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LIST OF ABBREVIATIONS

¶ /Para	Paragraph
&	And
§	Section
%	Percentage
AAR	Authority for Advance Ruling
A/c.	Account
ACIT	Additional Commissioner of Income Tax
Addl.	Additional
AIR	All India Reports
Art.	Article
AY	Assessment Year
Bang	Bengaluru
BLR/BOMLR	Bombay Law Report
Bom.	Bombay
Cal.	Calcutta
CA	Companies Act
C.A.	Company Application
CBDT	Central Board of Direct Tax

Chen.	Chennai
CIT	Commissioner of Income Tax
CLA	Company Law Advisor
CLB	Company Law Board
Co.	Company
Comp. Cas.	Company Cases
CP	Company Petition
CPC	Code of Civil Procedure, 1973
CR	Case Report
CR	Company Rules
Cr.	Crore
C.S.T.	Central Sales Tax
CST	Commissioner of Sales Tax
CTBT	Central Board of Direct Tax
CTR	Currency Transaction Report
CTR	Current Tax Reporter
CTO	Commercial Tax Officer
DCCT	Deputy Commissioner of Commercial Tax
DCIT	Director of Income Tax (International Taxation)
Del.	Delhi

DIT	Director of Income Tax
DRT	Debt Recovery Tribunal
DTAA	Double Taxation Avoidance Agreement
DTR	Daily Tax Report
Dy.	Deputy
Ed.,	Edition
Etc.	Et cetera
FDI	Foreign Direct Investment
FII	Foreign Institutional Investors
FPI	Foreign Portfolio Investors
FY	Fiscal Year
GI	Galileo Investors
GOS	Global Office Suppliers
Govt.	Government
HC	High Court
HNI	High Networth Investors
Hon'ble	Honorable
i.e.	That is
Ibid	Ibidum
ILR	Indian Law Report

INR	Indian National Rupee
In Re	In Reference
I – T	Income Tax
IT Act	Income Tax Act
ITA, I.T.A.	Income Tax Appeal
ITAT	Income Tax Appellate Tribunal
I.T.D.	Income Tax Department
ITD	Income Tax Tribunal Decisions
ITO	Income Tax Officer
ITR	Income Tax Report
I.T.R.	Income Tax Return
JCIT	Joint Commissioner of Income Tax
Kan.	Karnataka
KVAT	Karnataka Value Added Tax
L.R.	Law Report
Ltd.	Limited
M/s	Messer's
Mah.	Maharashtra
Mds	Madras
Mum	Mumbai

NCLT	National Company Law Tribunal
No., no.	Number
Ors.	Others
P & L	Profit and Loss
p.	Page
p.a.	Per Annum
Para.	Paragraph
PA	Public Announcement
PIE	Private Equity Investors
Pvt.	Private
P & H	Punjab & Haryana
r/w	Read With
Reg/Reg.s	Regulation/Regulations
Rev.	Revised
RS	Resident Shareholders
Rs.	Rupees
SC	Supreme Court
SCC	Supreme Court Cases
SCL	Supreme Court Law Reporter
SCR	Supreme Court Report

SEBI	Securities and Exchange Board of India
SE	Singaporean Entity
SI	Simple Interest
Sing.	Singapore
SOS	Stalwart Online Stores
SOT	Select Orders of ITAT
SSA	Sales – Cum – Service Agreement
Supp.	Supplementary
The Act	The Companies Act, 2013
Trib.	Tribunal
T.N.	Tamil Nadu
TNVAT	Tamil Nadu Value Added Tax
TTJ	Tax Tribunal Judgment
UOI	Union of India
u/s	Under Section
VAT	Value Added Tax
v/vs	Versus
Vol.	Volume
w.e.f.	With effect from
W.r.t.	With Respect To

STATEMENT OF JURISDICTION

The Petitioners have humbly approached the Hon'ble National Company Law Tribunal, Karnataka, through its Winding – up jurisdiction, invoked under Section 271(1) (a) of the Companies Act, 2013¹.

Section 271(1) (a) of the Companies Act, 2013:

“Circumstances under which a company may be wound up by Tribunal:

(1) A company may, on a petition under section 272, be wound up by the Tribunal,--

(a) if the company is unable to pay its debts...”

The Hon'ble Tribunal has tagged the impleading petition with the main petition and it is a specially ordered matter. The petitioners are honoured to argue on the maintainability of the main petition, maintainability of the all the impleading petitions and merits on all counts.

The present memorial sets forth the facts, issues raised and arguments advanced in the present case.

¹ The Companies Act, No. 18 of 2013.

[STATEMENT OF FACTS]

STATEMENT OF FACTS

Global Office Suppliers Pvt. Ltd. – It is a company registered under the CA, 1956, having its registered office in Beng. On January 01, 2015, it entered into an SSA with SOS under both, inventory and marketplace models, latter having a strict payment clause. On December 31, 2016, GOS served a legal notice on SOS for non – payment. Thus, the winding up petition was filed.

