

**15th SURANA & SURANA NATIONAL CORPORATE LAW MOOT
COURT COMPETITION, 2017**

**BEFORE
THE NATIONAL COMPANY LAW TRIBUNAL, BANGALURU**

Company Application (CA) 1 of 2017

Company Application (CA) 2 of 2017

Company Application (CA) 3 of 2017

in

Company Petition (CP) 10 of 2017

IN THE CASE CONCERNING THE WINDING UP OF THE COMPANY

GLOBAL OFFICE SUPPLIERS PVT. LTD, BENGALURU (APPLICANT)

SHAREHOLDERS OF STALWART ONLINE STORES PVT LTD (APPLICANT)

ADDITIONAL COMMISSIONER OF INCOME-TAX, BENGALURU (APPLICANT)

DEPUTY COMMISSIONER OF COMMERCIAL TAX, BENGALURU (APPLICANT)

v/s

STALWART ONLINE STORES PVT LTD, BENGALURU (RESPONDENT)

MEMORIAL FROM THE SIDE OF APPLICANT

THE TABLE OF CONTENTS

- **THE INDEX OF AUTHORITIES..... IV**
- **THE LIST OF ABBREVIATION..... XII**
- **THE STATEMENT OF JURISDICTION..... XV**
- **THE STATEMENT OF FACTS..... XVI**
- **THE STATEMENT OF ISSUES..... XVII**
- **THE SUMMARY OF ARGUMENTS..... XVIII**
- **THE ARGUMENTS ADVANCED..... 1**

ISSUE I: THE WINDING UP PETITION AND IMPEADING PETITION ARE ADMISSIBLE IN

NATIONAL COMPANY LAW TRIBUNAL,..... 1

- 1. Admissibility of winding up petition..... 1**
- 2. Admissibility of impleading petition..... 2**
- 3. Alternate remedy is not a bar.....3**
 - a. Arbitrator has no power to wind up the company..... 3*
 - b. Summary suit doesn't prohibit from filing winding up..... 4*

ISSUE II: Stalwart is liable to wind up under 433(e) & 433(f) of the Companies Act,

1956..... 4

- 1. Stalwart is liable to be Wound Up under section 433(e)..... 4**
- 2. Stalwart is liable to Wound Up under section 433(f)..... 5**
 - a. The Advancement of Loan is Not in Accordance with Law & Oppression of remaining 26% Shareholders..... 6*
 - b. Siphoning of funds by Stalwart..... 7*
 - c. Stalwart, Galilio and Sam are Related Parties..... 7*

d. <i>Company should be Wound up under § 433(f)</i>	8
---	---

ISSUE III: The Impleading petitions filed by Income Tax Department & Sales Tax Department respectively are maintainable	9
--	----------

1. The NCLT has jurisdiction to hear the Parties	9
2. Tax departments can be impleaded in a winding up petition	10

ISSUE IV: Stalwart is an assessee in default for the loan advancement made to Galileo	11
--	-----------

1. The benefits of DTAA are not applicable	11
2. The Loan Advancement is not subjected to tax in India	12
a. <i>The loan advancement is a dividend</i>	12
b. <i>The loan advancement is subject to TDS in India</i>	12

ISSUE V: Stalwart is liable to pay sales tax in Karnataka for the Sales made under the marketplace model	13
---	-----------

1. Stalwart is a dealer	13
a. <i>Stalwart is involved in business of selling</i>	14
b. <i>Stalwart is indirectly involved in supplying and distributing goods</i>	14
2. Stalwart is liable to discharge VAT and CST liabilities in Karnataka for the sales made under marketplace model	15

