Legal Decisions[1]

Income Tax

LD/66/01

Indus Towers Limited
vs.
Deputy Commissioner of Income Tax
29th May, 2017

Delay in issuing a notice under Sec. 143(2) would be fatal to the re-assessment proceedings – Re-assessment proceedings for AY 2009-10 quashed on the ground of delay in issuing notice u/s. 143(2) despite validly issued reopening notice u/s. 148

The Petitioner is the successor to India Cellular Towers Infrastructure Ltd. ('ICTIL'). ICTIL and India Cellular Limited ('ICL') filed a scheme of arrangement ('demerger scheme') under Sec. 391 to 394 of the Companies Act, 1956 on 17th/24th April, 2009 for transfer of the passive infrastructure (PI) assets owned by ICL to ICTIL with effect from 1st January, 2009. On 3rd and 31st August 2009, the High Court of Delhi and High Court of Gujarat, respectively, approved the demerger scheme. ICTIL filed a return of income for the AY 2009-10 on 26th September, 2009. On 29th September, 2009, the demerger scheme became effective upon its submission to the Registrar of Companies. As a result, the PI assets owned by ICL stood transferred to ICTIL with effect from 1st January, 2009.

On February 22, 2013, the AO issued a notice u/s. 148 of the Act to ICTIL for re-opening the assessment for AY 2009-10, which already stood concluded, requiring ICTIL to file its return of income within 30 days of the receipt of the notice. The re-opening was ordered because of the receipt of capital assets by ICTIL on 'nil' consideration from ICL and the demerger approved by the HC was not compliant with the Act. ICTIL requested that the revised return filed by it on March 31, 2010 u/s. 139(5) of the Act should be considered as the return filed in response to the notice was rejected by AO.

Aggrieved, the assessee preferred an appeal before the Delhi High Court.

It was assessee's contention that belief of Assessing Officer was a mere change of opinion and the proceedings have been initiated on the basis of no material and, therefore, assumption of jurisdiction was plainly unsustainable in law. It was further contended that in terms of the proviso to Sec. 153(1), time limit for completion of AY 2009-10 was December 31, 2011. In addition, the proviso to Sec. 143(2) requires that notice for assessment should be issued within six months from the end of the financial year in which the return was furnished by an assessee.

The High Court held that law on this point was fairly well settled in the decisions in *ACIT vs. Hotel Blue Moon [2010] 321 ITR 362 (SC)* reiterated in *CIT vs. Madhya Bharat Energy Corporation [2011] 337 ITR 389 (Del)* and *Principal Commissioner of Income tax vs. Jai Shiv Shankar Traders (P.) Ltd. [2016] 383 ITR 448 (Del)]*. In the last mentioned judgment, the division bench had held that the delay in issuing a notice under Sec. 143(2) would be fatal to the re-assessment proceedings.

The High Court quashed the impugned notice dated 22nd February, 2013 issued to the Petitioner u/s. 148 as well as the consequential order dated 20th January, 2014 disposing of its objections as well as the reassessment proceedings pursuant thereto.

LD/66/02

Palam Gas Service
vs.
Commissioner of Income Tax
3rd May, 2017

The Supreme Court observed that as per Sec. 194C, it is the statutory obligation of a person, who is making payment to the sub-contractor, to deduct tax at source at the rates specified therein and plain language of the section suggests that such a tax at source is to be deducted at the time of credit of such sum to the account of the contract or at the time of payment thereof, whichever is earlier.

The Supreme Court noted that tax has to be deducted in both the contingencies, namely, when the amount is credited to the account of the contractor or when the payment is actually made. Section 200 of the Act imposes further obligation on the person deducting tax at source, to deposit the same with the Central Government or as the Board directs, within the prescribed time.

The Supreme Court stated that a conjoint reading of these two sections would suggest that not only a

[1] *Contributed by CA. Sahil Garud, CA. Mandar Telang, Indirect Taxes Committee, Committee on International Taxation, Insolvency and Bankruptcy Laws Group, Disciplinary Directorate and ICAI's Editorial Board Secretariat.*
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person, who is paying to the contractor, is supposed to deduct tax at source on the said payment whether credited in the account or actual payment made, but also deposit that amount to the credit of the Central Government within the stipulated time.

The view held in case of *P.M.S. Diesels & Ors vs. CIT [(2015) 374 ITR 562]* was approved by the Supreme Court wherein the Punjab & Haryana High Court had observed that though the words 'paid' and 'payable' are antonyms in grammatical sense, but it covers both when amounts are 'payable' and 'paid'.

It was further held *"...once it is found that the aforesaid Sections mandate a person to deduct tax at source not only on the amounts payable but also when the sums are actually paid to the contractor, any person who does not adhere to this statutory obligation has to suffer the consequences which are stipulated in the Act itself."*

Thus, dismissing the appeal, the Supreme Court held that the view taken by various High Courts is the correct view and the judgment of the Allahabad High Court in *CIT vs. Vector Shipping Services (P) Ltd.[(2013) 357 ITR 642]* did not decide the question of law correctly.

LD/66/03

Jagdish Gandabhai Shah

vs.

Principal Commissioner of Income Tax

28th March, 2017

Gujarat HC allows stay application of assessee; AO may grant stay of demand till disposal of first appeal on payment of 15% of the disputed demand, unless the case falls in the category mentioned in Para 4[B] of the modified instructions-If the Assessing Officer opined that the case fell within parameters of Clause 4 [B](a), he was required to refer the matter to the administrative Principal CIT/CIT, who would, after considering the relevant facts, decide the quantum/proportion of demand to be paid by the assessee as lump sum payment for granting a stay of the balance demand

The Assessing Officer passed assessment order against the assessee, an individual, determining income higher than claimed in return. On scrutiny assessment, a demand notice was issued to the assessee, who in turn appealed to CIT(A) and also approached the AO with an application u/s. 220(6) to keep the demand in abeyance till the disposal of the first appeal. AO rejected such application on the ground that at the time of submitting the stay application, the assessee had not deposited 15% of the demand as pre-deposit. Stay application filed to Principal CIT was also rejected and asked assessee to pay entire outstanding demand failing which the AO shall be free to take suitable action as per the law.

Aggrieved, the assessee preferred an appeal before Gujarat High Court.

The High Court noted Clause-4 of CBDT Instruction dated February 29, 2016, and observed that Assessing Officer may grant stay of demand till disposal of first appeal on payment of 15% of the disputed demand, unless the case falls in the category mentioned in Para 4[B] of the modified instructions. It was noted that the impugned decision of AO in rejecting the stay application and consequently directing the petitioner to deposit 100% of the disputed demand on the ground that the petitioner had not deposited 15% of the disputed demand as a pre-deposit before his application for stay was considered on merits could not be sustained and the same deserves to be quashed and set-aside.

HC held that if the Assessing Officer opined that the case fell within parameters of Clause 4 [B](a), he was required to refer the matter to the Administrative Principal CIT/CIT, who would, after considering the relevant facts, decide the quantum/ proportion of demand to be paid by the assessee as lump sum payment for granting a stay of the balance demand.

Thus, High Court remanded the matter to Assessing Officer to pass an appropriate order on the stay application afresh in accordance with law and on merits and considering the modified instructions dated 29th February 2016.

Transfer Pricing

LD/66/04

KMG Infotech Ltd.

vs.

Dy. Commissioner of Income Tax

Bangalore ITAT

The TPO could not reject the Most Appropriate Method ('MAM') without providing any reasons for the rejection.

