

Team Code:

**15TH SURANA AND SURANA NATIONAL CORPORATE LAW MOOT COURT
COMPETITION, 2017**

IN THE HON'BLE NATIONAL COMPANY LAW TRIBUNAL, BENGALURU

P. No. (CIVIL) _____

IN THE MATTER OF SECTION 272 OF THE COMPANIES ACT, 2013

GLOBAL SUPPLIERS PVT. LTD, BENGALURU.....PETITIONER NO. 1

SHAREHOLDERS OF STALWART ONLINE STORES PVT. LTD.....PETITIONER NO. 2

ADDL. COMMISSIONER OF INCOME TAX, BENGALURU..... PETITIONER NO. 3

DEPUTY COMMISSIONER OF COMMERCIAL TAX, BENGALURU.... PETITIONER NO. 4

v.

STALWART ONLINE STORES PVT. LTD., BENGALURU.....RESPONDENT

BEFORE SUBMISSION TO HON'BLE CHIEF JUSTICE AND HIS COMPANION JUSTICES

OF

THE HON'BLE NATIONAL COMPANY LAW TRIBUNAL

MEMORANDUM ON BEHALF OF THE PETITIONERS

TABLE OF CONTENTS

TABLE OF CONTENTS..... *i*

LIST OF ABBREVIATIONS..... *iii*

INDEX OF AUTHORITIES *vi*

[A] Cases *vi*

[B] Books..... *x*

[C] Legislations..... *xi*

[D] Online Databases *xi*

STATEMENT OF JURISDICTION..... *xii*

STATEMENT OF FACTS..... *xiii*

STATEMENT OF ISSUES *xiv*

SUMMARY OF ARGUMENTS *xv*

ARGUMENTS..... *1*

**ISSUE 1: Whether Stalwart Online Stores Pvt. Ltd. Should be Wound Up On The
 Petition Filed By Global Office Suppliers Pvt. Ltd.**..... **1**

A. THE PRESENT PETITION IS MAINTAINABLE BEFORE NCLT, BENGALURU
 **1**

A.1. Existence Of Arbitration Clause Does Not Oust Jurisdiction Of The Court **1**

A.2. Filing Of A Summary Suit In City Civil Court Is Not A Bar To Winding Up..... **2**

B. STALWART SHOULD BE WOUND UP FOR ITS INABILITY TO PAY DEBTS . **2**

B.1. Stalwart Is Deemed To Be Unable To Pay Its Debts **2**

B.2. There Is A Presumption Of Insolvency **3**

B.3. The Company’s Claim On The Amount Due Is Not Bona Fide **4**

B.4. Commercial Hardship Is Not A Defence For Non-Performance Of Contract **5**

**ISSUE 2: Whether Stalwart Online Stores Pvt. Ltd. Should Be Wound Up On The
 Impleadment Filed By Its Shareholders** **5**

A. THE TRANSACTION IS ILLEGAL **5**

A.1. No Record Of Loan Advancement..... **6**

A.2. Loan Advancement Is Prohibited By Law	6
A.3. The Transaction Amounts To A Related Party Transaction	7
B. THE TRANSACTION LEADS TO OPPRESSION.....	8
B.1. Loss Of Confidence.....	9
B.2. The Transaction Constitutes Fraud	9
ISSUE 3: Whether The Impleading Petitions Filed By The Tax Departments Against Stalwart Online Stores Pvt. Ltd. Are Valid.....	10
A. THE PETITIONS FILED BY TAX DEPARTMENTS ARE MAINTAINABLE.....	10
B. THE CLAIMS OF THE INCOME TAX DEPARTMENT ARE JUSTIFIABLE.....	10
B.1. Loan Advanced By Stalwart To Galileo Is Deemed Dividend	11
B.2. Deemed Dividend Is Chargeable Under Sec. 195 Of The IT Act.....	12
B.3. The ‘Substance Over Form’ Doctrine Makes The Amount Advanced Taxable ...	12
B.4. Repayment Of Amount Does Not Characterize It As Loan.....	12
B.5. Deemed Dividend Only Broadens The Scope Of Dividend	13
C. THE CLAIMS OF THE SALES TAX DEPARTMENT ARE JUSTIFIABLE	13
C.1. Commission Agents Are Dealers Under KVAT And CST Acts	13
C.2. Principle Of ‘Noscitur A Sociis’ Does Not Apply	14
C.3. Dealers Must Register Themselves Under KVAT And CST Acts	14
D. INCOME TAX AND SALES TAX DUES SHOULD BE PAID AT PAR WITH THOSE OF SECURED CREDITORS	14
D.1. Historical Reasons Entail Preferential Payment Of State Dues.....	15
D.2. Tax Dues Create First Charge Over The Assets Of The Company	15
PRAYER.....	16

LIST OF ABBREVIATIONS

&	<i>And</i>
¶	<i>Paragraph</i>
AC	<i>Appeal Cases</i>
AIR	<i>All India Reporter</i>
All.	<i>Allahabad</i>
Anr.	<i>Another</i>
AP	<i>Andhra Pradesh</i>
App.	<i>Appeal</i>
BCLC	<i>Butterworths Company Law Cases</i>
Bom.	<i>Bombay</i>
CA	<i>Company Application/ Civil Appeal</i>
Cal	<i>Calcutta</i>
Cas	<i>Cases</i>
Ch.	<i>Chancery</i>
Civ.	<i>Civil</i>
CLA	<i>Corporate Law Advisor</i>
CLC	<i>Company Law Cases</i>
Co.	<i>Company</i>
Com	<i>Company</i>
Comp.	<i>Company</i>

Corpn.	<i>Corporation</i>
Del.	<i>Delhi</i>
EC	<i>European Cases</i>
Ed.	<i>Edition</i>
Eq.	<i>Equity Reports</i>
ER	<i>England Law Reports</i>
EWCA	<i>England and Wales Court of Appeal</i>
FB	<i>Full Bench</i>
GLR	<i>Gazette Law Reports</i>
Guj.	<i>Gujarat</i>
HCR	<i>High Court Reports</i>
HL	<i>House of Lords</i>
Hon'ble	<i>Honourable</i>
HP	<i>Himachal Pradesh</i>
ITR	<i>Income Tax Reports</i>
Kant.	<i>Karnataka</i>
KB	<i>King's Bench</i>
Ker	<i>Kerala</i>
LR	<i>Law Reports</i>
Ltd.	<i>Limited</i>
Mad	<i>Madras</i>
Ors.	<i>Others</i>
P&H	<i>Punjab and Haryana</i>

PC	<i>Privy Council</i>
Pg	<i>Page</i>
Punj.	<i>Punjab</i>
Pvt.	<i>Private</i>
Rep.	<i>Reporter</i>
SC	<i>Supreme Court</i>
SC	<i>Supreme Court</i>
SCC	<i>Supreme Court Cases</i>
SCL	<i>SEBI & Corporate Laws</i>
SCR	<i>Supreme Court Reporter</i>
SCR	<i>Supreme Court Reports</i>
Sec.	<i>Section</i>
STC	<i>Sales Tax Cases</i>
Supl.	<i>Supplementary</i>
Suppl.	<i>Supplement</i>
TLR	<i>Times Law Reports</i>
UOI	<i>Union of India</i>
US	<i>United States</i>
v.	<i>Versus</i>
Vol.	<i>Volume</i>