• THE PRAYER	XIX
---------------------------	------------

THE INDEX OF AUTHORITIES**SUPREME COURT CASES**

SE NO	CASE LAW NAME	PAGE
1	Anwar Khan Mehboob Co. v. CST, (1970) 2 SCC 294 ¶¶7, 8.	15
2	A. Ayyasamy v. A. Paramasivam & others (2016) 10 S.C.C. 386 ¶21.	4
3	Assn. of India v. State of Karnataka, (1993) 1 SCC 409	15
4	B. Gangadhar v. B.G. Rajalingam, (1995) 5 SCC 780 ¶5.	14
5	BSNL v. UOI & Ors., (2006) 3 SCC 1 ¶35	14
6	CIT v. Mysodet (P.) Ltd., [1999] 103 Taxman 336 (SC) ¶10.	13
7	Chowringhee Sales Bureau (P) Ltd. v. CIT, (1973) 1 SCC 46	
8	Cosmosteels (P.) Ltd. v. V Jairam Das Gupta (1978) 1 S.C.C. 215 ¶9.	6
9	Cotton Corpn. of India Ltd. v. United Industrial Bank Ltd., (1983)4 S.C.C. 625	4
10	Dale & Carrington Pvt. Ltd and Anr. v. P.K. Prathapan & ors.,(2005) 1 S.C.C.212 ¶11,13	7
11	Executive Engineer & Anr. v. Shri Seetaram Rice Mills, 2011 Indlaw SC 822, ¶32.	13
11	Govindlal Chhaganlal Patel v. Agriculture Produce Market Committee, Godhra & ors. (1975) 2 S.C.C. 482 ¶13.	7
12	G.E. Technology Centre (P.) Ltd. v. CIT, [2010] 327 ITR 456 ¶7.	12
13	Gunwantlal v. State of M.P., AIR 1972 SC 1756 ¶4	14
14	Haryana Telecom ltd. v. Sterlite Industries (India) ltd.,(1999) 5 S.C.C. 688 ¶5.	3,4
15	IBA Health (I) (P.) Ltd. v. Info-drive systems SDN BHD [2010] 10 S.C.C. 553 ¶22.	5
16	Imperial Chit Fund (P.) Ltd. v. ITO, (1996)8 SCL 1517 ¶¶ 16 ,17..	10
17	Iyanahalli Bakkappa and Sons v. State of Mysore, (1972) 4 SCC 523	15
18	M.S.D.C Radharamanan v. M.S.D Chandrasekara Raja & Anr. (2008) 6 S.C.C.750 ¶19.	9

15TH SURANA & SURANA NATIONAL CORPORATE MOOT COURT COMPETITION, 2017

19	Madan Lal v. State, (2003) 7 SCC 465 ¶24.	14
20	Mechalec Engineers and Manufacturers v. Basic Equipment Corporation (1976) 4 S.C.C. 687	6
21	Mediquip Systems (P) Ltd. v. Proxima Medical Systems (2005) 7 SCC 42 ¶19.	5
22	National Textile Workers' Union and others v. P. R. Ramakrishnan, (1983) 1 S.C.C. 228 ¶71	3
23	Punjab Distilling Industries Ltd. v. CIT, [1965] 57 ITR 1 (SC) ¶10	12
23	Ramesh Chandra Kundan Mittal Mal v. Municipal Corpn. Of Greater Bombay, (1992) 2 S.C.C. 524 ¶¶ 13,14.	2
24	Sangramsinh P. Gaekwad and Ors. v. Shantadevi p. Gaekwad (dead) through Irs. & Ors.(2005) 11 S.C.C.314	6
25	Severn Trent Water Purification Inc v. Chloro Controls (India) Pvt. ltd. & other (2008) 4 S.C.C. 380 ¶49.	3
26	Shamrao Vithal Coop. Bank Ltd. v. Kasargode Panduranga Maliya,(1972) 4 S.C.C. 600 ¶6.	14
27	State Bank of Bikaner & Jaipur v. National Iron & Steel Rolling Corpn, (1995) 2 S.C.C. 19	10
28	State of Himachal Pradesh v. Kailash Chand Mahajan, AIR 1992 S.C. 1277	8
29	State of Karnataka v. Ranganatha Reddy, (1977) 4 SCC 471 ¶82	15
30	State of Orissa v. Binapani Dei, A.I.R. 1967 S.C. 1269 ¶12.	2
31	State of Tamil Nadu v. M.K. Kandaswami, [1975] 4 SCC 745	14
32	S.V. Kandoskar, Official Liquidator & Liquidator of the Colaba Land & Mills Co. Ltd. v. V.M. Deshpande, Income Tax Officer, [1972] 83 ITR 685,¶17	9
33	Tata Consultancy Services v. State of A.P., (2005) 1 S.C.C. 308 ¶81.	13
34	Transmission Corpn. Of A.P. Ltd. v. CIT, [1999] 105 Taxman 742 (SC) ¶9.	13
35	Union of India v. Elphinstone Spinning and Weaving Co. Ltd. A.I.R. 2001 S.C. 724.	8