Facts and Background

The assessee was engaged in the business of rendering software development services to its Associated Enterprises ('AEs') KMG, USA and non-AEs. The assessee applied Comparable Uncontrolled Price ('CUP') method to justify the consideration

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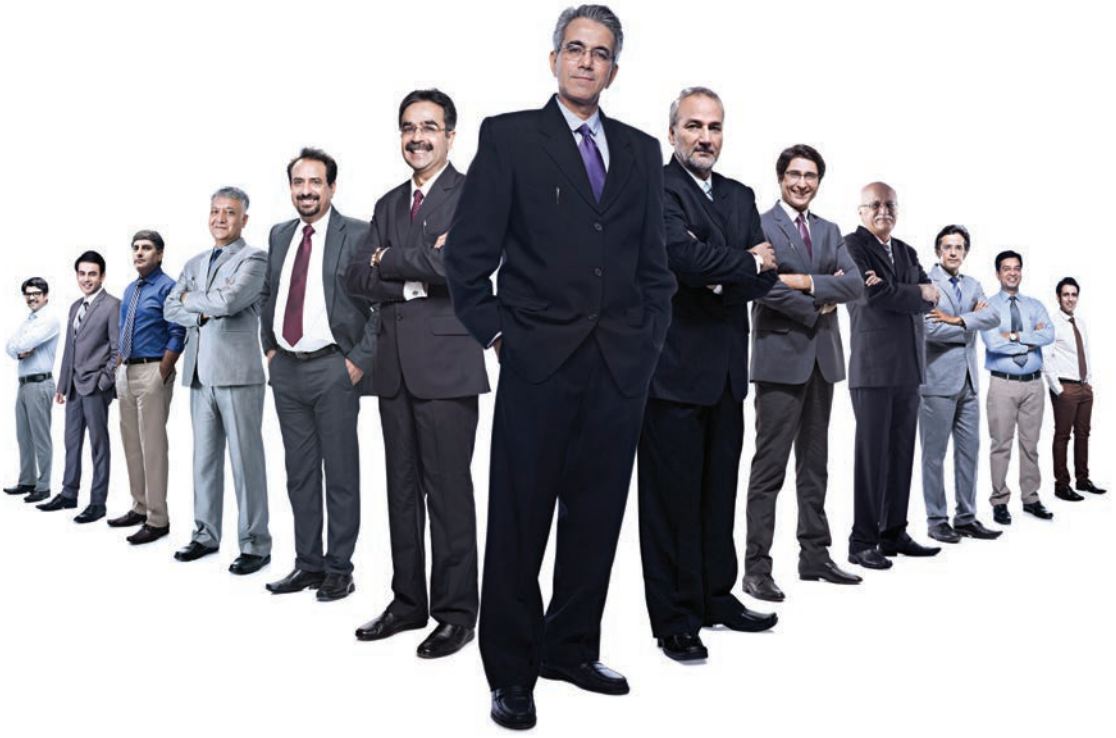

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received for international transactions entered into with its AEs to be at arm's length.

The Transfer Pricing Officer rejected TP study report submitted by the assessee and also rejected the CUP method adopted by the assessee. The TPO computed ALP by adopting Transactional Net Margin Method as the MAM and proceeded with different set of comparables. The assessee challenged rejection of CUP method by TPO and rejection of internal comparables. Without prejudice to the above, the assessee also sought for the adjustment on account of under-capacity utilisation if the TNMM was to be considered as the MAM. The DRP confirmed the findings of the TPO and further held that 6 companies were not comparable with the assessee on the application of upper turnover limit of ₹200 crore.

Issue

Whether the TPO was right in rejecting the CUP as the MAM?

Held

The ITAT observed that the assessee contended that the TPO as well as DRP had not assigned any reason as to why CUP method was not the MAM in the nature of transactions assessee had with its AE and that TPO had not considered the alternative submissions of the assessee that in case TNMM was adopted as the MAM. The assessee had submitted that the TNMM same should be applied based on internal comparables rather than external comparables since the law is quite settled that internal comparables are more preferable to external comparables. Further, the ITAT also observed that the assessee had submitted that the TPO had not considered the submissions of the assessee for adjustment towards unutilised capacity. The AO also not followed directions of the DRP while passing final assessment order. In the circumstances, the matter was to be restored back to the file of the Assessing Officer for *de novo* consideration.

Further, the ITAT observed that the department had no serious objections for restoring the matter back to the file of the Assessing Officer/TPO for fresh analysis of TP study. In the circumstances, the matter was remitted back to the Assessing Officer to consider the above submissions *de novo* after affording due opportunity of being heard to the assessee-company.

LD/66/05

Socomec Innovative Power Solutions (P.) Ltd.
vs.
Dy. Commissioner of Income Tax
Chennai ITAT

Berry ratio was MAM adopted by Assessing Officer/TPO where assessee had not purchased all materials from its AE and 50 per cent of other materials were purchased from domestic market and other independent enterprises

Facts and Background

The assessee is a subsidiary of Socomec SA France and is engaged in the business of import of 'Socomec' branded Uninterrupted Power Supply (UPS) from its AEs. The same is sold in India and accordingly assessee is thus only a trading entity. The assessee had adopted Comparable Uncontrolled Price ('CUP') as Most Appropriate Method ('MAM') for determining the Arm's Length Price ('ALP') of its AE purchases. The Transfer Pricing Officer rejected the CUP method so adopted by the assessee. The TPO suggested Resale Price Method ('RPM') or the Berry Ratio as the other MAM.

Despite RPM being one of the prescribed methods for determining the ALP under the provisions of Income-tax Act and Rules, the TPO proceeded to determine the ALP of the assessee's transaction of imports (Purchases) from its AE using Berry Ratio and made an adjustment. DRP confirmed said order.

Issues

Whether the TPO's act of determining the ALP by applying Berry Ratio as the MAM was justified?

Held

The ITAT observed that there was no dispute that the assessee has not made any value addition to the UPS goods procured from its AE. The UPS were sold in Indian market in the same way as it was procured from the AE. The TPO has accepted in the TP study that RPM was one of the accepted methods out of five methods in Transfer Pricing. The RPM is a method to compare the gross profit of the assessee with the gross profit of the comparable companies and to compute the ALP, it begins with the price at which a product that has been purchased from AE is resold to an independent enterprises. This price is then reduced by an appropriate gross profit, that this price representing the amount out of which the seller would seek to cover selling and other operative expenses.

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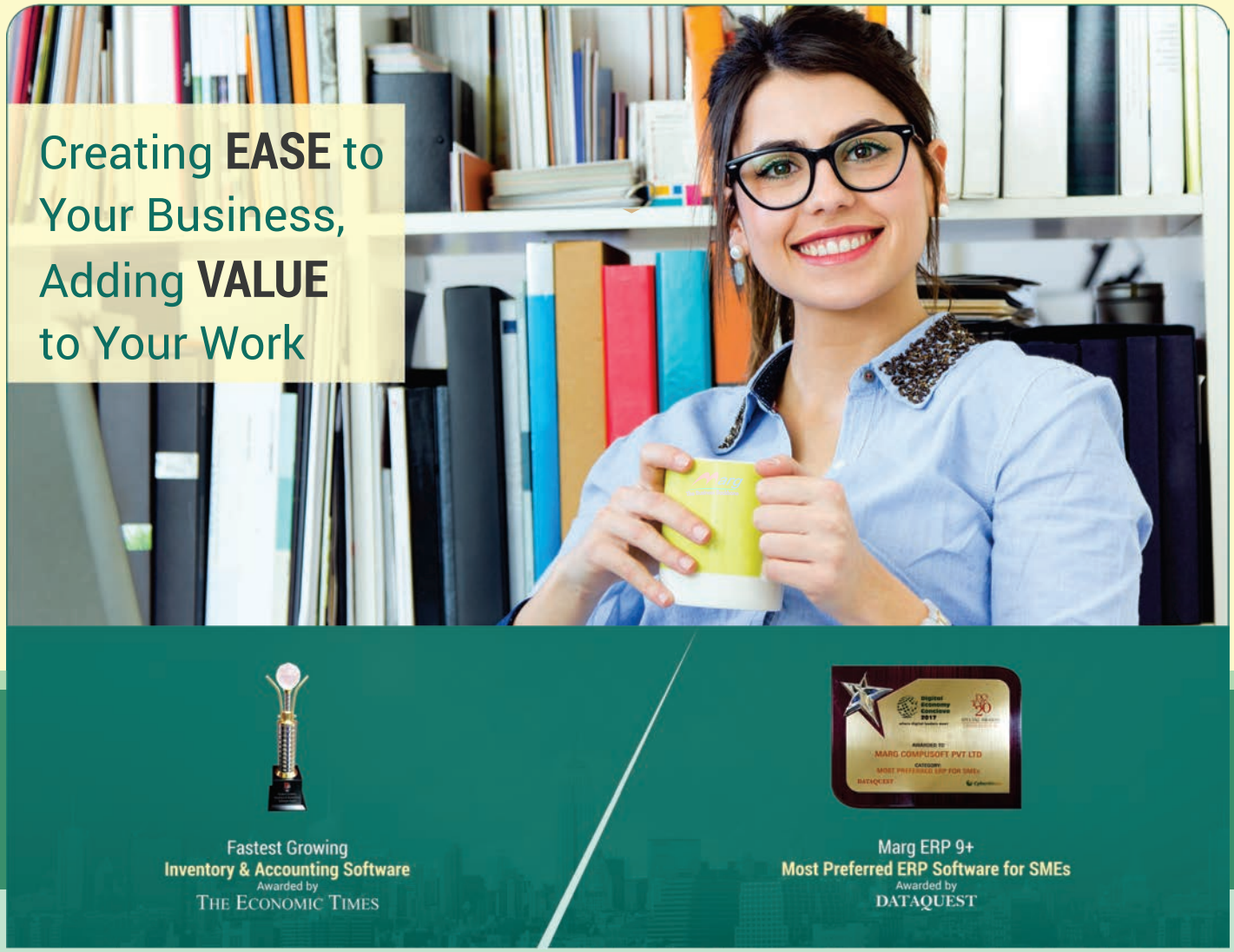