INDEX OF AUTHORITIES

[A] CASES:

Advent Corpn Ltd. re, (1969) 2 Comp LJ 71	1
Allen v. Gold Reefs of West Africa Ltd., (1900) 1 Ch 656.....	10
Areva T & D India Ltd. v. Bhema Cements Ltd., (2012) 108 CLA (Snr) 7 (AP).....	2
Arvind Investment Consultant v. Presto Finance Ltd., (1998) 94 Com Cases 350 (Guj.).	4
Baroda City Cooperative Bank Ltd. v. State of Gujarat, 2010 (3) GLR 2132.....	16
Bikaner Trading v. CIT, 24 ITR 419	12
Bombay Stock Exchange v. V.S. Kandalgaonkar, 2015 (2) SCC 1.	16
Burdland v. Earle, (1902) AC 83	10
Cambatta v. CIT, 14 ITR 748,757	12
Caprihans India Ltd. v. Mey's Pharmaceuticals Ltd., AIR 1994 Del 178.	3
Central Bank of India v. Sukhani Mining and Engg. Industries Pvt. Ltd., (1997) 47 Comp Cases 1 (Pat.)	2
CIT v. James Anderson, 51 ITR 345	12
CIT v. Martin Burn Ltd., [1982] 136 ITR 805(Cal).	13
CIT v. Mittal, 219 ITR 420.....	12
CIT v. Mysodet (P) Ltd., (1999) 237 ITR 35(SC).	13
CIT v. Parvathavarthini, 219 ITR 661	12
CIT v. Shakuntala, 43 ITR 352 (SC)	12
CIT v. Sokkalal, 236 ITR 98.....	12
Collector of Aurangabad &Anr. v. Central Bank of India, 1967 (3) SCR 855.	15
Collector of Aurangabad v. Central Bank of India, [1967] (3) SCR 855.....	16

Color Coats v. Venkataramana Hotels Ltd., (1998) 16 SCL 345	3
Cook v. Deeks, (1916) 1 AC 554.....	10
Davis (KP) v. ITO, [1995] 53 ITD 79 (Coch-Trib).....	13
Director of Rationing and Distribution v. The Corporation of Calcutta &Ors., 1960 CriLJ 1684.....	15, 16
Dunlop India Ltd., In re [2013] 31 taxmann.com 135 (Calcutta)	10
Ebrahimi v. Westbourne Galleries Ltd. (1973) AC 360 (HL).	9
First Income Tax Officer v. Short Brothers(P) Ltd., 1960 60 ITR 83	12
Friends Tea Co. Ltd., In re (2012) 112 SCL 45 (Cal).....	10
Fulham Football Club Ltd. v. Richards, 2011 EWCA Civ 855 (CA).....	2
G. Calridge & Co. Ltd. v. Nav Bharat Investments Ltd., (1997) 47 Com Cases 428 (Bom.) ...	3
Ghouse Khan v. BalaSubbaRowther, AIR 1927 Mad 92.	11
Gregory v. Helvering, 293 U.S. 465 (1935).	13
Haryana Telecom v. Sterile Industries (I.) Ltd., [1992] 22 SCL 156.	1
Hewlett Packard India Ltd. v. BPL Net Com Ltd., (2002) 110 Comp Cas 575 (Kant).....	1
Hind Mercantile Corporation Pvt. Ltd. v. J.H. Payner & Co. Ltd., (1971) Comp Cas 548.....	2
Hindustan Investment Corporation Ltd v. CIT, 27 ITR 202; CWT v. Sumitradevi, 96 ITR 419.....	12
Howrah Mills Co. Ltd. and Jardine Henderson Ltd., In re (2011) 105 SCL (Cal.)	6
Howrah Trading v. CIT, 36 ITR 215 (SC).....	12
Integrated Broadcasting Co. P. Ltd. v. Netlinx Ltd. (2012) 111 CLA (Snr) 11 (AP)	1, 2
ITO v. Arvind Mafatlal, 45 ITR 271 (SC)	12
Jaluram v. CIT, 22 ITR 490	12
JG Finance Co. Ltd. v. Jamna Auto Industries Ltd., (2000) 1 Comp LJ 139 (P&H)	1
John Paterson and Co. (India) Ltd. v. Promod Kumar Jalan, (1983) 53 Comp Cas 255 (Cal.)..	3

Kantilal Manilal & Ors. v. Deputy Commissioner of Income Tax, 1961 SC 1038.....	13
Karam Chand Thapar & Bros. (Coal) Sales Ltd. v. Acme Paper Ltd., (1994) AIR Del 3.	2
Kothari Industrial Corporation Ltd. v. Kotak Mahindra Bank Ltd., (2010) 97 SCL 119 (Mad.).....	4
KTB (Singapore) Plc. v. Associated Forest Products P. Ltd., (1996) 21 Corpt LA 394 (Cal.).	3
M. V. Appa Rao v. Rule P. Appa Rao, AIR 1922 PC 233.	5
M/s Kharavela Industries v. OSFC & Ors., AIR 1985 Ori 153.....	5
Marsons Ltd. v. Mundhra Bright Steel, (2002) 39 SCL 919 (Cal.).....	4
Meghraj v. Bayabai, (1969) 2 SCC 274.....	5
Mutual Life Insurance Co. of New York v. Rank Organisation, 1995 BCLC 11	10
Navnital C. Javeri v. K.K. Sen, ITR 0427, Balaji v. Income Tax Officer, 43 ITR 393(SC)...	13
Nepa Ltd. v. Jnanamandal Ltd (2001) 107 Comp Cas 240 (All.).....	2
Nepa Ltd. v. Jnanamandal Ltd., (1999) 21 SCL 53 (All.).....	3
Paradine v. Jane, KB, (1647) 82 ER 897	5
People (Attorney General) v. Kennedy, 116 Cal. App. 2d 273.	15
Pradesh Iron and Steel Co. v. G.B. Springs P. Ltd., (2003) 54 CLA (Snr) 9 (Del.).....	2
Prime Century City Development (P.) Ltd. v. Ansal Buildwell Ltd., (2003) 113 Comp Cas 68 (Del).....	1
Punjab Agro Industries Corporation Ltd. v. Diesh Fertilizers and Chemical P. Ltd., (1990) 3 Comp LJ 327.....	3
Punjab National Bank v. Surinder Singh Mandyal, AIR 1996 HP 1	5
R. Sabapathy Rao v. Sabapathy Press Ltd., AIR 1925 Mad. 489	9
Rakesh Products v. Furo Chit & Finance Co. P. Ltd., (1990) 3 Comp LJ 218 (Del)	3
Re American Pioneer Leather Co. (1918) 1 Ch. 556.....	8
Re Davis and Collett Ltd., (1935) All ER Rep. 315	8