15TH SURANA & SURANA NATIONAL CORPORATE MOOT COURT COMPETITION, 2017

36	Union of India v. K.G. Khosla, (1979) 2 S.C.C. 242.	15
37	Union of India v. R. Gandhi, president, Madras Bar Assn.,(2010) 11 S.C.C. 1 ¶121	1
	Vijay Industries v. NATL Technologies Ltd. (2009) 3 S.C.C. 527 ¶34.	5

HIGH COURTS & TRIBUNAL

38	Asstt. CIT v. Hindustan Urban Infrastructure Ltd., [2015] 53 taxmann.com 331 ¶43.	13
39	Asstt. CIT v. Bhaumik Colour (P.) Ltd., [2009] 118 ITD 1 (Mum) ¶¶ 23,24.	12
40	Asstt. CIT v. Pravin C. Pandya, [2013] 38 taxmann.com 408 ¶ 3.2.	12
41	Asstt. CIT v. Y.V. Rajashekhara Babu, [2011] 13 taxmann.com 232 (Visp.). ¶7	12
42	B.V. Satyanarayanan v. Vivek Kulkarni, (2009) 150 Comp. Cas. 216 (CLB) ¶6	6
43	Bagalkot Cement Co. Ltd. v. State of Mysore , 1970 SCCOnline Kar 261 ¶11	14
44	Bagmane Constructions (P.) Ltd. v. CIT, [2015] 57 taxmann.com 120 (Kar.) ¶25 .	12
45	Bharat Heavy Electricals Ltd. v. Union of India [1996] 102 STC 373	15
46	C.C.E. v. Sri Krishna Rajendra mills.,[1992] 1992 taxmann.com 402 (CEGAT- New Delhi).	10
47	Chandrasekhar Maruti v. ACIT, [2016] 71 taxmann.com 239 ¶8. .	12
48	CIT v. M/s Kingfisher Airlines Ltd., 2014 SCC Online Kar 7700 ¶13.	9
49	CIT v. K Srinivasan, [1963] 50 ITR 788 (Mad.) ¶¶ 4,5 .	12
50	CIT v. Mahesh Chandra Mantri, [2015] 234 Taxman 158 (Cal.) ¶3.	12
51	CIT v. National Travel Services, [2011] 14 taxmann.com 14 (Del.) ¶ 19	12
52	CIT v. Raj Kumar, [2009] 181 Taxman 155 (Del.) ¶9.	12
53	CIT v. Standipack, [2012] 20 taxmann.com 19 (Del.).	12
54	Corporate Ispat Alloys ltd. v. Jayaswal Neco Industries ltd. 2016	4

15TH SURANA & SURANA NATIONAL CORPORATE MOOT COURT COMPETITION, 2017

	S.C.C. OnLine Bom. 70 ¶¶ 4,5.	
55	CPI India Real Estate Venture Ltd. v. Perpetual Infracon (P.) Ltd. [2014] 49 taxmann 25 (CLB - New Delhi) ¶37.	6
56	Daulat Makanmal Luthria v. Solitaire Hotels (P.) Ltd. [1993] 76 Comp. Cas. 215 (Bom.) ¶16 .	8
57	Dep. CIT v. Encore Technologies Pvt. Ltd., 2016 SCC OnLine ITAT 143 ¶5.2.	12
58	Dep. CIT v. Atul Engg. Udyog, [2011] 133 ITD 1(Agra) ¶18.	12
59	Dilip Kumar Swain v. Executive Officer, Cuttack Municipal Corporation 1996 S.C.C. OnLine Ori 236	6
60	Hegde & Golay Ltd. v. S.B.I. 1985 S.C.C. OnLine Kar. 428 ¶¶ 17,34,41.	5
61	Imperial Corporate and Services (P) Ltd. v. Aruna Sugars and Enterprises Ltd., 2002 S.C.C. OnLine Mad. 659 ¶8.	5
62	In Re: Sahara India Real Estate Corporation Limited and Sahara Housing Investment Corporation Limited, MANU/SB/0045/2011	8
63	Indian Associates v. Shivendra Bahadur Singh, A.I.R. 2003 Del. 292 ¶30.	2
64	Integrated Broadcasting Co. (P.) Ltd. v. Netlinx Ltd. [2012] 23 taxmann.com 371 (AP) ¶¶9,10.	3,5
65	ITO v. Kalyan Gupta, [2007] 11 SOT 530 (Mum) ¶20.	13
66	Joti Prasad Bala Prasad v. A.C.T. Developers, 1989 S.C.C. OnLine Del. 234 ¶¶ 5,6.	5
67	K.P Chackochan v. The Federal Bank & ors. 1989 S.C.C. OnLine Ker. 108.¶20	8
68	Kamadenu Enterprises v. Vivek Textile Mills P. Ltd. (1984) 55 Comp. Cas. 68 (Kar.) ¶4.	4
69	Kandula Radhakrishna Rao & Ors. v. The province of Madras, (1952) 65 LW 250	14
70	Keerat Kaur v. Patiala Exhibitors Pvt. Ltd., 1990 SCC OnLine P&H. 677 ¶6.	3
71	Krishna Kilaru v. Maytas Properties Ltd., 2012 S.C.C. OnLine A.P. 1049	4