Shareholders of SOS – These are 26% resident shareholders of SOS, who filed an impleading petition. In February 2016, SOS advanced a loan of INR 50 Cr. to its foreign investor from Sing., GI, which had a voting stock of 24% in the company. This loan was sanctioned by a board resolution in which two Indian promoters of SOS, Sam and GI voted. This transaction was in violation of the CA and accounted to oppression towards 26% shareholders.

Additional CIT, Bengaluru – SOS filed its ITR for the FY 2015-16 before September, 2016. Herein, ITD noticed that the loan sanctioned to the SE i.e. GI by SOS falls under the category of ‘dividend’, per the IT Act. Hence, the ITD claimed that tax should have been withheld on the same transaction. However, SOS claimed that this transaction was a mere loan advancement which would be eventually repaid. The SOS also referred to the DTAA for a wider ambit of the meaning of ‘dividend’.

Deputy CCT, Bengaluru – The STD issued a notice to SOS stating that it has failed to register itself as a ‘dealer’ under the marketplace business model and failed to discharge VAT and CST liabilities under the KVAT Act, 2003 and it was required to pay VAT and CST on inter and intra state sales. This issue is for recovery of sales tax under the marketplace model.

STATEMENT OF ISSUES

- [ISSUE I]** WHETHER THE WINDING UP PETITION FILED BY GLOBAL OFFICE SUPPLIERS AND IMPEADING PETITION FILED BY THE SHAREHOLDERS OF STALWART ARE MAINATAINABLE OR NOT?
- [ISSUE II]** WHETHER THE COMPANY IS LIABLE TO BE WOUND UP ON THE GROUND THAT IT IS COMMERCIAL INSOLVENT, AS IT WAS UNABLE TO PAY THE DEBT?
- [ISSUE III]** WHETHER THE COMPANY IS LIABLE TO BE WOUND UP ON ACCOUNT OF OPPRESSION TOWARDS MINORITY SHAREHOLDERS, THEREBY RENDERING IT A JUST AND EQUITABLE GROUND?
- [ISSUE IV]** WHETHER THE IMPEADING PETITIONS FILED BY THE INCOME TAX DEPARTMENT AND SALES TAX DEPARTMENT ARE MAINTAINABLE OR NOT?
- [ISSUE V]** WHETHER THE INCOME TAX DEPARTMENT HAS A SIZEABLE CLAIM AGAINST STALWART OR NOT?
- [ISSUE VI]** WHETHER STALWART IS LIABLE TO PAY VAT AND CST TO THE SALES TAX DEPARTMENT OF BENGALURU, KARNATAKA OR NOT?

SUMMARY OF ARGUMENTS

- [I] (i) **Winding up petition filed by GOS is maintainable as:** **A.** It has a statutory right to claim its debt. **B.** Civil suit and non – invocation of arbitration clause do not bar this petition.
- (ii) **Impleading petition filed by resident shareholders is *per se* maintainable as:** **A.** They are contributories. **B.** They have valid *locus standi* to file this petition.
- [II] **Stalwart should be wound up as:** **A.** There is an express existence of debt. **B.** They are unable to pay the debt due. **C.** There is a *prima facie* ‘neglect and refusal to pay.’ **D.** There exists no *bona fide* defence against such an act of non – payment of debt.
- [III] **The company should be wound up on just and equitable ground as:** **A.** Sam and Galileo are related parties of SOS and RPT is prohibited by law. **B.** Sam is a controlling director in GI and a representative of the same in SOS, hence loan to a director is illegal. **C.** The minority shareholders were oppressed by the majority shareholders as they were not allowed to vote in the concerned resolution for such a loan transfer.
- [IV] **Impleading Petitions by the ITD and STD are maintainable as:** Both the departments have impleaded as a ‘secured creditor’ and are necessary parties to the suit.
- [V] **Stalwart is liable to pay tax to ITD as:** **A.** The said loan advancement falls under ‘deemed dividend’ of The IT Act, 1961. **B.** India – Sing. DTAA is inapplicable in this case.
- [VI] **Stalwart is liable to discharge its sales tax liability in Karnataka as:** **A.** Place of sale and purchase of goods is Karnataka. **B.** Stalwart under its marketplace model falls within the meaning of ‘dealer’, per The KVAT Act, 200

ARGUMENTS ADVANCED

[ISSUE I] WHETHER THE WINDING UP PETITION FILED BY GLOBAL OFFICE SUPPLIERS AND IMPLEADING PETITION FILED BY THE SHAREHOLDERS OF STALWART ARE MAINTAINABLE OR NOT?

[I.A.] THAT THE INSTANT WINDING UP PETITION IS MAINTAINABLE.

[¶ 1] It is humbly submitted before this Hon'ble Tribunal that the instant winding up petition, filed by GOS² under Section 271 (a) and (g) r/w Section 272(1)³ of The CA, 2013 is *per se* maintainable.⁴

[I.A.1] GOS is a creditor u/s 271 (1) (b) of The Act and has a statutory right to claim its debt.