Re International Securities Corpn., (1908) 25 TLR 31; Princess Resuss v. Bos (1871) LR 5 HL 176.....	6
Re T.E. Brismead & Sons Ltd. (1897) 1 Ch 45, 406 (C.A).....	10
Re West Surrey Tanning Co. [1866] LR 2 Eq 737.....	10
Re, Anglo - Continental Produce Co. Ltd., (1939) 1 ALL ER 99	9
Re, Westbourne Galleries Ltd., (1972) 2 All ER 492.....	10
Reflections Advertising & Marketing Ltd. v. Travancore Beverages P. Ltd., (1990) 3 Comp LJ 311 (Ker.).....	3
S.R. Muthuswami Gounder& Ors. v. Official Liquidator, Company Petition No. 23 of 195811 Seksaria Cotton Mills, re, (1969) 2 Comp LJ 155 (Bom).....	1
Shakti Mills v. CIT, 16 ITR 187	12
Sheela Rani Textiles Ltd. v. Sri Anjaneya Cotton Mills (P.) Ltd., (2012) 112 SCL 286	4
Shuttleworth v. Cox Bros & Co (Maidenhead) Ltd., (1927) 2 KB 9.....	10
Sri Murugun Oil Industries (P.) Ltd., Re, (1970) 40 Com Cases 77, 82 (Mad)	11
Sri TrimulaVenkateswara Timber v. CTO, (1968) 21 STC 312 (SC).....	15
State of Bombay v. Hospital Mazdoor Sabha, AIR 1960 SC 610.	14
Superior Trading, LLC v. Comm’r, 137 T.C. 70,88(2011).	13
Surendra Kumar Dhawan and Anr. v. R. Vir and Ors. [Vol.47 1997] Comp Cas 276.....	2
Tamplin Steamship Co. Ltd. v. Anglo Mexican Petroleum Products Co. Ltd., (1916) 2 AC 397.....	5
TarulataShyam v. CIT, [1977] 108 ITR 345(SC)	13
Tube Investments of India Ltd. v. Rim and Accessories P. Ltd., (1990) 3 Comp LJ 322 (Mad)	3
United Western Bank Ltd., In re, (1978) 48 Comp Cases 378 (Bom.).....	3
Universal Glass Ltd. v. Meerut Bottlers p. Ltd., (1985) 58 Com Cases 68 (Del).....	4

Walchand & Co. Pvt. Ltd v. CIT, (1975) 100 ITR 598 (Bom)..... 13

Waryam Singh v. Bhatinda Transport Co. P. Ltd., (1963) 33 Com Cases 897 (Punj.) 10

Wimco Ltd. v. Sidvink Properties (P.) Ltd., (1996) Comp Cas 610..... 2

[B] BOOKS:

1. 1 RAMAIYA A, GUIDE TO THE COMPANIES ACT, PROVIDING GUIDANCE ON THE COMPANIES ACT, 2013 (18th ed. 2015).
2. 2 RAMAIYA A, GUIDE TO THE COMPANIES ACT, PROVIDING GUIDANCE ON THE COMPANIES ACT, 2013 (18th ed. 2015).
3. 3 RAMAIYA A, GUIDE TO THE COMPANIES ACT, PROVIDING GUIDANCE ON THE COMPANIES ACT, 2013 (18th ed. 2015).
4. 3 RAMAIYA A, GUIDE TO THE COMPANIES ACT (17th ed. 2010).
5. AVTAR SINGH, COMPANY LAW (16th ed. 2015).
6. 1 POLLOCK & MULLA, INDIAN CONTRACT AND SPECIFIC RELIEF ACTS (RG Padia ed., 13th ed. 2006).
7. DR. G.K. KAPOOR & SANJAY DHAMIJA, COMPANY LAW AND PRACTICE (21st ed. 2016).
8. 1 KANGA, PALKHIVALA & VYAS, THE LAW AND PRACTICE OF INCOME TAX (10th ed. 2014).
9. 2 KANGA, PALKHIVALA & VYAS, THE LAW AND PRACTICE OF INCOME TAX (10th ed. 2014).
10. VINOD SINGHANIA, TAXMANN GUIDE TO INCOME TAX (56th ed. 2017-18).
11. 1 SAMPATH IYENGAR, LAW OF INCOME TAX (11th ed. 2011-13).
12. 2 SAMPATH IYENGAR, LAW OF INCOME TAX (11th ed. 2011-13).
13. 1 CHATURVEDI & PITHISARIA, INCOME TAX LAW (6th ed. 2014).
14. 2 CHATURVEDI & PITHISARIA, INCOME TAX LAW (6th ed. 2014).
15. S.J.SHAH, POLLOCK AND MULLA: THE SALE OF GOODS ACT (8th ed. 2011)
16. 1 K. CHATURVEDI, CENTRAL SALES TAX LAWS (12th ed. 2012).

17. 2 K. CHATURVEDI, CENTRAL SALES TAX LAWS (12th ed. 2012).

18. DATEY V.S., CENTRAL SALES TAX LAW & PRACTICE (15th ed. 2016).

[C] LEGISLATIONS:

1. Companies Act, 1956
2. Companies Act, 2013
3. Companies (Amendment) Act, 2015
4. Companies (Meetings of Board and Powers) Rules, 2014
5. Indian Contract Act, 1872
6. Sale of Goods Act, 1930
7. Income Tax Act, 1961 (IT Act)
8. Indian Singapore Tax Treaty, 1994
9. Karnataka Value Added Tax Act, 2003 (KVAT Act, 2003)
10. Central Sales Tax Act, 1956

[D] ONLINE DATABASES:

1. SCC Online (www.sconline.com)
2. Manupatra (www.manupatra.com)
3. Taxmann (taxmann.com)

STATEMENT OF JURISDICTION

The Hon'ble National Company Law Tribunal, Bengaluru has the jurisdiction to hear the instant matter under Section 280 of the Companies Act, 2013.

Section 280 - Jurisdiction of Tribunal

The Tribunal shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of,—

- (a) any suit or proceeding by or against the company;
- (b) any claim made by or against the company, including claims by or against any of its branches in India;
- (c) any application made under section 233;
- (d) any scheme submitted under section 262;
- (e) any question of priorities or any other question whatsoever, whether of law or facts, including those relating to assets, business, actions, rights, entitlements, privileges, benefits, duties, responsibilities, obligations or in any matter arising out of, or in relation to winding up of the company,

whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made or such scheme has been submitted, or is submitted, before or after the order for the winding up of the company is made.

STATEMENT OF FACTS

1. Global Office Suppliers Pvt. Ltd (Petitioner No. 1, hereinafter ‘Global’) and Stalwart Online Stores Pvt. Ltd. (respondent company, hereinafter Stalwart) agreed that Global will sell stationery items directly to Stalwart under the inventory model and directly supply the goods to the customers under the marketplace model. Under the inventory model, payment should be made in 3 working days, failing which, Post Dated Cheques(PDCs) will be issued and upon their dishonour, 24% interest and penalty would be levied till the dues are settled.
2. Stalwart failed to make payments from July, 2015 to July, 2016 and drew 12PDCs which were dishonoured by Stalwart’s bank. Stalwart made intermittent payments of 6 crores in the meanwhile. There were delays in delivery of goods by Global to the customers of Stalwart under the marketplace model. Global served a legal notice on Stalwart and then filed a winding up petition before the NCLT, Bengaluru to wind up Stalwart.
3. Stalwart advanced a loan of INR 50 crores to Galileo Investors Pte. Ltd. (hereinafter ‘Galileo’) out of its sales proceeds by a Board resolution in which two Indian promoters, Galileo and Sam voted. This was done without informing the rest of the shareholders. There was no written loan agreement. It appeared to 26% resident shareholders (Petitioner No. 2) as a case of related party transaction (RPT) under the Act. They filed an impleading petition.
4. The income-tax department (Petitioner No. 3) noticed that the loan constituted ‘dividend’ as per the Income-tax Act, 1961 and thus taxes should have been withheld by Stalwart. Sales Tax Department, Bengaluru (Petitioner No. 4) felt that Stalwart was indirectly involved in selling goods for a commission. The IT department and the Karnataka Sales Tax Department issued notices to Stalwart and filed impleading petitions independently in the main winding up petition for their dues to be settled at par with secured creditors.
5. NCLT has tagged all the impleading petitions together and posted it for hearing under its discretionary powers.

