined to entertain the complaint made by the petitioner against the respondent no.2.

The High Court of Delhi held as follows:

The transactions in question are alleged to have been entered into in the year 1999-2000 and

2000-2001. Admittedly, these transactions were not transactions relating to securities markets as all these transactions were not transacted on any of the recognized Stock Exchange but were stated to be "off market transactions". This means that the shares alleged to have been transferred by the petitioner to respondent no. 2 were on the basis of a private arrangement between the two parties. Concededly, respondent no. 2 is not registered as a broker/sub-broker with the SEBI. Further, the SEBI found that the petitioner could not substantiate that respondent no.2 had approached the petitioner as a broker.

The functions of SEBI under the SEBI Act include regulating of business in Stock Exchange and other security market and regulating the working of Stock brokers, sub-brokers and other market intermediaries. And, the facts of the present case do not indicate that the transactions entered into between the petitioner and respondent no. 2 were transactions either related to the securities market or transactions between an investor and a broker. The transfer of shares alleged to have been affected by the petitioner in favour of respondent no. 2 were, plainly, in the nature of private transactions between two parties, which were unrelated to the securities market.

Thus, SEBI would have a very limited role to play in respect of such transactions.

The petitioner's contention that the jurisdiction of Civil Courts is barred in respect of the allegations relating to the alleged transaction entered into between the petitioner and respondent no. 2 is misconceived. The jurisdiction of Civil Courts to enforce the provisions of the SEBI Act in respect of matters, which are vested with the adjudicating authority, is barred by virtue of Sections 15Y and 20A of the SEBI Act.

The complaint made by the petitioner before the SEBI was for imposition of penalty upon respondent no. 2. However, the SEBI found that petitioner had failed to provide any material to conclude that respondent no. 2 had approached the petitioner as a broker. Consequently, the SEBI held that the disputes related to entities, which were not regulated by SEBI. There is no infirmity with the SEBI's decision. The impugned order passed by SEBI is neither patently erroneous nor ill-informed by reason. Accordingly, the present petition is dismissed as bereft of any merits.

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LD/63/35

SRG Infotech Ltd.

vs.

Securities and Exchange Board of India

September 23, 2014 (DEL)

Regulation 6, read with regulation 7, of the SEBI (Prohibition of Fraudulent and Unfair Trade Practice Relating to Securities Market) Regulations, 1995 read with Section 26 of SEBI Act, 1992 and Section 492 of the Criminal Procedure Code – Prohibition on unfair trade practice relating to securities

Complaint was filed against petitioners alleging offence of violation of Regulation 6(d) which was purported to have been committed by petitioners on 04.01.2000 on 09.10.2003 and cognizance order was passed on 8-4-2004, held, cognizance order was not barred by limitation under section 468(2) of Code of Criminal Procedure

SEBI filed complaint against the petitioners alleging violation of Regulation 6(d). The complaint was originally filed in the Court of ACMM who had passed the impugned order summoning the petitioners.

The petitioner submitted that (as per the un-amended Act) the offence for which the complaint was filed was punishable with imprisonment up to 1 year and in terms of Section 468 (2) (b) of the Cr.P.C. the period of limitation for taking cognisance of such an offence is one year. It is pointed out that even as per the averments made in the complaint the SEBI was aware of the offence purported to have been committed by the petitioners on 04.01.2000; limitation for taking cognisance of such an offence expired on 04.01.2001; impugned order passed on 08.4.2004 taking cognizance of an offence which had taken place on 04.01.2000 suffers from the vice of limitation. It is pointed out that under Section 469 of the Cr.P.C. the period of limitation has to commence from the date of the offence and in the alternate where the commission of the offence first comes to the knowledge of such a person; submission being reiterated that in this case admittedly knowledge about the offence was known to the Board on 04.01.2000 and cognisance having been taken four years later *i.e.* on 08.4.2004 is clearly time barred.

The High Court of Delhi held as follows:

Section 26 clearly stipulates that no court shall take cognisance of any offence punishable under this Act except on a complaint made by the Board.

Under Section 30 of the Act, the Board by a notification may make regulations which are consistent with this Act.

Sub-Section (2) of Regulation 7 states that the Board may cause an investigation to be made into the conduct and affairs of any person dealing in securities by Investigating Officer whom the Board considers fit to ascertain whether there are circumstances which would render any person guilty of having contravened any regulations as also to investigate into any complaint of any contravention (of any regulations) by any persons. Regulation 9 casts a duty upon such a person to produce records.

Under Regulation 10, the Investigating Officer shall upon completion of the investigation after taking into account all relevant facts and submissions made by the persons concerned, submit a report to the Board.

The wholesome reading of these Regulations thus clearly specify that the Board has the power to order an investigation; this is a preliminary investigation carried out by the Board after giving notice to the suspected person and this is for the purpose of ascertaining whether any *prima facie* case of guilt is made out against such a person. It does not necessarily mean that the investigation must end into finding of guilt. It can also be the converse. It is only after the investigation is complete and the report has been submitted to the Board that a complaint can be filed under Section 26 of the Said Act and it is the Board alone which can file a complaint.

In the case at hand, the complaint specifically states that the Board had approved the investigation report on 09.10.2003. Thus the competency of the Board to file the complaint under Section 26 of the said Act arose only on 09.10.2003.

The second submission of the petitioner that there is no specific role attributed to the present petitioners is also negatived. Petitioner no.1 is the company of whom admittedly petitioner nos.3 and 4 are directors. The complaint specifically states that accused no. 1 is a company incorporated under the Indian Companies Act of whom the three petitioners before this Court are the persons in-charge and responsible for the conduct of its affairs. They, admittedly, are the working directors of the company. It is also not the case of the petitioners that they were not the directors of the company during the period when the alleged offence was committed. ■