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Legal Update

The ITAT commented that in the light of the functions performed, an appropriate profit margin can be recorded, after adjustments for other costs associated with the purchase of the product as an ALP filed original transfer of the pricing between AEs.

However, the TPO adopted Berry Ratio method on the reason that the company is not just trader. There was also value added service by the assessee-company which is a permanent factor. According to the TPO, the conduct of the assessee clearly showed that it is captive for AE. For this purpose rejecting the RPM, the TPO has given the reasons that the assessee had not purchased all the materials from its AE but merely 50 per cent of the materials such as battery and other related materials were purchased from domestic market and other independent enterprises. If the RPM is considered as most appropriate method, the margin earned by the assessee to purchase the material from other independent parties is also part of the gross profit earned by the assessee.

Based on the above facts, the ITAT held that, the application of Berry Ratio was most appropriate method adopted by the Assessing Officer/TPO.

International Taxation

LD/66/06

Visteon Technical & Services Centre (P.) Ltd.

vs.

Dy. Commissioner of Income Tax

Chennai ITAT

Payment made to acquire software license for internal use of business is not royalty and hence not taxable as per Section 9(1)(vi)

Facts and Background

The assessee Visteon India made payment towards purchase of software license from Vector, a US company. Visteon India had been granted a non-exclusive, non-transferable software license by Vector used for carrying out the testing in connection with the software developed by the company for automative industries. The software was used by the company only for internal purposes of the business and cannot be shared externally or sub-licensed to be third party or commercially exploited.

The Assessing Officer ('AO') from the invoices raised by the Vector noticed that the assessee acquired the license to use the software for a particular tenure subject to certain terms and conditions and held that the said payment was in the nature of royalty and taxable under Section 9(1)(vi). Accordingly, the AO treated the assessee as the assessee-in-default and charged interest under Section 201(1)/(1A) for non-deduction of tax at source. The Commissioner of Income-Tax (Appeals) ('CIT(A)') confirmed the order of the AO.

Issue

Whether the payments made by Visteon India would be regarded as Royalty under Section 9(1)(vi)?

Held

The ITAT observed that the assessee had purchased the software license from the 'Vector' for internal use of the company. As per the agreement the assessee could not transfer/share externally or sub-license to the third party or commercially exploit. It was not permitted to make any alteration of the software and did not get any ownership right except rights of use in the company. The assessee referred the Indo-US treaty and the 'computer software' does not fall under the definition of Royalty.

Further the ITAT observed that as per the clauses and license agreement, Section 14 of the Copyright Act, the assessee is not authorised to do any of acts mentioned in the Copyrights Act. The Indo-US treaty also excluded the computer software from the definition of Royalty in the treaty. Thus, the company had merely been provided the access to the copyrighted software and had no right to use the copyright embedded in the software. In other words, the Company is not permitted to make copies or make alternations to the software. From the above facts, the ITAT observed that it was clear that the assessee has purchased software for the purpose of internal use and the same cannot be held as payments towards royalty.

Hence the ITAT held that as per the terms and conditions of the purchase agreement, payment made to acquire the software license did not fit into the definition of royalty and non-taxable as per Section 9(1)(vi).

LD/66/07

Oncology Services India (P.) Ltd.

vs.

Additional Director of Income Tax

Allahabad ITAT

Payment to a German based company for sharing of its standard operating procedures

(SOPs) developed over a period of time, amounts to sharing of scientific experiences and thus payments were taxable in India as royalty under Article 13 of India Germany DTAA

Facts and Background

The assessee had made payment aggregating to Euros 45,000 to Germany based entity OSE Oncology Services Europe S.a.r.l (OSE Germany) without any tax deduction at source. The payments made were for the purpose of sharing SOPs, access to database, email server, hardware and software.

The assessee contended that these payments, in the absence of the Permanent Establishment ('PE') of OSE Germany in India, were not taxable in India. Further, the assessee argued that the receipts by OSE Germany were required to be treated as business profits in the hands of the OSE Germany, and, as such, taxability could arise only if the OSE Germany had a PE in India.

The Assessing Officer ('AO') observed that payments made by the assessee are made for "using the name, goodwill and market reputation" and hence "the assessee has made payments for the use of technology, patent, trademark and accordingly the same is treated as royalty under Section 9(1)(vi) of the Income-tax Act and as per tax treaty between India and Germany", the Assessing Officer proceeded to raise the impugned demand under Section 201 r.w.s 195. The Commissioner of Income Tax (Appeals) ('CIT(A)') had dismissed the appeal of the assessee.

Issue

Whether the payments made by the assessee could be considered as Royalty under Section 9(1)(vi) of the Act?

Held

The ITAT observed that Article 13(3) of Indo German tax treaty, which defines the expression 'royalties', provides that " The term 'royalties' as used in this article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work, including cinematograph films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment, or

for information concerning industrial, commercial or scientific experience".

Further ITAT observed that sharing of SOPs, amounts to sharing 'information concerning industrial, commercial or scientific experience'. SOPs are "matured validated standard procedures" which have been developed by OSE Germany over a period of time and approved by the regulatory bodies. The said SOPs were non transferable and the assessee was not allowed to make any changes in it and that in other words, it can be said that the assessee is allowed to view only SOP established by OSE Germany. In effect thus, it is only sharing of the information about the scientific experiences, industrial and commercial, experiences that is covered by Article 13(3) by the OSE Germany.

Accordingly, based on the above, the ITAT held that the payments made by the assessee are in the nature of the royalty and hence taxable as per Section 9(1)(vi) of the Act.

Service Tax

LD/66/08

Chanakya Mandal
vs.
Union of India
18th April, 2017

Explanation to Section 65(105)(zzc) of Finance Act clarifying levy of service tax to all training and coaching centres, including non-profit oriented educational public trusts constitutionally valid

The petitioner is a Trust registered under the Bombay Public Trust Act, 1950. The petitioner Trust claimed that it provides, not necessarily by charging a fee, the necessary training and coaching so as to enable the students to appear for the Indian Administrative Services and other civil services examinations.