STATEMENT OF ISSUES

~ ISSUE 1 ~

**WHETHER STALWART ONLINE STORES PVT. LTD. SHOULD BE WOUND UP ON THE
PETITION FILED BY GLOBAL OFFICE SUPPLIERS PVT. LTD.**

~ ISSUE 2 ~

**WHETHER STALWART ONLINE STORES PVT. LTD. SHOULD BE WOUND UP ON THE
IMPLEADMENT FILED BY ITS SHAREHOLDERS**

~ ISSUE 3 ~

**WHETHER THE IMPEADING PETITIONS FILED BY THE TAX DEPARTMENTS AGAINST
STALWART ONLINE STORES PVT. LTD. ARE VALID**

SUMMARY OF ARGUMENTS

~ ISSUE 1 ~

WHETHER STALWART ONLINE STORES PVT. LTD. SHOULD BE WOUND UP ON THE PETITION FILED BY GLOBAL OFFICE SUPPLIERS PVT. LTD.

It is humbly contended that the petition filed by Global is valid as it is maintainable before NCLT, Bengaluru. Further, the Stalwart is presumed to be insolvent because of the dishonour of cheques by it and rise in the competition, FDI regulatory issues are foreseeable circumstances under a contract. Hence, Stalwart is liable to be wound up.

~ ISSUE 2 ~

WHETHER STALWART ONLINE STORES PVT. LTD. SHOULD BE WOUND UP ON THE IMPLEADMENT FILED BY ITS SHAREHOLDERS

It is humbly contended that the petition filed by the shareholders of Stalwart is valid as it is maintainable before NCLT, Bengaluru. Further, the loan advancement to Galileo amounts to a related party transaction. Also, carrying out such transaction by a mere Board resolution is prohibited by law. Hence, Stalwart is liable to be wound up.

~ ISSUE 3 ~

WHETHER THE IMPLEADING PETITIONS FILED BY THE TAX DEPARTMENTS AGAINST STALWART ONLINE STORES PVT. LTD. ARE VALID

It is contended that the impleading petitions filed by the tax departments are valid as they are maintainable. Further, the loan advanced is deemed dividend and hence taxable under IT Act. Also, since Stalwart is a dealer under KVAT and CST Acts, it must discharge tax liabilities. Consequently, income tax and sales tax dues must be paid at par with secured creditors.

ARGUMENTS

~ ISSUE 1 ~

**WHETHER STALWART ONLINE STORES PVT. LTD. SHOULD BE WOUND UP ON THE
PETITION FILED BY GLOBAL OFFICE SUPPLIERS PVT. LTD.**

It is contended that the Hon'ble Tribunal should order Stalwart Online Stores Pvt. Ltd. to be wound up since, [A] *the present petition is maintainable before NCLT, Bengaluru* and [B] *it is unable to pay its debts.*

A. THE PRESENT PETITION IS MAINTAINABLE BEFORE NCLT, BENGALURU

It is contended that mere presence of alternative remedies is not a bar to the filing of a winding up petition.¹ Hence, [A.1] *the existence of an arbitration clause does not oust the jurisdiction of the court* and [A.2] *the filing of a summary suit in the City Civil Court is not a bar to winding up petition.*

A.1. EXISTENCE OF ARBITRATION CLAUSE DOES NOT OUST JURISDICTION OF THE COURT

The existence of an arbitration clause cannot oust the jurisdiction of the court exercising its discretionary powers under sec 271 of the Act.² Therefore, mere existence of the arbitration clause in the sales-cum-service agreement, does not oust the jurisdiction of NCLT.

**A.1.1. THE ARBITRATOR HAS NO JURISDICTION AS HIS POWER EMANATES FROM
CONTRACTUAL AGREEMENT**

¹ Advent Corpn Ltd. *re*, (1969) 2 Comp LJ 71; Seksaria Cotton Mills, *re*, (1969) 2 Comp LJ 155 (Bom)

² Integrated Broadcasting Co. P. Ltd. v. Netlinx Ltd. (2012) 111 CLA (Snr) 11 (AP); Prime Century City Development (P.) Ltd. v. Ansal Buildwell Ltd., (2003) 113 Comp Cas 68 (Del); Hewlett Packard India Ltd. v. BPL Net Com Ltd., (2002) 110 Comp Cas 575 (Kant); JG Finance Co. Ltd. v. Jamna Auto Industries Ltd., (2000) 1 Comp LJ 139 (P&H); Haryana Telecom v. Sterile Industries (I.) Ltd., [1992] 22 SCL 156.

The power of ordering winding-up, being strictly a statutory power, cannot be exercised by an arbitrator whose source of power emanates from the contractual agreement of the parties concerned,³ and it constitutes a *prima facie* ground for admission of the winding up petition.⁴ Therefore, the arbitrator has no power to order winding up of a company.

A.2. FILING OF A SUMMARY SUIT IN CITY CIVIL COURT IS NOT A BAR TO WINDING UP

A mere pendency of a civil suit is not a bar to the admission of winding up petition based on the same debt.⁵ In the present case, Global filed a Summary Suit before the City Civil Court, Bengaluru,⁶ which cannot be treated as a bar for the winding up petition filed before NCLT.

B. STALWART SHOULD BE WOUND UP FOR ITS INABILITY TO PAY DEBTS

It is contended that Stalwart should be ordered to be wound up because, [B.1] *it is deemed to be unable to pay its debts*, [B.2] *which creates a presumption of insolvency*. Further, [B.3] *Stalwart's claim on the amount due is not bona fide* and [B.4] *commercial hardship cannot be pleaded as a defence for non-performance of the contractual obligation*.

B.1. STALWART IS DEEMED TO BE UNABLE TO PAY ITS DEBTS

Where there is admission of indebtedness,⁷ the creditor had served a demand on the company which had neglected to pay the amount within three weeks thereafter, and the company was

³ Integrated Broadcasting Co. P. Ltd. v. Nettlelix Ltd. (2012) 111 CLA (Snr) 11 (AP); Hind Mercantile Corporation Pvt. Ltd. v. J.H. Payner & Co. Ltd., (1971) Comp Cas 548; Wimco Ltd. v. Sidvink Properties (P.) Ltd., (1996) Comp Cas 610; Surendra Kumar Dhawan and Anr. v. R. Vir and Ors. [Vol.47 1997] Comp Cas 276.

⁴ Areva T & D India Ltd. v. Bhema Cements Ltd., (2012) 108 CLA (Snr) 7 (AP); Fulham Football Club Ltd. v. Richards, 2011 EWCA Civ 855 (CA).