[¶ 2] A creditor can be stated to be 'every person having a pecuniary claim against company'.⁵ He is 'a person to whom debt is payable',⁶ he must have a present right to recover debt by a suit.⁷ Herein, it is *prima facie* established that GOS has a valid legal right to claim its debt, on account

² Page 1, ¶15, Case Data.

³ The Companies Act, § Section 271(1) (b), 2013 (18 of 2013).

⁴ *Ibid*, § Section 408 (1) (b), 2013 (18 of 2013).

⁵ Pankaj Mehra v. State of Maharashtra, (2000) 2 SCC 756.

⁶ The National Company Law Tribunal Rules, § Section 2(11), 2016.

⁷ Essar Steel Ltd. v. Gramercy Market Fund, (2002) 40 SCL 848.

[ARGUMENTS ADVANCED]

of admitted liability to pay, by SOS,⁸ and a violation of the payment clause of SSA,⁹ establishes its *locus standi* to file this petition.

[¶ 3] **Debt**¹⁰ is a sum of money due by a certain and express agreement.¹¹ This petition would be maintainable when: **(a)** there is 'debt' payable by the company; **(b)** this debt is payable by a creditor; and **(c)** company must be unable to pay the debt.¹² Thereby, this petition should be rendered maintainable, through a cumulative reading of ss. 271 and 272 of The CA, which would establish their right to claim their debt.

[I.A.2] Remedy of a civil suit for recovery of debt does not bar the creditor from invoking the jurisdiction of this Tribunal.

[¶ 4] Filing of a Summary Suit,¹³ for early recovery of money¹⁴ does not effectuate, the standing of this petition. Firstly, it is an established principal of legal jurisprudence that special law would prevail over general law.¹⁵ Secondly, mere fact that the petitioner has undertaken the remedy of filing a suit for recovery of money does not bar creditors to file a petition for winding up of a defaulting company.¹⁶ Thirdly, purpose of filing the suit for recovery of money and winding up

⁸ Page 3, ¶9, Case Data.

⁹ Page 2, ¶5, Case Data.

¹⁰ BRAYAN GARNER, BLACK'S LAW DICTIONARY, 1201-1202.

¹¹ Kesoram Industries & Cotton Milk Ltd. v. CWT, (1966) AIR 1370 (SC); Also in – PICUP v. North India Petrochemicals Ltd., (1994) 3 SCC 348.

¹² Pradeshiya Industrial & Investment Corpn. UP v. North India Petrochemicals Ltd., (1994) 13 CLA 363 (SC).

¹³ The Code of Civil Procedure, § Order XXXVII, 1908.

¹⁴ Page 5, ¶14, Case Data.

¹⁵ R.S. Raghunath v. State Of Karnataka, AIR (1992) SC 81.

¹⁶ Rishi Pal Gupta v. S.J. Knitting and Finishing Mills Private Limited, 73 (1998) DLT 593; Also in – Indo Alusys Industries Ltd. v. M/S Assotech Contracts, 2009 SCC Online Del 642.

[ARGUMENTS ADVANCED]

petition for non – payment of debt are distinct and different.¹⁷ Also, in *Sree Lakshmi Silks*¹⁸, it has been established that a petitioner can seek an order of winding up of the respondent co. w.r.t. very same claim for enforcement of which a civil suit has already been filed.

[I.A.3] Existence of an arbitration clause does not bar this petition.

¶ 5 Existence of an arbitration clause in the SSA could not be a ground to dismiss this petition, as an arbitrator has no power to order winding up.¹⁹ This power vests in the Tribunal, and notwithstanding any agreement between the parties the arbitrator has no jurisdiction regarding the same.²⁰ There is a clear distinction between statutory relief of winding up and contractual right to have dispute settled by arbitration.²¹ Also, it is enunciated in *Times Guaranty Financial Services*²², a winding up matter cannot be referred to an arbitrator even if the contract between the parties stipulates that, disputes shall be adjudicated upon through process of arbitration.

[I.B] THAT THE INSTANT IMPLEADING PETITION IS MAINTAINABLE.

It is humbly submitted that the instant petition is maintainable u/s 272(3) of The CA.

[I.B.1] The resident shareholders are contributories, per The Act.

¶ 6 S. 272(3) is a restrictive clause and must be interpreted judicially. In *Raja Surinder Singh*²³, the Hon’ble Apex Court ruled that the word ‘contributories’ includes a fully paid up shareholder.

¹⁷ Dhandhanian Brothers (P.) Ltd. v. Khaitan Overseas & Finance Ltd., (2004) 52 SCL 517.

¹⁸ Shree Lakshmi Silks v. Remanika Silks (P.) Ltd., (1999) 20 SCL 115.

¹⁹ Areva T & D Ltd. v. Bhema Cements Ltd., (2012)108 CLA (Snr.) 7.