The brochure of the petitioner indicates as to how the Trust enables students to gain a certain degree of confidence and face competitive examinations. The petitioner pointed out that profit generation was not the motive or the main or predominant aim. The petitioner contended that it could not fall within the net of service tax. However, on 27th August, 2010, a letter was addressed by the Superintendent of Central Excise to the petitioner which referred to a circular dated 28th January, 2009 of the Central Board of Excise and Customs. The said circular referred the levy of service tax on educational institutions. The letter also referred to the amendment in regard to non-levy of service tax on institutions, which are not profit making.

Assessee contended that Explanation was added to Sec. 65(26) and (27) of the Finance Act, 1994, which define 'commercial training or coaching' and 'commercial training or coaching centre' respectively. It was contended that it is an educational public trust and hence, service tax would not be leviable on its activities, at least in 2010. The assessee relied on various decisions of CESTAT which have taken a view that institutions like assessee cannot be brought within the purview of the service tax leviable under the Finance Act, 1994. Assessee further contended that the Explanation inserted was not retrospective and if it was held to be so, then merely because the legislature held a particular view, it could not overturn or reverse a binding judgment of a court of law.

The High Court noted that the legislature refers to a commercial training or coaching which means any training or coaching provided by a commercial training or coaching centre. As per the definition, commercial training or coaching centre means any institute or establishment providing commercial training or coaching for imparting skill or knowledge or lessons on any subject or field other than the sports, with or without issuance of a certificate and includes coaching or tutorial classes. HC also observed that as per Section 65(105)(zzc), 'taxable service' means any service provided or to be provided to any person, by a commercial training or coaching centre in relation to commercial training or coaching.

HC also referred to the Principles of Statutory Interpretation by Justice G. P. Singh, which states that an Explanation may be added to include something within or exclude something from the ambit of the main enactment or the connotation of some word occurring in it. The Principles also state that it is possible that it may have been added in a declaratory form to retrospectively clarify a doubtful point of law. Still further, there can be a limited retrospectivity as well and all of this is permitted by law. It is too well settled to require any reiteration that in matter of taxation the legislature enjoys greater freedom and latitude and it is allowed to pick and choose districts, objects, persons, methods and even rates of taxes if it does so reasonably.

The High Court referred the Supreme Court ruling in *'Bishwanath Jhunjhunwala and Anr.' [AIR 1997 SC 357]* wherein it was held that it is the

language of the provision which must be taken as decisive and where the language is unambiguous and clear, full effect has to be given to the amended provision.

The High Court held that once there is a power to make retrospective amendment and of the said nature, then, one could not pick one or two words from the Explanation and read them in isolation.

Thus, the High Court dismissed writ petition of assessee.

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LD/66/09

Manthena Satyanarana Raju Charitable Trust

vs.

Union of India

There is a very clear distinction between fitness centres or unisex saloons, which provide different types of services to the customers and their focus is mostly on beauty rather than on maintenance of health; 'Naturopathy' is a preventive treatment for illness and so is not taxable as "health & fitness" services

The petitioner, Manthena Satyanarana Raju Charitable Trust, is registered as a public charitable institution with the department of Income Tax under Section 12AA of the Income Tax Act, 1961 and which provides Naturopathy services for various types of ailments preferred writ petition challenging an Order in Original dated 31.05.2016 passed by the Commissioner of Customs, Central Excise & Service Tax demanding a sum towards service tax, apart from imposing penalties.

Assessee preferred the writ petition by passing the alternative remedy of appeal, on the ground that the adjudication order was completely without jurisdiction and contrary to the statutory scheme. It was contended that it was actually providing nature cure treatment and its main activity was to spread awareness of health by way of naturopathy, food therapy, water therapy and yoga at its premises, which could be divided into 2 parts - the first dealing with the creation of public awareness and the second dealing with the provision of nature cure treatment to the clients in its premises.

The High Court observed that assessee was indulging in public awareness and also spreading public health by way of care and counseling. Therefore, it was not possible to conclude that, the activities carried on by it would not fall within

the definition of "charitable activities" under the exemption Notification. HC noted that, assessee was rendering services and facilities requiring treatment or care for illness, which fact was undisputed by Revenue itself. Further, referring to expression 'health care' services" as defined under the exemption Notification, which covers services by way of diagnosis or treatment or care for illness, injury, deformity, abnormality or pregnancy, HC stated that it was also undisputed that the assessee rendered such services.

HC observed that an exemption Notification, which is understood by Revenue to confer a benefit upon the clinical establishments, cannot be made inapplicable to a holistic health care institution such as the assessee herein, as the same would tantamount to killing the indigenous system of health and well-being.

HC observed that Revenue had failed to take note of exemption *Notification No. 25/2012-ST* which exempts services provided by an entity registered u/s. 12AA of IT Act, by way of charitable activities. Perusing the definition thereto, HC opined that an institution claiming the benefit of exemption under the Notification should establish two things i) they are an entity registered u/s. 12AA of IT Act; and ii) that their activities fall within one or more of the activities indicated in definition of "charitable activities" in said Notification.

Thus, High Court held that there is a very clear distinction between fitness centres or unisex saloons, which provide different types of services to the customers and their focus is mostly on beauty rather than on maintenance of health. Thus, the High Court allowed assessee's writ petition and concluded that assessee would clearly fall within the purview of exemption Notification.

LD/66/10

Kohinoor Biscuit Products

vs.

Commissioner of Central Excise, Noida

Allahabad-CESTAT

Tribunal held that when products manufactured by job worker are transported to depots/premises of principal manufacturer, place of removal would be such depots/premises of principal manufacturer and not the premises of job worker. Accordingly, job worker would be entitled to credit of service tax paid on transportation charges incurred for transporting goods from his premises to such depots.

Appellant was manufacturing biscuits on job work basis for principal manufacturer. In terms of contract with principal manufacturer, appellant was also assigned with responsibility for inspection, packing and delivery of manufactured biscuits to various depots/premises of principal manufacturer as per direction issued by them. Further, the principal manufacturer addressed letter to excise authorities stating that they have authorised appellant company to manufacture biscuits on their behalf. Appellant's claim of CENVAT credit of service tax on transportation charges paid for transporting manufactured biscuits to depots of principal manufacturer was denied by revenue on the contention that as the place of removal of manufactured biscuits is the factory of appellant and not the depots/premises of job worker, outward transportation of biscuits does not fall within the ambit of input service as defined under Rule 2(l) of the CENVAT Credit Rules, 2004.

Tribunal found that it is undisputed that appellant job worker was manufacturing biscuits on behalf of principal manufacturer and clearing biscuits on payment of excise duty on MRP basis, that admittedly appellant had transported biscuits to depots/premises of principal manufacturer in terms of stipulations mentioned in the contract with principal manufacturer and paid transportation charges including service tax. Tribunal held that in terms definition of 'input services' given in Rule 2(1)(ii) of CCR, 2004 and Rule 3 of CCR, 2004 allowing manufacturer to take CENVAT credit of any input services received by manufacturer of final product, appellant has correctly taken CENVAT credit in respect of service tax paid on outward transportation and thus set aside the order denying CENVAT credit to appellant.

LD/66/11

SMV Beverages (P.) Ltd

vs.

Commissioner of Central Excise, Nagpur

Mumbai-CESTAT

When products purchased from sister concern are used in manufacturing final product, and marketing and advertisement expenditure is shared with such sister concern so as to enhance the sale of final product, the amounts received towards share of expenditure incurred would not be chargeable to service tax under category of 'business auxiliary services'.

Appellant, a franchisee of Pepsi Foods Ltd. (i.e. PFL) is engaged in manufacturing of Pepsi range products and is also trading in Pepsi brand products purchased from another sister concern in the group. Appellant entered into 'Bottling Appointment and Trade Mark License Agreement' with PFL. Under the said agreement, appellant purchased concentrate i.e. basic raw material from PFL for manufacturing various aerated products, for which PFL raised invoices on appellant. The final aerated water products were manufactured and sold by appellant only and not by PFL to various distributors. Further, appellant was also vested with responsibility of promoting and marketing the products, enhancing goodwill & visibility of trademarks so as to maximise sales and increase beverage's market share. Accordingly, PFL and appellant were sharing marketing and other expenses which mutually benefit appellant as well as PFL. The share of expenses received was shown by appellant in Balance Sheet as additional income under the head 'net incentive' and 'support of other receipts'.