⁵ Madhya Pradesh Iron and Steel Co. v. G.B. Springs P. Ltd., (2003) 54 CLA (Snr) 9 (Del.); Nepa Ltd. v. Jnanamandal Ltd (2001)107 Comp Cas 240 (All.); Central Bank of India v. Sukhani Mining and Engg. Industries Pvt. Ltd., (1997) 47 Comp Cases 1 (Pat.); Karam Chand Thapar & Bros. (Coal) Sales Ltd. v. Acme Paper Ltd., (1994) AIR Del 3.

⁶ ¶ 14, Moot Proposition.

⁷ John Paterson and Co. (India) Ltd. v. Promod Kumar Jalan, (1983) 53 Comp Cas 255 (Cal.).

deemed to be unable to pay its debts.⁸ In such cases, the court has ordered winding up.⁹ In the present case, respondent company had admitted its liability to the Global,¹⁰ and failed to settle its debts. Therefore, the respondent company is deemed to be unable to pay its debts.

B.2. THERE IS A PRESUMPTION OF INSOLVENCY

If the debtor company's dues are established on record¹¹ and it fails to pay the creditor, it would create a presumption of commercial insolvency.¹² In such cases, an order for winding up is granted.¹³ Stalwart admitted the liability for non-payment.¹⁴ In spite of serving a legal notice, it had failed to clear its dues,¹⁵ which creates a presumption of insolvency against it.

B.2.1. DISHONOR OF CHEQUES IS A SUFFICIENT GROUND TO PRESUME INSOLVENCY

The company is presumed to be insolvent when the cheques issued by it in its ordinary trade transaction have been dishonoured due to insufficiency of funds.¹⁶ Such circumstances establish a case of commercial insolvency.¹⁷ Stalwart drew PDCs, each cheque amounting to

⁸ Color Coats v. Venkataramana Hotels Ltd., (1998) 16 SCL 345.

⁹ Nepa Ltd. v. Jnanamandal Ltd., (1999) 21 SCL 53 (All.).

¹⁰ ¶ 9, Moot Proposition.

¹¹ Caprihans India Ltd. v. Mey's Pharmaceuticals Ltd., AIR 1994 Del 178.

¹² KTB (Singapore) Plc. v. Associated Forest Products P. Ltd., (1996) 21 Corpt LA 394 (Cal.).

¹³ G. Calridge & Co. Ltd. v. Nav Bharat Investments Ltd., (1997) 47 Com Cases 428 (Bom.); Reflections Advertising & Marketing Ltd. v. Travancore Beverages P. Ltd., (1990) 3 Comp LJ 311 (Ker.); Rakesh Products v. Furo Chit & Finance Co. P. Ltd., (1990) 3 Comp LJ 218 (Del); Tube Investments of India Ltd. v. Rim and Accessories P. Ltd., (1990) 3 Comp LJ 322 (Mad); Punjab Agro Industries Corporation Ltd. v. Diesh Fertilizers and Chemical P. Ltd., (1990) 3 Comp LJ 327; United Western Bank Ltd., *In Re*, (1978) 48 Comp Cases 378 (Bom.).

¹⁴ ¶ 9, Moot Proposition.

¹⁵ ¶ 15, Moot Proposition.

¹⁶ Arvind Investment Consultant v. Presto Finance Ltd., (1998) 94 Com Cases 350 (Guj.).

¹⁷ Universal Glass Ltd. v. Meerut Bottlers p. Ltd., (1985) 58 Com Cases 68 (Del).

1 Crore, which were dishonored by the bank due to insufficiency of funds.¹⁸ Therefore, dishonor of Stalwart's cheques creates a presumption of insolvency.

B.3. THE COMPANY'S CLAIM ON THE AMOUNT DUE IS NOT BONA FIDE

The company's defence against the claim on dues is not *bona fide*.¹⁹ Where the goods supplied were of poor quality, the defence was held to not be *bona fide*.²⁰ Stalwart claims that deficiency of services in one business had affected its contractual payments under the other.²¹ But, Stalwart conducts business in the said two models with two separate website address for each model.²² This signifies that these models operate independent of each other and deficiency of services in one cannot affect the payments in the other.

B.3.1. THE MONEY SHOULD BE APPROPRIATED TOWARDS THE INTEREST

If the debtor makes payment without any direction of appropriation,²³ in the absence of the agreement to the contrary, the rule applicable in such cases is that payment is first applied to wipe out interest and then the principal.²⁴ Stalwart had made intermittent payments of INR 6 crores without mentioning to which amount it has to be appropriated. Therefore, this amount paid has to be appropriated towards interest and penalty, then to the principal amount.

¹⁸ ¶ 6, Moot Proposition.

¹⁹ Sheela Rani Textiles Ltd. v. Sri Anjaneya Cotton Mills (P.) Ltd., (2012) 112 SCL 286; Kothari Industrial Corporation Ltd. v. Kotak Mahindra Bank Ltd., (2010) 97 SCL 119 (Mad.).

²⁰ Marsons Ltd. v. Mundhra Bright Steel, (2002) 39 SCL 919 (Cal.).

²¹ ¶ 8 and 9, Moot Proposition.

²² ¶ 2, Moot Proposition.

²³ Sec. 60, Indian Contract Act, 1872.

²⁴ Punjab National Bank v. Surinder Singh Mandyal, AIR 1996 HP 1; Meghraj v. Bayabai, (1969) 2 SCC 274; M/s Kharavela Industries v. OSFC & Ors., AIR 1985 Ori 153; M. V. Appa Rao v. Rule P. Appa Rao, AIR 1922 PC 233.

B.4. COMMERCIAL HARDSHIP IS NOT A DEFENCE FOR NON-PERFORMANCE OF CONTRACT

When a party by his own contract creates a duty, he is bound to make it good, notwithstanding any accident by inevitable necessity.²⁵ Where the possibility of alteration of circumstances was within the contemplation of the parties at the time of the contract, it cannot be pleaded as a defence.²⁶ Stalwart was not able to settle the invoices raised by Global because of rise in competition in the market and FDI regulatory issues.²⁷ Therefore, commercial hardship cannot be considered to be a reason for breach of contract.

Therefore, it is submitted that Stalwart has to be wound up for its inability to pay its debts.

~ ISSUE 2 ~

**WHETHER STALWART ONLINE STORES PVT. LTD. SHOULD BE WOUND UP ON THE
IMPLEADMENT FILED BY ITS SHAREHOLDERS**

It is contended that Stalwart should be wound up because, [A] *the transaction is illegal* and [B] *this transaction leads to oppression*.

A. THE TRANSACTION IS ILLEGAL

It is just and equitable to wind up the company where the objects of the company are illegal.²⁸

The loan advancement to Galileo is illegal because [A.1] *there is no record of loan advancement*, [A.2] *such a loan advancement is prohibited by law* and [A.3] *this transaction amounts to a related party transaction*.

²⁵ *Paradine v. Jane*, KB, (1647) 82 ER 897.

²⁶ *Tamplin Steamship Co. Ltd. v. Anglo Mexican Petroleum Products Co. Ltd.*, (1916) 2 AC 397.

²⁷ ¶ 6, Moot Proposition.