15TH SURANA & SURANA NATIONAL CORPORATE MOOT COURT COMPETITION, 2017

72	Krishnan S v. Rathinaval Naicker, 2006 Indlaw MAD 1973 ¶16.	10
73	Madhya Pradesh Iron & Steel Co. v G.B. Springs (P.) Ltd. 2002 S.C.C. OnLine Del. 1371 ¶3.	4
74	Madura Coats (P.) Ltd., In re, [2005] 145 Taxman 366 (AAR-New Delhi)¶6.	6
75	Naresh Sharma v. ITO, 2015 SCC OnLine ITAT 6940 ¶¶8,10.	12
76	Official liquidator of Piramal Financial Services ltd. V. R.B.I. (2004) 118 Comp. Cas. 27.	4
77	Official Liquidator, Radel Services (P.) Ltd. vs. Southern Screws (P.) Ltd., [1988] 63 Comp. Cas. 749 (Mad.) .	10
78	P.G. Vivekanandan v. R.P.S. Benefit fund Ltd. [2004] 49 SCL 671 (MAD.) ¶40.	7
79	Parmod Kumar Dang v. Jnt. CIT, [2006] 6 SOT 301 ¶10.	12
80	Philips Carbon Black Ltd. v. Anil Kumar Poddar, 2010 S.C.C. OnLine Cal. 2129 ¶4.	3
81	PILCOM v. CIT (TDS), Kol., [2012] 347 ITR 410 ¶10.	9
82	Re, Anglo Continental Produce Co. Ltd. (1939) 1 All ER 99 ¶20	8
83	S.B.I. v. Hegde & Golay Ltd. [1987] 62 Comp.Cas. 239(Kar.) ¶17	5
84	Shahdara (Delhi) Saharanpur Light Railway Co. Ltd. v. ITO (1988) 63 Comp. Cas. 627 (Cal.).	9
85	SICOM Ltd. v. Entertainment World Developers (P.) Ltd, 2016 taxmann.com 212 (Bom.).	2,5
86	Smt. P. Sridevi v. Cherishma Housing P. Ltd., 2008 S.C.C. OnLine A.P. 864 ¶41.	8
87	Smt. Ushar R. Shetty v. Radeesh Rubber Pvt. Ltd. [1995] 84 Comp. Cas. 602 (Kar.).	1
88	Sojitz Corporation v. Teracom Ltd. [2013] 36 taxmann.com 83 (Bom.).	5
89	State of Kerala v. Official Liquidator, (1987) 62 Comp. Cas. 742 (Ker.).	9
90	State of Maharashtra v. Official Liquidator of Reliance Heat Transfer (P.) Ltd., MANU/MH/0127/2004.	10

15TH SURANA & SURANA NATIONAL CORPORATE MOOT COURT COMPETITION, 2017

91	Subban Beigh v. Govt. of Mysore, AIR 1953 Mys 19 ¶3.	14
92	Surana Industries Ltd. and etc. v. M/s. Good Earth Maritime Ltd. & Anr. 2005 S.C.C. OnLine Mad. 641¶4.	2
93	T.M. Mohandas v. Nectar Laboratories Ltd.,[2007] 140 Comp. Cas. 257 (AP) ¶28.	2
94	Tata Advanced Materials Limited v. Nil 2016 S.C.C. OnLine Kar. 1899 ¶9 .	7
95	Times Guaranty Financial Services Ltd. V. Perfect Pipes (P.) Ltd, [2004] 52 S.C.L.178 ¶ 2.	3
96	Unisystems Pvt. Ltd. v. Stepan Chemical Ltd., 1985 S.C.C. OnLine P&H 504 ¶7.	5
97	UOI v. Calcutta Hardware & Iron Syndicate [1984] 145 ITR 115 ¶6.	9
98	VIL Ltd. v. Raibareilly Allahabad Highway (P.) Ltd. [2016] 69 taxmann.com 260 (CLB - New Delhi) ¶19,	6
99	Waryam Singh v. Bhatinda Transport Co. P. Ltd., (1963) 33 Com. Cases 897 (Punj.) ¶¶ 2,4.	8