Revenue contended that the holistic reading of contractual terms of the agreement indicates that appellant is engaged in promotion/marketing or sale of goods for PFL, that narration in debit notes clearly indicates that these debit notes were raised for marketing expenses of advertisement and additional support rendered by appellant to PFL and there is an indirect benefit which flows to PFL in as much, that by increasing the sale of aerated waters, the concentrate of such aerated waters are marketed by the appellant, thus advertising of aerated waters increases the sale of concentrate manufactured by PFL. On these contentions, Revenue alleged that appellant was providing 'business auxiliary services' to PFL and demanded service tax on amounts received by appellant from PFL towards share of common expenditure.

While rebutting Revenue's contentions appellant submitted that the amounts received by them from PFL were pertaining to agreed upon share of marketing expenditure which was incurred by appellant but was to be borne by PFL and no amount is received by them in respect of products purchased for trading purpose. Further, appellant submitted that the expenses incurred by them for promoting and marketing is in respect of the products sold by them which are manufactured out of concentrates purchased from PFL and such sales are not on behalf of PFL, which indicates that appellant is not providing 'business auxiliary service' to PFL. Appellant relied upon various decisions i.e. *Bharat Petroleum Corpn. vs. CST [Final Order Nos.*

Legal Update

A/828-830/2014-WZB/C-1 (CSTB), dated 4-6-2014] holding that amounts received for sharing of common expenditure would not be liable to service tax, in case of *CCE vs. Nahar Industrial Enterprises Ltd. [2010] 29 STT 172 (P & H HC)*,it was held that service tax can be levied only when services are provided. Further in *AMR India Ltd. vs. CCE &ST [2016] 56 GST 670/71 taxmann.com 175 (Bang – CESTAT)*, it was held that incentives received from sale of products are not taxable under business auxiliary service.

CESTAT found that the agreement between appellant and PFL is for sale of concentrate to appellant for using the same in manufacturing final products. The agreement lists down conditions for bottling the trade marks, for which PFL is vested with rights to sell and distribute beverages in other areas by appointing various bottlers. As regards allegations made by Adjudicating Authority, by merely relying on certain clauses of the agreement, the Tribunal held that conjoint and holistic reading of said clauses, which are dealing with vesting of responsibility on appellant for undertaking marketing activities, indicates that the appellant is not vested with responsibility to promote or market or sale the goods produced or provided or belonging to PFL, as PFL is only producing and selling concentrate to the appellant for converting into aerated water, thus, the findings of Adjudicating Authority that the concentrates are belonging to PFL and promotional activities undertaken by appellant would indirectly increase sale of concentrates, also does not cut the ice, in as much the said concentrate is sold by PFL on payment of excise duty to the appellant, which would indicate that once the sale takes place the concentrate does not remain the property of PFL.

The Tribunal further held that since there is no provision of service by PFL in this case, question of appellant undertaking marketing/promotion of services provided by PFL would not arise as the appellant is not selling/marketing or promoting the concentrates manufactured by PFL, the question of appellant providing 'business auxiliary services' would not arise and accordingly the impugned order was set aside.

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Excise

LD/66/12

Thermo Electric Furnaces

vs.

Commissioner of Central Excise

5th April, 2017

CESTAT order which denied SSI exemption on ground that turnover of manufactured electric furnace and heating elements exceeded turnover limit prescribed under Notification No. 1/93, set aside by HC; Aggregate value of clearance of manufactured products was not correctly computed; Show cause notice invoking extended limitation period alleging fraud/ suppression by Jt. Commissioner was held to be without jurisdiction.

The assessee was availing the benefit of SSI Exemption Notification No. 1/93 during the period 1995-1996, 1996-1997 and 1997-1998, while clearing manufactured electric furnaces. The factory premises of the assessee were inspected by the Revenue. The scrutiny of records by the Department made them to come to a *prima facie* conclusion that the appellant had raised invoices of three kinds – i) Invoices concerning the manufactured goods for the supply of full set of electrical furnaces, such as, Aluminium melting furnaces, Holding furnaces and Electric resistance Baleout furnace etc. along with Control Panels, Industrial ovens and other special fabrications. The manufacture of these goods, even according to the Department, was carried out, at the specific request of the customers; (ii) Trading Invoices for bought out goods, like Cerwool, Ceramic fibre, Ceramic blanket, Refractory bricks, fire clay, Accoset, SS Studs, SS Washers, Thermocouple etc. along with heating elements; and (iii) Invoices for Labour Charges.

Revenue aggregated the turnover of such invoices and held that the exemption limit for the relevant years was exceeded. Revenue issued a Show Cause Notice (SCN) demanding duty along with interest and penalty, and subsequently affirmed this demand. Both, the Commissioner (Appeals) and the CESTAT ruled against the assessee, aggrieved by which the assessee approached the HC.

Assessee submitted that mere cutting of wires would not amount to manufacture. Further, as per the assessee, aggregate value of clearance of manufactured products by the Department was not correct. The inclusion of tailor-made items/ goods which could not be bought and sold in the market had to be excluded from the aggregate value of clearances, and manufacture alone would not make the goods dutiable, unless marketability was established. Further, the bought out items, which were supplied to the customers could not be included in the value of clearances, as they were not subjected to any process. Furthermore, the furnaces manufactured as per the customers' specifications,

which were delivered to the specified site, albeit in CKD condition and embedded in earth, could not have been included in the aggregate value of clearances. The assessee also contended that the Joint Commissioner was not a competent authority to issue SCN for extended period and that such SCN could only have been issued by the Commissioner of Central Excise.

HC observed CESTAT had failed to decide whether furnaces transported to the customers' site in CKD condition and thereafter, embedded in earth, were goods or not. Further, the aspect regarding bought out goods being treated as manufactured goods due to lack of correlation with purchases, was also not dealt by CESTAT.

HC analysed Section 11A and observed that in a case where duty has not been levied or paid or has been short-levied or short-paid or erroneously refunded and the said amount is ₹1 crore or less, a SCN under Section 11A(1) read with first *proviso* to the sub-Section could only be issued by the Commissioner of Central Excise or, with his prior approval, by any officer, subordinate to him. In the instant case, the Joint Commissioner went on to observe, once, the power to adjudicate the case involving suppression of facts/wilful misstatement is delegated to an authority like the Additional Commissioner and the Joint Commissioner etc., the power to issue notice involving such offences is also bestowed concurrently, along with the power to adjudicate. HC rejected such a stand of the Revenue.

HC observed that in the order of the Tribunal, there is no discussion, as to how it came to the conclusion that there has been suppression of material facts by the appellant. HC opined that such observation was general in nature and a charge of suppression is required to be levelled with specificity and, it is only when an assessee is unable to rebut such a charge with relevant material, that a conclusion of suppression can be reached by an Adjudicating Authority.

HC thus allowed assessee's appeal and remanded the matter to the Adjudicating Authority for fresh decision with the assessee having liberty to raise all defenses.

Legal Update

Insolvency and Bankruptcy Code

National Company Law Appellate Tribunal (NCLAT)
M/s. Innoventive Industries Ltd. (Appellant/Corporate Debtor)
vs.
ICICI Bank & Anr. (Respondents/ Financial Creditor)
15th May, 2017

Section 60 read with Sections 7,8 & 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4(3) of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016 read with Section 424 of the Companies Act, 2013 and Section 4 of the Maharashtra Relief Undertaking (Special Provisions) Act, 1958–Adjudicating Authority for Corporate Persons

Facts of the case:

Pursuant to default in payment of dues the financial creditor filed an application under Section 7 of the IB Code. The corporate debtor filed an interim application stating that the Industry, Energy and Labour Department of Maharashtra has passed a relief under the provision of the Maharashtra Relief Undertaking (Special Provisions) Act, 1958 (Bombay Act XCVI of 1958) (hereinafter referred to as MRU Act 1958) suspending the liabilities of the Corporate Debtor and remedies against the debtor for one year from 22.07.2016 and therefore the financial creditor could not have invoked this relief till 21st July, 2017.