²⁸ *Re International Securities Corpn.*, (1908) 25 TLR 31; *Princess Resuss v. Bos* (1871) LR 5 HL 176.

A.1. NO RECORD OF LOAN ADVANCEMENT

It is mandatory for a company to record any loan advancement in its register,²⁹ even if the contracts or arrangements is with a related party.³⁰ A board resolution cannot be considered to be a record for the purposes of this section because the Act requires the company to maintain a register,³¹ where the entries are made in a prescribed manner.³² Where the company lacks proper maintenance of records, it is a just and equitable ground for winding up.³³ Except one board resolution there is no other record of this transaction. Thus, board resolution cannot be considered to be a record, as it violates the mandate of this Act.

A.2. LOAN ADVANCEMENT IS PROHIBITED BY LAW

The loan advancement made by the Stalwart to Galileo is prohibited by law because [A.2.1] *loans should not be given to the directors*. In cases where such transactions have to be made, then [A.2.2] *a shareholders' meeting should have been conducted and a special resolution should have been passed*.

A.2.1. LOANS ARE NOT TO BE GIVEN TO THE DIRECTORS

The Act places prohibition on loans being given, either directly or indirectly, to any of its directors or any other person in whom the director is interested.³⁴ Galileo is one of the directors of Stalwart as he voted in the Board meeting.³⁵ Therefore, the said loan advancement is prohibited by law.

²⁹ Sec. 186(9), Companies Act, 2013.

³⁰ Sec. 189, Companies Act, 2013, read with Rule 16, Companies (Meetings of Board and Powers) Rules, 2014.

³¹ Sec. 189, Companies Act, 2013, read with Rule 16, Companies (Meetings of Board and Powers) Rules, 2014.

³² Rule 12, Companies (Meetings of Board and its Powers) Rules, 2014.

³³ Howrah Mills Co. Ltd. and Jardine Henderson Ltd., *In Re* (2011) 105 SCL (Cal.).

³⁴ Sec. 185(1), Companies Act, 2013.

³⁵ ¶ 11, Moot Proposition.

A.2.1.1. ALTERNATIVELY: LOANS ARE NOT TO BE GIVEN TO THE PERSON IN WHOM THE DIRECTOR IS INTERESTED

The expression, "*any other person to whom the director is interested*" includes any private company of which such director is a member.³⁶ Sam who is a director of Stalwart, also holds 24.99% voting shares in Galileo.³⁷ This indicates that loan advancement to Galileo is also prohibited by law as Sam is an interested party to it.

A.2.2. A SPECIAL RESOLUTION SHOULD HAVE BEEN PASSED

Loans given to whole-time directors of a company, require the approval of the members by a special resolution in a general meeting.³⁸ Galileo has an interest in the sale proceeds of Stalwart out of which the loan amount of INR 50 crores had been advanced.³⁹ This indicates that Galileo is a whole-time director to which if a loan has to be advanced, can only be done by passing a special resolution. Therefore, a shareholders' general meeting should have been conducted in which a special resolution should have been passed.

A.3. THE TRANSACTION AMOUNTS TO A RELATED PARTY TRANSACTION

It is contended that winding up can be ordered under just and equitable grounds,⁴⁰ where it becomes impossible to manage a company's affairs because the voting power at general meetings is divided between two dissenting groups. The loan advancement amounts to a related party transaction because [A.3.1] *the parties to the transaction are related parties* and [A.3.2] *the interested parties should not participate in the meeting*.

A.3.1. THE PARTIES TO THE TRANSACTION ARE RELATED PARTIES

³⁶ 3 RAMAIYA A, GUIDE TO THE COMPANIES ACT 4936 (17th ed. 2010).

³⁷ ¶ 10, Moot Proposition.

³⁸ Sec. 185(1), Companies Act, 2013.

³⁹ ¶ 11, Moot Proposition.

⁴⁰ *Re Davis and Collett Ltd.*, (1935) All ER Rep. 315; *Re American Pioneer Leather Co.* (1918) 1 Ch. 556.

A director of a company is a related party.⁴¹ Galileo is one of the board of directors.⁴² Therefore, Galileo is a related party.

A.3.1.1. ARGUENDO, If a director of one company is a member of any other private company, then the latter becomes a related party to the former.⁴³ Sam is a member of Galileo,⁴⁴ and also one of the directors of Stalwart.⁴⁵ Therefore, Galileo has to be treated as related party.⁴⁶

A.3.2. INTERESTED PARTIES SHALL NOT PARTICIPATE IN THE MEETING

Any director who is interested in a concerned transaction shall not participate in the said meeting.⁴⁷ Therefore, Sam and Galileo are not entitled to participate in the meeting that should have been conducted to pass a special resolution with uninterested shareholders.

B. THE TRANSACTION LEADS TO OPPRESSION

It is contended that where the majority shareholders exercise their rights against the wishes of the shareholders, so as to prejudice their interests by denying their right to vote leads to oppression.⁴⁸ Oppression is a just and equitable ground for winding up of a company.⁴⁹ The shareholders holding 26% of the voting stock in the respondent company, were not informed

⁴¹ S. 2(76)(i), Companies Act, 2013.

⁴² Issue A.2.1

⁴³ Sec. 2(76)(iv), Companies Act, 2013.

⁴⁴ ¶ 10, Moot Proposition.

⁴⁵ ¶ 11, Moot Proposition.

⁴⁶ Sec. 2(76)(iv), Companies Act, 2013.

⁴⁷ Sec. 184(2), Companies Act, 2013.

⁴⁸ *Re, Anglo - Continental Produce Co. Ltd.*, (1939) 1 ALL ER 99.

⁴⁹ *R. Sabapathy Rao v. Sabapathy Press Ltd.*, AIR 1925 Mad. 489; *Ebrahimi v. Westbourne Galleries Ltd.* (1973) AC 360 (HL).

of the loan advancement to Galileo.⁵⁰ They were deprived of their right to vote in the shareholders resolution.⁵¹ Therefore, the transaction amounts to oppression.

B.1. LOSS OF CONFIDENCE

When the minority shareholders have a justifiable loss of confidence in the probity of the Board of Directors, the court ordered winding up of that company.⁵² As the shareholders' approval was not sought, and they were not informed about the transaction with Galileo,⁵³ it makes them fear for future, thereby, losing confidence in the Board of Directors.

B.2. THE TRANSACTION CONSTITUTES FRAUD

In a company majority powers should be exercised in good faith for its benefit,⁵⁴ and cannot be used to appropriate to themselves the property of the company in which the other shareholders are entitled to participate.⁵⁵ This would lead to expropriation of the interest of the minority shareholders and constitute fraud,⁵⁶ which is a just and equitable ground for winding up.⁵⁷ The loan advancement of INR 50 crores to Galileo has been done by passing a board resolution in which Galileo and Sam had voted,⁵⁸ in order to appropriate money to

⁵⁰ ¶ 11, Moot Proposition.

⁵¹ Issue A.2.2.

⁵² *Re, Westbourne Galleries Ltd.*, (1972) 2 All ER 492.

⁵³ ¶ 11, Moot Proposition.

⁵⁴ *Mutual Life Insurance Co. of New York v. Rank Organisation*, 1995 BCLC 11; *Shuttleworth v. Cox Bros & Co (Maidenhead) Ltd.*, (1927) 2 KB 9; *Allen v. Gold Reefs of West Africa Ltd.*, (1900) 1 Ch 656.