FOREIGN CASES

100	Tweeds Garages Ltd. <i>in re</i> :[1962] 2 W.L.R. 38.	5
101	Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (1982) 2 W.L.R. 31 ¶16.	7

STATUTES

1	Arbitration and Conciliation Act, No. 26 of 1996.
2	Income Tax Act, No. 43 of 1961.
3	Indian Contract Act, No. 9 of 1872.
4	General Clauses Act, No. 10 of 1897.
5	Karnataka Value Added Tax Act, 2003, No. 32 of 2004.
6	The Central Sales Tax Act, No. 74 of 1956.

TREATIES & CONVENTIONS

1	Agreement for avoidance of double taxation and prevention of fiscal evasion, India-Singapore, May 27 th , 1994.
2	Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

BOOKS

1	MULLA, THE CODE OF CIVIL PROCEDURE, (B.M. PRASAD <i>eds.</i> 17 th ed. 2007).
2	CR DATTA, THE COMPANY LAW, (ed. 6 th ,2008)
3	A RAMAIYA, GUIDE TO THE COMPANIES ACT, (ed. 17 th ,2010)
4	TAXMANN,COMPANY LAW, (eds. RAKESH BHARGAVA, ed.,2014)
5	D.P. MITTAL, INTERPRETATION OF STATUTES, (ed. 2 nd 2012)
6	D.P. MITTAL, INDIAN DOUBLE TAXATION AGREEMENTS & TAX LAWS (7TH ED. 2014)
7	Dr. G.K. KAPOOR, COMPANY LAW AND PRACTICE (ed. 21 st 2016).
8	JUSTICE G.P. SINGH, PRINCIPLES OF STATUTORY INTERPRETATION (ED. 13TH 2012).
9	JUSTICE S.B. MALIK,COMMENTARY ON THE ARBITRATION AND CONCILIATION ACT 181, (ed. 7 TH 2015)
10	KANGA & PALKHIWALA, THE LAW AND PRACTICE OF INCOME TAX (Arvind P Datar <i>eds.</i> ed. 10 th 2014).
11	N S BINDRA, INTERPRETATION OF STATUTES (LexisNexis, ed. 10 th)
12	SIR DINSHAH FARDUNJI MULLA,THE SALE OF GOODS ACT AND THE INDIAN PARTNERSHIP ACT, (ed.10 th 2012).

15TH SURANA & SURANA NATIONAL CORPORATE MOOT COURT COMPETITION, 2017**ARTICLES**

1.	Secretarial Standard on General Meetings of Shareholders: Next step towards Good Governance; [2016] 75 taxmann.com 316.
2.	Dr. K.R. Chandratre, Minority Oppression- is The Doctrine of 'Legitimate Expectation' Inapplicable In Respect of Proceedings Under § 397 of The Companies Act, [2009] 91 SCL 31 (MAG).
3.	Deborah DeMott: Defining Good Faith in the MBO Context, 25 WAKE FOREST L. REV. 15 (1990).
4.	Vikas R. Koteswar, Recovery of tax Dues in winding up proceeding ,An analysis of conflicting laws and judicial pronouncements.
5.	H. Padamchand Khincha, Interpretation of tax treaties vis-à-vis Judicial Precedents, [2016] 75 taxmann.com 19 (Article).
6.	Asem Chawla, Fourth NLSIR Symposium India's Taxation Regime: Perspectives on the proposed changes – Interpretation of tax treaties: An Art. Yet to be mastered, 23(2) NLSI. Rev. 1 (2011).

OTHER DOCUMENTS

1	G20/OECD PRINCIPLES OF CORPORATE GOVERNANCE, OECD 2015.
2	http://indiacorplaw.blogspot.in/2016/10/nclt-revolutionizing-realm-of-corporate.html .
3	http://www.mca.gov.in/Ministry/latestnews/Draft_Report_NareshChandra_CII.pdf .
4	OECD, COMMENTARY ON MODEL TAX CONVENTION, 2014.