The Adjudicating Authority/Tribunal held that IB Code has come into existence subsequent to MRU Act 1958 and therefore, *Non-Obstante* clause in Section 238 of IB Code prevails upon any other law for the time being in force, hence it could not be said that Notification given under MRU Act will become a bar to passing order u/s. 7 of the IB Code. Moreover, the objective under MRU Act, is to prevent unemployment of the existing employees of an industry which is recognised as relief undertaking, but by passing an order u/s. 7 it will not cause any obstruction to their employment until next 180 days, even if the company goes into liquidation, then also the rights of the employees are protected to the extent mentioned under IB Code. The Application filed by the Corporate Debtor was therefore dismissed. The Tribunal also dismissed the plea of the corporate debtor that notice has not been served on the ground that this plea pales into insignificance because this Bench has already heard the Corporate Debtor's application which was already been dismissed. The Adjudicating Authority/ Tribunal on perusal of the documents filed by the financial creditor found that the application under Section 7(2) is complete and therefore admitted the same declaring moratorium. Aggrieved with the order of the Tribunal the appellant/corporate debtor filed this appeal.

The questions involved in this appeal are:

(i) Whether a notice is required to be given to the Corporate Debtor for initiation of Corporate Insolvency Resolution Process under IB Code and if so, at what stage and for what purpose?
(ii) Whether MRU Act 1958 shall prevail over IB Code. In other words, whether a Corporate Debtor who is enjoying the benefit of MRU Act, can be subjected to IB Code? and
(iii) Whether in a case where Joint Lender Forum (JLF) have reached agreement and granted permission to the Corporate Debtor prior consent of JLF is required by financial creditor, before filing of an application under Section 7 of the IB Code?

Decision:

Ist issue: After considering various decisions of the Supreme Court, it was observed that "useless formality" is another exception to the ratio of natural justice. Where on the admitted or undisputed facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not insist on the observance of the principles of natural justice because it would be futile to order its observance. Therefore, where the result would not be different, and it is demonstrable beyond doubt, order of compliance with the principles of natural justice will not be justified.

Further from the decisions of the Hon'ble Supreme Court, the exception on the principles of natural justice can be summarised as follows:-

(i) Exclusion in case of emergency,
(ii) Express statutory exclusion,
(iii) Where discloser would be prejudicial to public interests,

(iv) Where prompt action is needed,
(v) Where it is impracticable to hold hearing or appeal,
(vi) Exclusion in case of purely administrative matters,
(vii) Where no right of person is infringed,
(viii) The procedural defect would have made no difference to the outcome,
(ix) Exclusion on the ground of 'no fault' decision maker etc,
(x) Where on the admitted or undisputed fact only one conclusion is possible - it will be useless formality.

There is no specific provision under the I&B Code, 2016 to provide hearing to corporate debtor in a petition under Section 7 or 9 of the I&B Code, 2016. I&B Code, 2016 empowers 'adjudicating authority' to pass orders under Section 7, 9 and 10 of the Code, 2016 and not the National Company Law Tribunal. It is by virtue of the definition under sub-section (1) of Section 5 read with Section 60 of the I&B Code, 2016, the National Company Law Tribunal plays role of an "Adjudicating Authority".

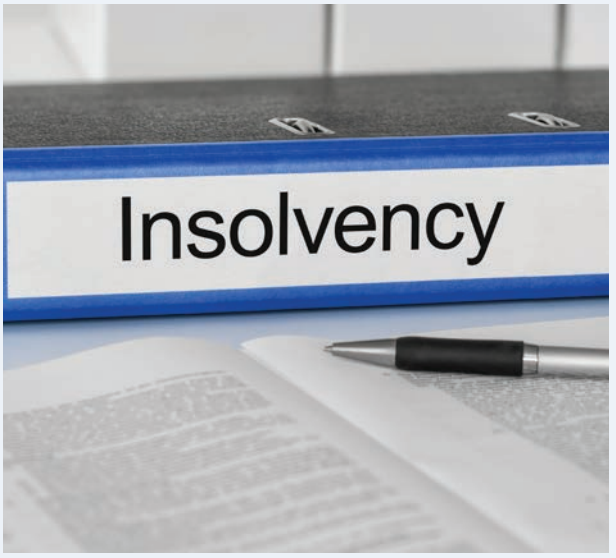
As amended Section 424 of the Companies Act, 2013 is applicable to the proceeding under the I&B Code, 2016, it is mandatory for the Adjudicating Authority to follow the principles of natural justice while passing an order under I&B Code, 2016. Further, as Section 424 mandates the 'Tribunal' and Appellate Tribunal, to dispose of cases or/ appeal before it subject to other provisions of the Companies Act, 2013 or IB Code 2016 such as, Section 420 of the Companies Act, 2013 was applicable and to be followed by the Adjudicating Authority. Thus it is clear that sub-rule (3) of Rule 4 of I&B (Application to Adjudicating Authority) Rules, 2016, mandates the applicant to dispatch forthwith, a copy of the application "filed with the Adjudicating Authority". Thereby a post filing notice required to be issued and not as notice before filing of an application. The purpose for the same being to put corporate debtor to adequate impound notice so that the Corporate Debtor may bring to the notice of Adjudicating Officer "mitigating factor/ records before the application is accepted even before formal notice is received."

Legal Update

The insolvency resolution process under Section 7 or Section 9 of I&B Code, 2016 has serious civil consequences not only on the corporate debtor - company but also on its directors and shareholders in view of the fact that once the application under Sections 7 or 9 of the I&B Code, 2016 is admitted it is followed by appointment of an 'interim resolution professional' to manage the affairs of the corporate debtor, instant removal of the board of directors and moratorium for a period of 180 days. For the said reason also the Adjudicating Authority is bound to issue limited notice to the corporate debtor before admitting a case under Section 7 and 9 of the 'I & B Code', 2016.

The Adjudicating Authority is bound to issue a limited notice to the corporate debtor before admitting a case for ascertainment of existence of default based on material submitted by the corporate debtor and to find out whether the application is complete and or there is any other defect required to be removed. Adherence to principles of natural justice would not mean that in every situation the Adjudicating Authority is required to afford reasonable opportunity of hearing to the corporate debtor before passing its order.

The Adjudicating Authority post ascertaining and being satisfied that such a default has occurred may admit the application of the financial creditor. In other words, the statute mandates the Adjudicating Authority to ascertain and record satisfaction as to the occurrence of default before admitting the application. Mere claim by the financial creditor that the default has occurred is not sufficient. The same is subject to the Adjudicating Authority's summary adjudication, though limited to 'ascertainment' and 'satisfaction'.



It is evident from Section 9 of the I & B Code that the Adjudicating Authority has to, within fourteen days of the receipt of the application under sub-Section (2), either admit or reject the application. Section 9 has two-fold situations insofar as notice of dispute is concerned. As per sub-sSction (5)(i) of Section 9, the Adjudicating Authority can admit the application in case no notice raising the dispute is received by the operational creditor (as verified by the operational creditor on affidavit) and there is no record of a dispute is with the information utility. On the other hand, sub-Section (5)(ii) of Section 9 mandates the Adjudicating Authority to reject the application if the operational creditor has received notice of dispute from the corporate debtor. Section 9 thus makes it distinct from Section 7. While in Section 7, occurrence of default has to be ascertained and satisfaction recorded by the Adjudicating Authority, there no similar provision under Section 9. Under Section 7, neither notice of demand nor a notice of dispute is relevant whereas under Sections 8 and 9 notice of demand and notice of dispute become relevant both for the purposes of admission as well as for the rejection.