²⁰ Integrated Broadcasting Co. (P.) Ltd. v. Netlinx Ltd., (2012) 111 CLA (Snr) 11.

²¹ California Pacific Trading Corporation v. Kitply Industries Ltd., (2004) 52 SCL 621.

²² Times Guaranty Financial Services Ltd. v. Perfect Pipes (P.) Ltd., (2004) 52 SCL 178.

²³ Raja Surinder Singh v. P.B and A Products Co. Ltd., (1956) 26 Comp. Cas. (Pepsu.) 41.

[ARGUMENTS ADVANCED]

Hence, these resident shareholders are contributories²⁴, in consonance with the intention of the legislature.

[I.B.2] The contributories have a valid locus standi to file this petition.

[¶ 7] In Severn Trent Water Purification²⁵, the Hon’ble Supreme Court ruled that s. 272(3) of The Act is a ‘self-contained’ code as to presentation of petition by contributory, provided all the conditions in the said section have been fulfilled.

[¶ 8] It is humbly submitted that the petition is *per se* maintainable and the company should be wound up on just and equitable grounds²⁶, as further continuation of the company is sham and in violation of the interest of the shareholders, which is of utmost importance.

[ISSUE II] WHETHER THE COMPANY IS LIABLE TO BE WOUND UP ON THE GROUND THAT IT IS COMMERCIALY INSOLVENT, AS IT WAS UNABLE TO PAY THE DEBT?

[II.A] THERE IS AN EXPRESS EXISTENCE OF DEBT.

[¶ 9] It is a threefold stand: (1) There was an express promise to pay the dues²⁷, by the existence and acceptance of strict payment clause in the agreement.²⁸ (2) Non – payment, by way of inability to settle invoices and dishonored cheques was substantial to establish the indebtedness of SOS²⁹,

²⁴ Page 3, ¶ 10, Case Data.

²⁵ Severn Trent Water Purification Inc. v. Chloro Controls (India) P. Ltd., (2008) 82 SCL (SC) 435.

²⁶ The Companies Act, § 433 (f), 1956; corresponding to §272 (g) of The Companies Act, 2013 (18 of 2013).

²⁷ Reunion Engineers Co. P. Ltd. v. Uma Kumar Proprietor, Kandhan electricals, (2011) 161 Comp Cases 186.

²⁸ Page 2, ¶5, Case Data.

²⁹ K.V. Associates (P.) Ltd. v. Matharu Chemical Industries, (2004) 49 SCL 537.

[ARGUMENTS ADVANCED]

which resulted in breach of contract. (3) SOS had expressly acknowledged its liability to pay, which cannot be dismissed on technical grounds³⁰ and hence should be admitted.³¹

[II.B] THEY ARE UNABLE TO PAY THE DUE DEBT AS WELL AS ARE IN NON-COMPLIANCE WITH THE MANDATORY REQUISITES UNDER THE ACT.

[¶ 10] The requirements of ‘inability to pay debts’ in s. 271 (2) (a) are: (1) Indebtness of creditor for more than Rs.1L. (2) Statutory demand notice served on company by such creditor. (3) Failure by the company to pay within 21 days after receipt of notice.³² The present facts *prima facie* establish the fulfillment of all these requisites and thereby, SOS’s ‘inability to pay’.³³

[¶ 11] In *Mitsugen Glazes Ltd.*³⁴, ‘Where the company admitted its liabilities but could not pay, even after statutory notice has been given and its post-dated cheques were also dishonored, the court passed winding – up order’.³⁵

[¶ 12] The Hon’ble Apex court held that: (1) Failure to pay agreed statutory interest is ‘debt’. (2) No legal requirement that the entire ‘debt’ must be definite and certain. (3) If dues as regards principal amount stands admitted, fact that there is a dispute as to agreement for payment of interest

³⁰ G.K.W. Ltd., v. Shriram Bearings Ltd., (1998) 18 SCL 461 (Delhi), Also in Indu Engineering & Textiles Ltd. v. Deep Special Steels Ltd., (1996) 87 Comp. Cas. 133.

³¹ NEPC India Ltd. v. Indian Airlines Ltd., (2003) 44 SCL.

³² The Companies Act, § Section 271 (1) (b), 2013 (18 of 2013).

³³ Page 5, ¶14 and 15, Case Data.

³⁴ Mitsugen Glazes Ltd. v. Varkey Overseas Trading Co. Pvt. Ltd., (2000) 24 SCL 393.

³⁵ Kola Jagganatha Reddy v. Harshita Polymers (P.) Ltd., (1999) 2 Comp. LJ (AP) 42.

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payable, would not result in dismissal of petition. (4) Inability to pay the debt even after statutory procedural compliance. This would entitle to admission of this winding up petition.³⁶

[II.C] THERE IS A PRIMA FACIE ‘NEGLECT AND REFUSAL TO PAY.’