THE LIST OF ABBREVIATIONS

&	And
¶	Paragraph
¶¶	Paragraphs
§	Section
₹	Rupees
A.A.R.	Authority of Advance Ruling
ACIT.	Assistant Commissioner of Income Tax
A.I.R.	All India Reporter
Anr.	Another
A.P.	Andhra Pradesh
Art.	Article
Assn.	Association
A.Y.	Assessment year
BOD's	Board of Directors
B/w	Between
C.B.D.T.	Central Board of Direct Taxes
CEGAT	Customs Excise & Gold Appellate Tribunal
C.I.T.	Commissioner of Income Tax.
C.L.B.	Company Law Board.
Co.	Company
Co. A.	Companies Act
Corpn.	Corporation

15TH SURANA & SURANA NATIONAL CORPORATE MOOT COURT COMPETITION, 2017

C.S.T.	Central Sales Tax
C.S.T.A.	Central Sales Tax Act
C.T.O.	Commercial Tax Officer
C.T.R.	Current Tax Report
D.C.I.T.	Deputy Commissioner of Income Tax.
D.I.T.	Director of Income Tax
D.T.A.A.	Double Taxation Avoidance Agreement
Dy.	Deputy
eds.	Editor
H.C.	High Court
Hon'ble	Honourable
I.A.A.	Indian Arbitration Act.
Id.	IBID
I.T.	Income Tax
I.T.A.	Income Tax Act
I.T.A.T.	Income Tax Appellate Tribunal
I.T.O.	Income Tax Officer
I.T.R.	Income Tax Reporter
J.C.I.T.	Joint Commissioner of Income Tax
KVAT	Karnataka Value Added Tax
KVATA	Karnataka Value Added Tax Act
Ltd.	Limited
L. Rev.	Law Review
M/s	Messer's

15TH SURANA & SURANA NATIONAL CORPORATE MOOT COURT COMPETITION, 2017

Mag.	Magazine
Manu.	Manupatra.
NCLT	National Company Law Tribunal
NCLAT	National Company Law Appellate Tribunal
OECD	Organization for Economic Cooperation and Development
Pvt.	Private
RBI	Reserve Bank of India
Rev.	Revised
RPT	Related Party Transaction
SBI	State Bank of India
S.C.	Supreme Court
S.C.C.	Supreme Court Cases
S.C.L.	SEBI and Corporate Laws
S.O.T.	Selected order of Tribunals
S.T.C.	Sales Tax Cases
TD's	Tax Departments
TDS	Tax deducted at source
Trib.	Tribunal
u/s	Under Section
w.e.f.	With effect from
v.	Versus
VAT	Value Added Tax
VCLT	Vienna Convention on Law of Treaties
W.L.R.	Weekly Law Report

THE STATEMENT OF JURISDICTION

Applicants have humbly approached the National Company Law Tribunal, Bengaluru under section 439(1)(d)¹ of Companies Act 1956.

The application for being impleaded as applicants are filed by Shareholders of Stalwart Pvt. Ltd., Additional Commissioner of Income Tax and Deputy Commissioner of Commercial Tax under *Order 1 Rule 10*² of The Civil Procedure Code 1908 read with section 446(2)³ of Companies Act 1956.

¹439. (1) An application to the [*Tribunal*] for the winding up of a company shall be by petition presented, subject to the provisions of this section,—

- (a) by the company; or
- (b) by any creditor or creditors, including any contingent or prospective creditor or creditors; or
- (c) by any contributory or contributories; or
- (d) by all or any of the parties specified in clauses (a), (b) and (c), whether together or separately

²Court may strike out or add parties—The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

³ 446(2): 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 391 by or in respect of the company;
- (d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the 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 before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960.

THE STATEMENT OF FACTS

HISTORY: Global Pvt. Ltd. (applicant) a company registered under Companies Act, 1956 and KVAT, having registered office in Bengaluru. Stalwart (respondent), a newly establish co. registered under Companies Act, 2013 has registered office in Bengaluru and corporate office in Chennai. Stalwart approached Global for entering into a sales and service agreement for delivering goods and services to the costumers of Stalwart. It was agreed that if any default occurs Stalwart will have to pay 24% S.I. and ₹20 lakhs fine per month.

WINDING UP: Global was delivering goods according to the contract. However, from July 2015 to June 2016 all the cheques were dishonoured amounting to ₹19.32 crores. Stalwart paid ₹6 crores to Galileo which were adjusted and total debt was of ₹13.92 crores. This amount was payable even after the statutory notice was given to Stalwart.