While ascertaining, the 'Adjudicating Authority' to come to a conclusion whether there is an existence of default for the purpose of Section 7 or there is a dispute raised by the corporate debtor and all other purpose whether an application is complete or incomplete, it is not only necessary to hear the Financial Creditor/Operational Creditor but also the Corporate Debtor.

The different decisions of the Hon'ble Supreme Court and exception of principles of natural justice as summarised in the preceding paragraphs is not applicable to the insolvency resolution process as it is not a case of emergency declared or prejudicial to public interest or that there is a statutory exclusion of rules of natural justice or it is impracticable to hold hearing. It is not the case that no right of any person has been affected, as immediately on appointment of an Interim Resolution Professional, the Board of Directors stand superseded. There are other persons who are also affected due to order of moratorium. Therefore, the 'Adjudicating Authority' is duty bound to give a notice to the corporate debtor before admission of a petition under Section 7 or Section 9.

In the present case though no notice was given to the Appellant before admission of the case but it was found that the Appellant intervened before the admission of the case and all the objections raised by appellant has been noticed, discussed and considered by the 'Adjudicating Authority' while passing the impugned order dated 17th January 2017. Thereby, merely on the ground that the Appellant was not given any notice before admission of the case cannot render the impugned order illegal as the Appellant has already been heard. If the impugned order is set aside and the case is remitted back to the Adjudicating Authority, it would be 'useless formality' and would be futile to order its observance as the result would not be different. Therefore, order to follow the principles of natural justice in the present case does not arise.

However, in some of the cases initiation of Insolvency Resolution Process may have adverse consequences on the welfare of the Company. Therefore, it will be imperative for the "Adjudicating Authority" to adopt a cautious approach in admitting Insolvency Application by ensuring adherence to the principles of natural justice.

IInd Issue: The Schedule to the MRU Act specifies only certain acts to which the restriction applies. Accordingly, the application of the MRU Act can only be extended to such acts as specified in the schedule and no other legislation. The legislations referred to in the 'schedule' to the MRU Act are employment welfare related which is in consonance with the objects and purpose of the MRU Act i.e. 'employment and unemployment'. The protection under the MRU Act, therefore, cannot be extended to other legislations especially to union legislation which is subsequent to the MRU Act and related to insolvency resolution i.e. I&B Code, 2016. Section 4 of the MRU Act, including Section 4 (iv), therefore, is limited in scope to the acts listed in the schedule thereto.

The MRU Act operates in a different field from the I&B Code, 2016. MRU Act is an Act to make temporary provisions for industrial relations and other matters to enable the State Government to conduct or to provide a loan, guarantee or financial assistance for the conduct of certain industrial undertakings 'as a measure of preventing unemployment or of unemployment relief.'

On the other hand, the I&B Code, 2016 is an Act enacted to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interest of all the stakeholders including alteration in the order of priority of payments of government dues. The I&B Code, 2016, which is later act of greater specificity, seeks to balance the interests of all stake holders.

Section 238 of the I&B Code, 2016 is non-obstante clause which overrides the operation of the MRU Act. As per Section 238 of the I&B Code, 2016 the provisions of the Code are to be given effect to notwithstanding anything contrary contained in any other law or any instrument having effect under such law.

In view of the aforesaid objects of the two enactments it is apparent that the two enactments operate in entirely different fields. This is further made clear by the fact that the MRU Act is enacted under Entry 23 of List III while the Code has been enacted under Entry 9 of the List III. The MRU Act has received Presidential assent under Article 254(2) of the Constitution of India, which is only required for statutes enacted by the State Government in exercise of its legislative competence under the Concurrent List.

In light of the aforementioned non-obstante provision (which is a subsequent Union Law), the provisions of the I&B Code, 2016 shall prevail over the provisions of the MRU Act and any instrument issued under the MRU Act including the Notification.

Following the law laid down by Hon'ble Supreme Court in *Yogender Kumar Jaiswal vs. State of Bihar, (2016) 3 SCC 183* and *Madras Petrochem Limited and Another vs. Board for Industrial and Financial Reconstruction and Others," (2016) 4 SCC* 1 it was held that there is no repugnancy between I&B Code, 2016 and the MRU Act as they both operate in different fields. The Parliament has expressly stated that the provisions of the I&B Code, 2016 (which is a later enactment to the MRU Act) shall have effect notwithstanding the provisions of any other law for the time being in force. This stipulation does not mean that the provisions of MRU Act or for that matter any other law are repugnant to the provisions of the Code.

In view above, it was held that the Appellant was not entitled to derive any advantage from MRU Act, 1958 to stall the insolvency resolution process under Section 7 of the I&B Code.

IIIrd Issue: The Tribunal has noticed that there is a failure on the part of appellant to pay debts. The Financial Creditor has attached different records in support of default of payment. Apart from that it is not supposed to go beyond the question to see whether there is a failure on fulfilment of obligation by the financial creditor under one or other agreement, including the Master Restructuring Agreement. In that view of the matter, the Appellant cannot derive any advantage of the Master Restructuring Agreement dated 8th September, 2014.

For initiation of corporate resolution process by financial creditor under sub-Section (4) of Section 7 of the Code, the 'Adjudicating Authority' on receipt of application under sub-Section (2) is required to ascertain existence of default from the records of Information Utility or on the basis of other evidence furnished by the financial creditor under sub-section (3). Under sub-Section 5 of Section 7, the 'Adjudicating Authority' is required to satisfy:-

(a) Whether a default has occurred;
(b) Whether an application is complete; and
(c) Whether any disciplinary proceeding is against the proposed Insolvency Resolution Professional.

Once it is satisfied that it is required to admit the case but in case the application is incomplete application, the financial creditor is to be granted seven days' time to complete the application. However, in a case where there is no default or defects cannot be rectified, or the record enclosed is misleading, the application has to be rejected.

Beyond the aforesaid practice, the 'Adjudicating Authority' is not required to look into any other factor, including the question whether permission or consent has been obtained from one or other authority, including the JLF. Therefore, the contention of the petition that the Respondent has not obtained permission or consent of JLF to the present proceeding which will adversely affect loan of other members cannot be accepted and fit to be rejected.

In the aforesaid circumstances the 'Adjudicating Authority' having satisfied on all counts, including

default and that the application is complete and that there is no disciplinary proceeding pending against the Insolvency Resolution Professional, no interference is called for against the impugned judgment.

Case Review: Order dated 17th January, 2017 and Order dated 23rd January, 2017 passed by National Company Law Tribunal, Mumbai Bench, Mumbai in *ICICI Bank Ltd. vs. M/s. Innoventive Industries Ltd.* (*C.P. No. 1/I&BP/NCLT/MB/MAH/2016*), *Upheld.*

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National Company Law Appellate Tribunal (NCLAT)
M/s. Starlog Enterprises Ltd. (Appellant/Corporate Debtor)
vs.
ICICI Bank Ltd. (Respondent/Financial Creditor)
24th May, 2017

Section 61 read with Sections 7, 9 & 75 of the Insolvency and Bankruptcy Code, 2016– Appeals and Appellate Authority

Facts of the case:

Financial Creditor/Applicant having failed to realise the outstanding dues filed an application under Section 7 of the Code before the Adjudicating Authority/NCLT. The applicant filed proof for service of notice to the corporate debtor. The NCLT satisfied that there was a default on the part of corporate debtor passed an *ex parte* order admitting the application filed under Section 7 of the Code declaring moratorium.

The corporate debtor/appellant filed an appeal against the order of NCLT on the following grounds:

1. In absence of notice given to the Appellant before admitting the case under Section 7 of the Code, the impugned order is violative of rules of natural justice.
2. The application under Section 7 by the Financial Creditor is incomplete, misleading and being not *bona fide* was fit to be rejected.
3. The impact of the appointment of Insolvency Resolution Professional on the business and management of the appellant was that in view of the mismanagement the appellant has incurred financial losses as one of its contracts was terminated and also suffered loss of several valuable human resources.