[¶ 13] SOS maliciously forbear to discharge the rightful debt due to its creditor. It sanctioned a loan worth 50 Cr. to GI³⁷, but couldn’t fulfill their lawful contractual obligation of Rs. 13.92 Cr³⁸. They chose not to pay the due debt. Thus, the Tribunal should, in the interest of public order winding up, to unwarily prevent jeopardy of public interests.³⁹

[II.D] NO BONA FIDE DEFENCE AGAINST SUCH AN ACT OF NON – PAYMENT OF DEBT.

[¶ 14] (1) SSA, does not envisage any clause that deficiency in goods would lead to nonpayment. (2) The defect in goods was in the marketplace model and payment was due for inventory model⁴⁰, they are distinct and different categories and can’t be cumulated with one another.⁴¹ (3) Such a defence for non – payment that goods supplied were defective, is neither *bona fide* nor probable.

³⁶ Vijay Industries v. NATL Technologies Ltd., (2009) 3 SCC 527.

³⁷ Page 3, ¶11, Case Data.

³⁸ Page 5, ¶14, Case Data.

³⁹ Dena Bank v. Khataau dyes & Fibres Ltd., [1995] 83 Comp. Cas. (Bom.) 632.

⁴⁰ Page 3, ¶8, Case Data.

⁴¹ Shyam Dri Power Ltd. v. Bhav Shakti Steel Mines P. Ltd., (2013) 177 Comp. Cas. (Del) 248.

[ISSUE III] WHETHER THE COMPANY IS LIABLE TO BE WOUND UP ON ACCOUNT OF OPPRESSION TOWARDS THE MINORITY SHAREHOLDERS, THEREBY RENDERING A JUST AND EQUITABLE GROUND?

[¶ 15] It is humbly submitted that the loan advancement in question is illegal and violative of the provisions of The Act, as a related party transaction has been undertaken and an invalid loan to a director has been sanctioned, thereby oppressing the minority shareholders.

[III.A] SAM AND GALILEO ARE RELATED AND INTERESTED PARTIES.

[¶ 16] Sam is a related party, per S. 2(76)(i) of The Act and he exercises “control”, by way of S.2(27) of The Act in GI and is also an interested director, per S. 2(49) of The Act.

[III.B] RELATED PARTY TRANSACTION HAS BEEN UNDERTAKEN.

[¶ 17] (1) Per the provision of s. 188(1) of The Act, except with the consent of the board, given by a resolution at a meeting of a board, subject to the prescribed conditions, no company shall enter into an agreement with a related party⁴². (2) Per RC 49(VII) (E)⁴³, all material RPT shall inquire approval of the shareholders through a special resolution and the related parties shall abstain from voting on such resolutions, but evidently, this clause was violated.⁴⁴

⁴² A.R Sundarsanam v. Madras Purasawalkam Hindu Janapokara Saswatha Nidhi Ltd, (1985) 57 Comp. Cas. (Mad) 776.

⁴³ Revised Clause 49 of the Listing Agreements, 2014.

⁴⁴ Page 3, ¶11, Case Data.

[III.C] A LOAN TO A DIRECTOR IS STATUTORILY PROHIBITED.

[III.C.1] Sam exercises control in Galileo and is an interested director.

[¶ 18] By virtue of s. 2(10), a board means a ‘board of directors’ and they have a statutory right to vote in board resolutions. Furthermore, Sam exercises control in Galileo based on his shareholding pattern which is more than 10%, per the provision of s. 2(27) of The Act. Also, he is an interested director in Galileo, as per section 184(2) (a) of The Act.

[III.C.2] Resolution so passed is not in compliance with The Act.

[¶ 19] (1) S.185 r/w s. 188 of The Act, very clearly mentions that a loan to any director, or any related party or any other entity in which a director is interested⁴⁵ is prohibited by law and if any such transaction takes place, it has to be ratified in a general meeting of shareholders by a special resolution, as in s.114 of The CA. (2) In such a resolution, the interested and related parties have to abstain from voting⁴⁶, which clearly did not happen in the instant case. Hence, the resolution so passed was *prima facie* non statutory and against the provisions of The CA⁴⁷.

[III.D] THE MINORITY SHAREHOLDERS HAVE BEEN OPPRESSED BY THE REST MAJORITY SHAREHOLDERS.

[¶ 20] In V.S. Krishnan⁴⁸, the Hon’ble Supreme Court has stated that “*the constitution of oppression is fundamentally a question of fact*”. Moreover, a survey of various judicial pronouncements tells us that denying voting rights to the shareholders is a *prima facie* act of

⁴⁵ Walchandnagar Industries Ltd. v. Ratanchand Khimchand Motishaw, (1953) 23 Comp. Cas. (Bom) 343.

⁴⁶ Needle industries India ltd v. Needle Industries Newey Holding Ltd, (1981) 51 Comp. Cas. (SC) 743.

⁴⁷ First Leasing Company of India Ltd. v. Addl. Registrar of Companies, (1997) 89 Comp. Cas. (Mad) 635.