⁵⁵ *Burdland v. Earle*, (1902) AC 83.

⁵⁶ *Cook v. Deeks*, (1916) 1 AC 554.

⁵⁷ *Dunlop India Ltd., In re* [2013] 31 taxmann.com 135 (Calcutta); *Waryam Singh v. Bhatinda Transport Co. P. Ltd.*, (1963) 33 Com Cases 897 (Punj.); *Re West Surrey Tanning Co.* [1866] LR 2 Eq 737.

⁵⁸ ¶ 11, Moot Proposition.

themselves constituting fraud. Hence, where the object of the company is illegal or fraudulent, it is a sufficient ground for winding up under just and equitable grounds.⁵⁹

Therefore, it is submitted that the respondent company should be wound up on just and equitable grounds.

~ ISSUE 3 ~

**WHETHER THE IMPLEADING PETITIONS FILED BY THE TAX DEPARTMENTS AGAINST
STALWART ONLINE STORES PVT. LTD. ARE VALID**

It is contended that the impleading petitions filed by the Tax Departments against Stalwart are valid as, [A] *They are maintainable*, [B] *the claims of the Income Tax Department and [C] the Sales Tax Department are justifiable and lastly, [D] Income Tax and Sales Tax dues should be paid at par with secured creditors.*

A. THE PETITIONS FILED BY TAX DEPARTMENTS ARE MAINTAINABLE

In the winding up procedure, the Tribunal has the jurisdiction to decide any question of priorities or any other question which may relate to or arise in the course of winding up whether such application is made before or after commencement of winding up.⁶⁰ This provision is not restricted to any category of suits or any class of plaintiffs, and covers all suits and other legal proceedings whoever may be the plaintiff.⁶¹ NCLT has jurisdiction as tax departments can be heard under the present ground before winding up order is passed.

B. THE CLAIMS OF THE INCOME TAX DEPARTMENT ARE JUSTIFIABLE

⁵⁹ Friends Tea Co. Ltd., In re (2012) 112 SCL 45 (Cal); *Re T.E. Brismead & Sons Ltd.* (1897) 1 Ch 45, 406 (C.A).

⁶⁰ Sec. 280(e), Indian Companies Act, 2013.

⁶¹ S.R. Muthuswami Gounder & Ors. v. Official Liquidator, Company Petition No. 23 of 1958; Sri Murugun Oil Industries (P.) Ltd., *Re*, (1970) 40 Com Cases 77, 82 (Mad) *Ghouse Khan v. Bala Subba Rowther*, AIR 1927 Mad 92.

It is contended that the claims of the IT Department are justifiable as [B.1.] *Loan advanced by Stalwart to Galileo is Deemed Dividend*, [B.2.] *Deemed dividend is chargeable under Sec. 195 of the IT Act*, [B.3.] *The Substance over Form doctrine makes the amount advanced taxable*, [B.4.] *Repayment of amount does not characterize it as loan and* [B.5.] *Deemed dividend only broadens the scope of dividend.*

B.1. LOAN ADVANCED BY STALWART TO GALILEO IS DEEMED DIVIDEND

A loan is deemed dividend if *firstly*, it is not a company in which public are substantially interested, *secondly*, payment is made through loan or advance, *thirdly*, person is a registered⁶² and beneficial owner⁶³ of at least twenty percent shares⁶⁴ not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits⁶⁵ and *fourthly*, loan has been advanced from accumulated profits where accumulated profits include all profits of the company up to the date of payment including current profits of the year.⁶⁶ In the present case, Stalwart is a Pvt. Ltd. company,⁶⁷ and has advanced the amount as a loan to Galileo, Galileo holds 24% voting stocks, the loan has been advanced out of sales proceeds⁶⁸ which are included under accumulated profits. Thus, all conditions of deemed dividend are satisfied and the loan advanced is deemed dividend.

⁶² Howrah Trading v. CIT, 36 ITR 215 (SC); CIT v. Shakuntala, 43 ITR 352 (SC); ITO v. Arvind Mafatlal, 45 ITR 271 (SC); CIT v. James Anderson, 51 ITR 345; Cambatta v. CIT, 14 ITR 748,757; Shakti Mills v. CIT, 16 ITR 187; Jaluram v. CIT, 22 ITR 490; Bikaner Trading v. CIT, 24 ITR 419; Hindustan Investment Corporation Ltd v. CIT, 27 ITR 202; CWT v. Sumitradevi, 96 ITR 419.

⁶³ CIT v. Sokkalal, 236 ITR 981; CIT v. Parvathavarthini, 219 ITR 661.

⁶⁴ CIT v. Mittal, 219 ITR 420.

⁶⁵ Sec. 2(22)(e), Income Tax Act, 1961.

⁶⁶ First Income Tax Officer v. Short Brothers(P) Ltd., 1960 60 ITR 83.

⁶⁷ ¶ 2, Moot Proposition.

⁶⁸ ¶ 11, Moot Proposition.

B.2. DEEMED DIVIDEND IS CHARGEABLE UNDER SEC. 195 OF THE IT ACT

Any person responsible for paying a non-resident any sum chargeable under the provisions of the IT Act, shall at the time of payment of such income deduct income tax.⁶⁹ Stalwart has failed to deduct tax on the amount advanced to Galileo⁷⁰ and is thus an Assessee in Default.

B.3. THE 'SUBSTANCE OVER FORM' DOCTRINE MAKES THE AMOUNT ADVANCED TAXABLE

Under *Substance Over Form* doctrine, a transaction should not be recorded in such a manner as to hide the true intent of the transaction.⁷¹ If the transaction is a series of steps which are so interdependent that the legal implications of one step would have no meaning without the completion of series, the step transaction doctrine is applicable.⁷² Stalwart gave a loan to Galileo without any written loan agreement or other record. The Board Resolution was passed without any notice to the shareholders in which related parties voted.⁷³ All these actions can be said to form a series of acts comprising a single integrated plan. Therefore, the amount, in substance, was dividend paid in the form of loan.

B.4. REPAYMENT OF AMOUNT DOES NOT CHARACTERIZE IT AS LOAN

Fact of repayment of loan is immaterial if it is characterized as deemed dividend.⁷⁴ Even if the loan is fully repaid, Sec. 2(22)(e) would still squarely apply.⁷⁵ Thus, Stalwart's contention of amount advanced not being a loan because it will be returned later⁷⁶ is not valid.

⁶⁹ Sec. 195, Income Tax Act, 1961

⁷⁰ ¶ 12, Moot Proposition.

⁷¹ Gregory v. Helvering, 293 U.S. 465 (1935).

⁷² Superior Trading, LLC v. Comm'r, 137 T.C. 70,88(2011).

⁷³ ¶ 11, Moot Proposition.

⁷⁴ Tarulata Shyam v. CIT, [1977] 108 ITR 345(SC); CIT v. Martin Burn Ltd., [1982] 136 ITR 805(Cal).

⁷⁵ Walchand & Co. Pvt. Ltd v. CIT, (1975) 100 ITR 598 (Bom); Davis (KP) v. ITO, [1995] 53 ITD 79 (Coch-Trib).

⁷⁶ ¶ 12, Moot Proposition.