Decision:

It is clear that before admitting an application under Section 9 of the Code it is mandatory duty of the 'Adjudicating Authority' to issue notice. In the present case admittedly no notice was issued by the 'Adjudicating Authority' to the corporate debtor, before admitting the application filed under Section 9 of the Code. For the said reason the judgment order cannot be upheld having passed in violation of principle of natural justice.

Showing an incorrect claim, moving the application in a hasty manner and obtaining an ex-parte order from the 'Adjudicating Authority' which admitted such an incorrect claim, the Financial Creditor cannot disprove its *mala fide* intention by stating that the claim submitted is correct amount. The I&B Code does not provide for any such mechanism where post-admission, the applicant financial creditor can modify their claim amount.

In some of the cases, an insolvency resolution process can and may have adverse consequences on the welfare of the company. This makes it imperative for the 'Adjudicating Authority' to adopt a cautious approach in admitting insolvency applications and also ensuring adherence to the principles of natural justice.

For the reasons aforesaid, the Appellate Tribunal set aside the *ex-parte* impugned order passed by NCLT.

In effect the appointment of Interim Resolution Professional, order declaring moratorium, freezing of account and all other order passed by 'Adjudicating Authority' pursuant to impugned order and action taken by the Interim Resolution Professional, including the advertisement published in the newspaper calling for applications are declared illegal. The 'Adjudicating Authority' is directed to close the proceeding. The appellant company is released from the rigour of law and allow the appellant company to function independently through its Board of Directors from immediate effect.

The Tribunal imposed a penalty of ₹ 50,000/- on Respondent/Financial Creditor.

Case Review: Order dated 17th February, 2017 passed by NCLT, Mumbai Bench, in *ICICI Bank Ltd. vs. M/s. Starlog Enterprises Ltd.* (*C.P. No.12/I&B/NCLT/MAH/2017*), *set aside.*

Legal Update

Disciplinary Case

CA. A In re:

Facts of the case:

A letter dated 26th May, 2008 was received from Securities and Exchange Board of India (SEBI) containing allegations against CA. "A" (hereinafter referred to as the 'Respondent'). On receiving the aforesaid letter, SEBI was to file a complaint in prescribed Form 'I' in triplicate, duly signed and verified, giving particulars as required in the said Form. But SEBI did not file the same in the prescribed form. In the absence of formal complaint and on an overall examination of allegations, it was treated as "Information" within the meaning of Rule 7 of the Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 (hereinafter referred to as the "Rules").

The allegations in brief were as under:-

- The Respondent was the auditor of M/s. XYZ Ltd. (hereinafter referred to as the 'Company') for the period from 17.08.1998 to 26.05.2000. The role of the Respondent in manipulation of accounts has been observed as under:-
- During investigation made by SEBI, the role of Mr. B and his Company M/s. F (P) Ltd. was observed in manipulation of the share price of the Company. The Respondent has introduced Mr. B to Mr. C. Deliveries for shares sold were mostly given to Mr. B by the Respondent. Mr. B had started operating shares on the request of Mr. C and the Respondent and made payments to the Respondent by cheques.
- The Respondent's statement was recorded on 18.08.2004, wherein he admitted that he had introduced Mr. B to Mr. C in 1991. Mr. B was given a verbal assignment for creating awareness in the shares of the Company.
- The Respondent also admitted that he had visited the offices of M/s. I Ltd and M/s. N Ltd. members of BSE along with Mr. B for introduction with brokers. The Respondent was not able to explain the reasons for payments by Mr. B to him.
- The Respondent had not acted merely as an Auditor of M/s. XYZ Group, but it seems that he was acting in nexus with Mr. B and Mr. C and thus aiding and abetting in the rigging and creation of artificial market in the shares of the Company by Mr. B. The conduct of the Respondent shows that he had not acted in the interest of investors in the Securities market.

The matter was enquired into by the Disciplinary Committee and the Committee, *inter alia*, gave its findings as under:-

The Committee noted the statements given by Mr. B and Respondent to SEBI. SEBI during its investigation observed the role played by the Respondent in the manipulation. It was also intriguing for the SEBI as to why the Respondent should visit the office of broker for introduction of entities (belonging to Mr.

C) for dealing in securities unless he acted in nexus with Mr. C and Mr. B. Further, the Respondent was not able to explain the reasons for payments by Mr. C to him.

The Committee also observed that the SEBI vide its Order dated 31st December, 2008 found that the Respondent was involved in fraudulent transactions and prohibited the Respondent from buying, selling or dealing in securities in any manner either directly or indirectly for a period of one year. Further, the Respondent did not file an appeal against the said order and accepted the said punishment. The Committee also noted the following admitted facts:

- That the Respondent was the Auditor of the Company for the period August, 1998 to May, 2000;
- The Respondent allowed Mr. B i.e. Director of the Company, to use the Office of him;
- The Respondent introduced Mr. B to Mr. C;
- The Respondent was paid ₹ 8.50 lakh from the Company.

As regard the payment received from the Company, the Respondent contended that he received the payment on account of loan given by him in 1995/97 but he did not remember the mode of loan given (either by cash or cheque), he did not have any documents to prove that he had given the loan and he had not checked as to why some of the payments were made from M/s. F (P) Ltd. The Committee is not convinced with the contention of the Respondent that he received the payment of ₹ 8.5 lakh in 1999-2000 on account of friendly loan given by him, as firstly the Respondent had accepted the finding of SEBI and the Respondent had not filed any appeal against the order passed by the SEBI. Further, the said hearing before the SEBI on 16.10.2008 was personally attended by the Respondent along with Mr. C and Mr. B. The Committee was unable to comprehend as to why the Respondent had not challenged the findings of SEBI as the same had levelled a stigma on his professional career.

The Respondent claimed that he filed an affidavit of Mr. B dated 11.05.2010 wherein he had stated that the payment was on account of repayment but the Committee noted that the Respondent had not filed any affidavit of Mr. B before the SEBI.

The Respondent being a professional ought to know the implications of giving loan to individual and receiving the payment from a Private Limited Company. The same raises doubt on the contention of the Respondent. The Committee noted that the enquiry was going on since 2004 before SEBI and the documents relates to the years 1997/1999/2000. The Respondent ought to have at least retained the accounts of 1999/2000 to establish that the payment was on account of friendly loan but he failed to retain the same.

Lastly, Director of M/s N Ltd submitted before SEBI that the Respondent used to visit their Office for delivery of shares and collection of payments. The Respondent had not refuted the said statement. Further, the Committee observed that the Respondent besides being the Statutory Auditor of the Company also connived with the Management of the Company to rig the share prices of the Company.

In view of the above, the Committee is of the opinion that the conduct of the Respondent is unbecoming of a Chartered Accountant and had brought disrepute to the profession of Chartered Accountancy. Accordingly, the Committee held the Respondent guilty of other misconduct falling within the meaning of Clause (2) of Part IV of First Schedule to the Chartered Accountants Act, 1949 {as amended by the Chartered Accountants (Amendment) Act, 2006}. However, since no substantial interest of the Respondent on his partner was brought on record, accordingly, the Committee held the Respondent not guilty of professional misconduct falling within the meaning of Clause (4) of Part I of Second Schedule to the Chartered Accountants Act, 1949 {as amended by the Chartered Accountants (Amendment) Act, 2006}.

The Disciplinary Committee, after giving an opportunity of hearing to the Respondent and upon considering the gravity of the matter, the nature of offence committed by the Respondent, was of the view that the conduct of the Respondent is grave in nature as he was involved in Share Price rigging and for the same he had been banned by the SEBI for one year. Accordingly, the Disciplinary Committee ordered that the name of the Respondent be removed from the Register of Members for a period of 3 Months and a fine of ₹ 1,00,000/- to be deposited within a period of ninety days.

The Respondent, aggrieved by the order passed by the Disciplinary Committee preferred an appeal before the Appellate Authority bearing *Ref. No. Appeal No. 15/ICAI/2011*. The Appellate Authority found no merit in the appeal and accordingly, dismissed it. ■