⁴⁸ V.S. Krishnan v. West fort Hi-Tech Hospital Ltd., (2008) 83 SCL 44/142 Comp. Cas. (SC) 235.

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oppression, which entitles them to file a petition for winding up on the same ground. Moreover, In *Shanti Prasad Jain*⁴⁹, the Apex Court ruled that if a company undertakes any related party transaction without calling a general meeting or passing a resolution, it constitutes an act of oppression *per se*. Thereby, the company should be wound up.

[ISSUE IV] WHETHER THE IMPLEADING PETITIONS FILED BY ITD AND STD ARE MAINTAINABLE OR NOT?

It is humbly submitted that ITD and STD, both are ‘necessary parties, to the suit. No orders can be passed effectively without adding these parties.’⁵⁰ Only a *prima facie* satisfaction is required for deciding impleadment of the parties and is imperative for a proper adjudication of the suit.⁵¹

[IV. A] PETITION FILED BY THE ITD IS NOT PREMATURE.

[¶ 21] Tax due and payable under s. 140A (1) of The I-T Act is a ‘civil debt.’⁵² After the tax becomes payable, the relationship between the Government and the assessee is that of a ‘creditor’ and ‘debtor’.⁵³ It has been settled in *Imperial Chit Fund*,⁵⁴ that the amount set aside u/s.178 of The ITA⁵⁵ will not be available for distribution in accordance with the provisions of The CA⁵⁶ and

⁴⁹ *Shanti Prasad Jain v. Kalinga Tubes Ltd*, (1965) 35 Comp Cas. (SC) 351.

⁵⁰ *Chaganti Lakshmi Rajyam v. A.P. Abdul Hameed*, 1999 AIHC 4037 (Mad).

⁵¹ *Akhshay Vidayala Charitable Trust v. E. Kala Devi*, (2002) 2 CCC 116 (Mad).

⁵² *Kashiram v. Income-Tax Officer*, (1977) 107 ITR (AP) 825.

⁵³ *A.M. Sali Maricar v. Income-Tax Officer*, (1973) 90 ITR (Mad) 116.

⁵⁴ *Imperial Chit Fund v. ITO*, (1996) 8 SCC 303.

⁵⁵ The Income Tax Act, § 178, 1961.

⁵⁶ The Companies Act, § 327, 2013.

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should be first applied to the satisfaction of tax liability, in the same way, as a ‘secured creditor’, who stands outside the winding up.⁵⁷

[IV.B] STALWART IS LIABLE TO PAY VAT AND CST IN KARNATAKA.

[¶ 22] Stalwart’s ‘*principal place of business*’ is located in Karnataka and not TN. Place of business is where a dealer ‘purchases’ or ‘sells’ goods.⁵⁸ Furthermore, per s. 6 of KVAT Act,⁵⁹ ‘sale or purchase of goods shall be deemed to have taken place in the State where goods are present at the time when contract was made.’ It is irrespective of the ‘place’ where the contract of the sale or purchase is made.

[ISSUE V] WHETHER INCOME TAX DEPARTMENT HAS A SIZEABLE TAX CLAIM AGAINST STALWART OR NOT?

[¶ 23] It is humbly submitted that ITD has tax claim over loan advanced by SOS to GI. There are three contentions in support of the same:

[V.A] LOAN ADVANCEMENT IS A ‘DEEMED DIVIDEND’.

[¶ 24] Any loan transferred by a Co. to a shareholder holding not less than ten per cent of the voting shares in that Co., or to any ‘concern’ in which such shareholder is a member and has a ‘*substantial interest*’⁶⁰ to the extent to which the Co. in either case possesses accumulated profits

⁵⁷ *Supra*, Note 54; ITO v. Indian Traders Bank Ltd., (1968) KLT 595.

⁵⁸ Karnataka Value Added Tax Act, § 2(23), 2003.

⁵⁹ Karnataka Value Added Tax Act, § 6, 2003.

⁶⁰ The Income Tax Act, § 2(32), 1961.

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is ‘deemed to be dividend’.⁶¹ This section plainly seeks to bring within its ambit, the net accumulated profits which are distributed by closely held companies to its shareholders in the form of loans.⁶² Object of this section is to prevent companies to distribute dividends in form of loan.⁶³ It is submitted that Stalwart is liable to pay tax u/s 2(22) (e) r/w s. 56 of The Act.

[V.A.1] Parties in transaction fulfills the requirements mentioned in s. 2(22) (e).

[¶ 25] In order to attract the provision of s. 2(22) (e) the person ‘shall be a beneficial owner of shares and must hold at least 10% of voting power in the lender company’.⁶⁴

[¶ 26] Sam and Galileo, both are beneficial shareholders in SOS holding at least 10% shares each. Furthermore, Sam also holds 24.99% voting shares in Galileo⁶⁵ and therefore, he has a ‘*substantial interest*’⁶⁶ in that company.