B.5. DEEMED DIVIDEND ONLY BROADENS THE SCOPE OF DIVIDEND

Deemed dividend does not alter the basic nature of dividend⁷⁷ but is merely an extension of dividend to include certain payments to be deemed as dividend for the purpose of preventing tax evasion.⁷⁸ Wherever the word dividend occurs it should include deemed dividend.⁷⁹ Hence, segregation of deemed dividend from dividend is not permissible.

C. THE CLAIMS OF THE SALES TAX DEPARTMENT ARE JUSTIFIABLE

The claims of the Sales Tax Department are justifiable because [C.1.] *Commission agents are dealers under KVAT and CST Acts* and [C.2.] *Principle of 'Noscitur a Sociis' does not apply* and [C.3.] *Dealers must register themselves under KVAT and CST Acts*.

C.1. COMMISSION AGENTS ARE DEALERS UNDER KVAT AND CST ACTS

'Dealer' means any person who carries on the business of buying, selling, supplying or distributing goods, directly or indirectly and includes a commission agent.⁸⁰ That is, every such person who, for an agreed commission, sells on behalf of any principal who is a resident of Karnataka is liable to tax under KVAT and CST Acts.⁸¹ Such a sale transaction is validated by the consent and authority of the owner of the goods.⁸² Stalwart, in pursuance of the agreement with Global, sells to the goods to the consumers.⁸³ It deducts its commission from the money received⁸⁴ is thereby acting as a commission agent effecting sale indirectly.

⁷⁷Kantilal Manilal & Ors. v. Deputy Commissioner of Income Tax, 1961 SC 1038

⁷⁸Navnital C. Javeri v. K.K. Sen, ITR 0427, Balaji v. Income Tax Officer, 43 ITR 393(SC).

⁷⁹CIT v. Mysodet (P) Ltd., (1999) 237 ITR 35(SC).

⁸⁰ Sec. 12(c), Karnataka Value Added Tax Act, 2003.

⁸¹ Sec. 8, Karnataka Value Added Tax Act, 2003; Sec. 2[b], Central Sales Act, 1956.

⁸² Sec. 27, Sale of Goods Act, 1930.

⁸³ ¶ 5, Moot Proposition.

⁸⁴ ¶ 2, Moot Proposition.

C.2. PRINCIPLE OF 'NOSCITUR A SOCIIS' DOES NOT APPLY

Noscitur a Sociis cannot prevail where it is clear that the wider words have been deliberately used in order to make the scope of the defined word correspondingly wider.⁸⁵ It is clear from a simple reading of Sec. 2(b) and 2(12) of KVAT and CST Acts respectively that the words 'buying', 'selling', 'supplying', 'distributing' should be interpreted independently to widen the ambit of the section. Moreover, if it is possible to pick out a single word or phrase and find it to be perfectly clear in itself, the principle of *Noscitur a Sociis* would be utterly meaningless.⁸⁶ Since 'selling' can be defined independently, and payment and delivery are immaterial to it,⁸⁷ Stalwart is a commission agent even when it is not delivering the goods.

C.3. DEALERS MUST REGISTER THEMSELVES UNDER KVAT AND CST ACTS

A dealer is liable to pay tax even if the goods sold by him do not belong to him so long as he has the right of disposal over them and can pass a valid title over them to the buyers.⁸⁸ Therefore, every dealer who effects sale of taxable goods in the course of interstate trade or commerce is liable to register under the KVAT⁸⁹ and CST Acts⁹⁰. Stalwart has its registered office in Bengaluru⁹¹ and effects interstate sale of goods and is hence liable to register and pay VAT and CST.

D. INCOME TAX AND SALES TAX DUES SHOULD BE PAID AT PAR WITH THOSE OF SECURED CREDITORS

⁸⁵ State of Bombay v. Hospital Mazdoor Sabha, AIR 1960 SC 610.

⁸⁶ People (Attorney General) v. Kennedy, 116 Cal. App. 2d 273.

⁸⁷ Sri Trimula Venkateswara Timber v. CTO, (1968) 21 STC 312 (SC).

⁸⁸ Notes under Sec. 2[b], Central Sales Act, 1956.

⁸⁹ Sec. 22, Karnataka Value Added Tax Act, 2003.

⁹⁰ Sec. 7, Central Sales Tax Act, 1956.

⁹¹ ¶ 2, Moot Proposition.

Income Tax and Sales Tax dues should be paid at par with those of secured creditors as [D.1.] *Historical reasons entail preferential payment of state dues* and [D.2.] *Tax dues create first charge over the assets of the company.*

D.1. HISTORICAL REASONS ENTAIL PREFERENTIAL PAYMENT OF STATE DUES

The government's claim to priority of realization of tax dues stems from English common law doctrine of priority of Crown debts.⁹² It was given judicial recognition and prior to the year 1950 it was the 'law in force' in the territory of India and is continued to be in force⁹³ by Article 372 of the Constitution.⁹⁴ And hence all revenues, taxes, cesses and rates due from the company to Government will be paid in priority to all other debts in a winding up.⁹⁵ Hence, tax departments' dues should be paid preferentially as they are government debts.

D.2. TAX DUES CREATE FIRST CHARGE OVER THE ASSETS OF THE COMPANY

Sec. 226 of Income Tax Act creates a first charge upon any asset for the recovery of unpaid tax if the assessee is in default. If first charge of the State is over the secured debts, both debts being equal, the State can claim priority over the secured debts.⁹⁶ Government debts will have precedence over other dues.⁹⁷ Since Stalwart Pvt. Ltd. is an assessee in default therefore Sec. 226 will be enforced. Thus, the tax departments should be treated at par with secured creditors as tax dues create first charge over the assets of the company.

Therefore, it is submitted that the claims of the tax departments are valid and should be treated at par with secured creditors.

⁹² Director of Rationing and Distribution v. The Corporation of Calcutta &Ors., 1960 CriLJ 1684; Collector of Aurangabad &Anr. v. Central Bank of India, 1967 (3) SCR 855.

⁹³ Director of Rationing and Distribution v. The Corporation of Calcutta &Ors., 1960 CriLJ 1684.

⁹⁴ Collector of Aurangabad v. Central Bank of India, [1967] (3) SCR 855.

⁹⁵ Art. 372, Constitution of India.

⁹⁶ Baroda City Cooperative Bank Ltd. v. State of Gujarat, 2010 (3) GLR 2132.

⁹⁷ Sec. 73(3) Civil Procedure Code; Bombay Stock Exchange v. V.S. Kandalgaonkar, 2015 (2) SCC 1.

PRAYER

Wherefore it is prayed, in the light of the issues raised, arguments advanced, and authorities cited, that this Hon'ble Tribunal may be pleased to:

1. **Hold** the main winding up petition and all impleading petitions to be maintainable.
2. **Order** Stalwart to be wound up on inability to pay debts and under just and equitable grounds.
3. **Hold and Declare** that the claims of Income Tax Department and Karnataka Sales Tax Department are valid and should be settled at par with secured creditors.

And/or Pass any other Order, Direction, or Relief that it may deem fit in the best interests of Justice, Equity and Good Conscience.

For This Act of Kindness, the Petitioners Shall Duty Bound Forever Pray.

Sd/-

(Counsels on behalf of the Petitioners)