[V.A.2] Loan was advanced as a part of accumulated profit.

[¶ 27] The loan advanced to a shareholder by such company can be deemed to be a dividend only to the extent, it is shown that the company possessed accumulated profit at the date of loan.⁶⁷ The mere fact that Stalwart is unable to clear invoices raised by Global does not exempt this loan advancement from being a part of ‘*accumulated profit*’.

⁶¹ *Supra* Note 60.

⁶² CIT v. Shri Raj Kumar, (2009) 318 ITR (Delhi) 462.

⁶³ G.R. Govindarajulu Naidu and Anr. v. CIT, (1973) 90 ITR (Mad) 13.

⁶⁴ Cargil India Pvt. Ltd. v. Assistant Commissioner of Income-tax, (2015) SCC Online ITAT 7876.

⁶⁵ Page 3, ¶ 10, Case Data.

⁶⁶ Smt. Gunvanti R. Mehta v. ITO, (1993) 45 ITD 382; see also K. CHATURVEDI & S.M. PITHISARIA, INCOME TAX LAW, 60.

⁶⁷ Navnit Lal C. Javeri v. K.K. Sen, (1965) 56 ITR 198.

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[¶ 28] In *P.K. Badiani*⁶⁸, the Apex Court held “at the position of payment, only the debit balance of the assessee with the company at any time could not be taken to represent and advance or loan of a company.”⁶⁹ A company may carry on business and may also derive income from various other sources.⁷⁰ Per s. 2(22) (e), ‘accumulated profits includes general reserves’.⁷¹

[V.A.3] Repayment of money advanced is not an exemption in s. 2(22) (e).

[¶ 29] It has been established in *Tarulata Shyam*,⁷² that repayment of loan taken is also covered in the stated section. It was held that even if ‘loan advanced to a shareholder was re-paid within 23 days it shall still be a deemed dividend u/s 2(22) (e) of The Act.’⁷³

[V.B] INDIA-SINGAPORE DTAA IS NOT APPLICABLE.

[¶ 30] Sam is an Indian citizen and a ‘tax resident’⁷⁴ and therefore, the treaty is not applicable in the instant case. It is clearly stated u/s 90A (4) of The Act that no relief is entitled to an assessee who is not a resident in a specified territory outside India.

[¶ 31] Per Article 10(4) of the treaty, term ‘*dividend*’ also includes ‘income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the state of which the company making distribution is a resident.’⁷⁵ The amount here is income under

⁶⁸ P.K. Badiani v. CIT, (1976) 105 ITR 642.

⁶⁹ *Id.*

⁷⁰ Tarulata Shyam & Ors. v. CIT, (1977) 108 ITR (SC) 345.

⁷¹ CIT v. K. Srinivasan, (1963) 50 ITR 788 (Mad).

⁷² *Supra* note 71; Walchand & Co. P. Ltd v. CIT, (1993) 204 ITR 146 (Bom).

⁷³ *Id.*

⁷⁴ Page 3, ¶ 10, Case Data.

⁷⁵ India-Singapore DTAA, Art. 10(4).

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The Act as already proved above. Moreover, s. 90 of The Act is to be only exercised for the purpose of ‘avoidance of double taxation’ or relief where double taxation has already taken place.⁷⁶ Provisions of The Act are applicable where treaty is silent.⁷⁷

[V.C] STALWART IS LIABLE TO PAY TAX ALONG WITH S INTEREST AND FINE.

[¶ 32] It is humbly submitted that U/s 201, Stalwart is deemed to be an ‘*assessee in default*’ as it failed to withhold tax in the dividend advanced to Galileo. The precondition for the applicability and/or operation of s. 201 is that the assessee is required to deduct tax at source in accordance with the provisions of the Act.⁷⁸ It is humbly submitted that Stalwart was liable to pay tax as per section 115-O of the Act which it failed. Stalwart herein is liable to pay tax along with the SI as per the provision.⁷⁹ Furthermore, Stalwart is liable for additional penalty u/s 271 C for failure to deduct tax at source and u/s 221⁸⁰ of The Act for default in making payment of tax.

[ISSUE VI] WHETHER STALWART IS LIABLE TO PAY VAT AND CST TO THE SALES TAX DEPARTMENT OF BENGALURU, KARNATAKA OR NOT?

[¶ 33] It is humbly submitted that Stalwart is liable to discharge its CST and VAT liability in Karnataka.

⁷⁶ UOI v. Azadi Bachao Andolan, 263 ITR 706 (2003); Indian Express v. UOI, 159 ITR 856 (SC); DINESH VYAS, THE LAW AND PRACTICE OF INCOME TAX, 1515.

⁷⁷ Central Board of Direct Taxes, Circular No. 333, (1982) 137 ITR (St.) 1; *Supra* Note 67.

⁷⁸ Bovis Lend Lease (India) P. Ltd. v. Income Tax Department, (2010) 127 TTJ 25.

⁷⁹ The Income Tax Act, §201(1A), 1961.

⁸⁰ The Income Tax Act, §221, 1961.

[ARGUMENTS ADVANCED]

[VI.A] STALWART ONLINE IS A DEALER AS PER DEFINITION OF DEALER IN K VAT ACT, 2003.

[¶ 34] Stalwart, an e-commerce entity, is a ‘dealer’, per s. 2(12) of KVAT Act under its marketplace model. E-commerce is defined as means of ‘buying’ and ‘selling’ of goods and services over digital network.⁸¹

[VI.A.1] Stalwart is carrying out a business of selling.

[¶ 35] Requirement for a person to come within the meaning of ‘dealer’ is that he must ‘carry on the businesses of selling and/ or supplying goods’.⁸² Herein, the expression ‘carrying on business’ implies that there must be some systematic or organized course of activity with a set purpose of making profit.⁸³

[¶ 36] It is asserted that the situation where business is dealt by person other than the actual dealer, such person would be eligible to sales tax in the same manner.⁸⁴

[VI.A.2] Respondent is acting as a commission agent under KVAT Act.

[¶ 37] A commission agent, buying, selling, supplying or distributing goods on behalf of any principal is a dealer.⁸⁵ Every person who, for an agreed commission, buys or sells on behalf of any principal is liable to tax under KVAT Act.⁸⁶ Sale or purchase need not be done by the person

⁸¹ Press Note 3, Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, (2016).

⁸² PRAKASH SAHAY, ‘PRINCIPLES OF VAT IN INDIA’, 205.

⁸³ State of A.P. v. H. Abdul Bakshi & Bros., (1964) 15 STC (SC) 644; see also, Hindustan Steel Ltd. v. State of Orissa, (1970) 25 STC (SC) 21; Ramaben Panubhai Patel through P.O.A. Manoj Bhai v. M.B. Parmar, (2001) 1 GLR 144.

⁸⁴ Mesco Properties Ltd., In re, (1980) WLR 96; (1980) 1 All ER 177 (CA).

⁸⁵ The Karnataka Value Added Tax Act, § 2(12) (c), 2003.

⁸⁶ The Karnataka Value Added Tax Act, § 8, 2003.

[ARGUMENTS ADVANCED]

himself and he may be considered a dealer even if he makes the sales through an agent.⁸⁷ In this situation, the goods sold may belong to any other person.⁸⁸

[VI.A.3] *Dominion over goods is immaterial.*

[¶ 38] An assessee has no dominion over goods and is not involved as a selling agent, but the activities of an assessee indicate that he has authority to conclude the bargain on behalf of the seller, he shall be considered as a ‘dealer’.⁸⁹ An agent for the collection of the sale price of goods or as a guarantor for such payment shall be deemed to be a dealer.⁹⁰ Stalwart is not merely bringing the sellers and the buyers together; instead it is holding a right to dispose the goods by passing a valid title over them to the purchases.⁹¹

⁸⁷ State of Mysore v. A.C. Hanumanthappa, (1955) 6 STC (Mys.) 3.

⁸⁸ Kishenchand Tolaram v. A.B. Ghanekar, (1961) 12 STC (Bom) 562.

⁸⁹ C.S.T. v. Co-operative Marketing Society, (1975) 35 STC (All) 171; Co-operative society Ltd. v. C.S.T., (1972) 29 STC (All) 619.

⁹⁰ The Central Sales Tax Act, Explanation 1 (iii), §.2 (b), 1956 (Act LXXIV of 1956).

⁹¹ Kandula Radhakrishna Rao v. Province of Madras, (1952) 3 STC 121; see also, Bagalkot Cement Co. v. State of Mysore, (1976) 37 STC (SC) 73; Tamil Nadu Value Added Tax Act, § 2(15), 2006; Citi Bank v. Commissioner of Sales Tax, (2016) 68 taxmann.com 296 (Delhi); HDFC Bank Ltd. v. The State of Tamil Nadu, (2016) 88 VST (Mad) 239.

[PRAYER]

PRAYER

Wherefore, in the light of the facts presented, issues raised, argument advanced and authorities cited, it is most humbly prayed before the Hon'ble National Company Law Tribunal of Karnataka that it may be pleased to adjudge, declare, and issue the following orders:-

1. That, Stalwart should be wound up on the grounds of inability to pay debt and just and equitable.
2. That, Stalwart is liable to pay income tax on the loan advanced to the shareholders and should ensure that their dues are correctly crystallized.
3. That, Stalwart should discharge its VAT and CST liabilities towards the Sales Tax Department.
4. That, an official liquidator should be appointed to settle the dues of Global Office Suppliers.

The Hon'ble Tribunal may be pleased to pass any other order as it deems fit in the interest of Justice, Equity and Good Conscience.

For this act of Kindness, the Petitioner shall duty bound forever pray.

Place: Karnataka

Sd/-

Dated: February, 2017

(Counsel for the Petitioners)