IMPLEADING PETITION BY SHAREHOLDER: Stalwart advanced a loan to one of its shareholders without informing other 26% shareholders. Moreover, there is no written loan agreement for the loan advancement. This is a related party transaction as only 74% shareholders voted. In that 20% was held by Sam who also had shares in Galileo and 24% was held by Galileo itself. Also such loan advancement was not in arm's length.

IMPLEADING PETITION BY INCOME TAX DEPARTMENT: The Income Tax department issued a notice u/s 201 of Income Tax Act, 1961 for not withholding of tax for the loan advanced to its shareholder Global and thus initiated proceedings for recovery. Thus, an impleading petition has been filed by income tax department.

IMPLEADING PETITION BY SALES TAX DEPARTMENT: The assessee Stalwart was issued a notice by the KVAT authorities for having failed to register itself as a dealer and discharge CST & VAT liabilities for the sales made under the marketplace model. The Sales Tax Department thus initiated for recovery proceedings. Thus, an impleading petition has been filed by sales tax department of Karnataka.

THE STATEMENT OF ISSUES

The following questions have been raised before this Tribunal to consider:

-ISSUE I-

WHETHER THE WINDING UP PETITION & IMPEADING PETITION ARE ADMISSIBLE IN NATIONAL COMPANY LAW TRIBUNAL?

-ISSUE II-

WHETHER STALWART IS LIABLE TO WIND UP UNDER 433(E) & 433(F) OF THE COMPANIES ACT, 1956?

-ISSUE III-

WHETHER IMPEADING PETITIONS FILED BY INCOME TAX DEPARTMENT & SALES TAX DEPARTMENT RESPECTIVELY ARE MAINTAINABLE?

-ISSUE IV-

WHETHER STALWART CAN BE CONSIDERED TO BE AN ASSESSEE IN DEFAULT?

-ISSUE V-

WHETHER STALWART IS LIABLE TO PAY SALES TAX IN KARNATAKA?

THE SUMMARY OF ARGUMENTS

ISSUE I: It is submitted that Stalwart is liable to wind up hence, the petitions filed under 433(e) and 433(f) should be admitted. The company has made the default of ₹13.92 crores. The company is also engaged in RPT and has oppressed its 26% shareholders resulting lack of faith in shareholders. There are no alternate remedies available.

ISSUE II: It is submitted that the company is unable to pay its debt even after the passage of statutory period. Also, Stalwart is involved in RPT with its shareholders which also leads to oppression of 26% shareholders and siphoning of funds.

ISSUE III: It is humbly submitted that the impleading petitions filed by the TDs are maintainable because *firstly*, the assessment of tax has been completed and the tax has been determined and thus NCLT has jurisdiction to scrutinize the tax claims & *secondly*, the TDs are secured creditor and their interest will be adversely affected on the outcome of the winding up petition.

ISSUE IV: It is humbly submitted that the assessee is an assessee in default because *firstly*, the benefits of DTAA will not be applicable on the loan advanced by the assessee because it goes against the object and purpose of the DTAA & *secondly*, the assessee failed to withhold tax for the loan advancement **u/s 195 of ITA** and thus is an assessee in default **u/s 201 of ITA**.

ISSUE V: It is humbly submitted before the Trib. that Stalwart is liable to pay sales tax in Karnataka because *firstly*, it is a dealer **u/s 2(12) of KVATA** for the sales made under the marketplace model and *secondly*, the situs of sale for the intra & interstate sales is at Karnataka.

THE ARGUMENTS ADVANCED

<p>I. THE WINDING UP PETITION AND THE IMPEADING PETITION ARE ADMISSIBLE IN THE NATIONAL CO. LAW TRIBUNAL (NCLT).</p>

It is pleaded before the Trib. that the winding up petition is filed after exhausting the statutory period.⁴ The Co., Stalwart is liable u/s 433(e) and also u/s 433(f) because the Co. has made its default and has lost the confidence of its remaining 26% shareholders.

1. ADMISSIBILITY OF THE WINDING UP PETITION

1.1. It is contended that NCLT has the special powers to decide the matter under its discretionary powers. SC has observed that the transfer of powers and jurisdiction, from Courts to NCLT and NCLAT is constitutional.⁵ The trib. can precede the winding up even if the Co. admits some of the liability and there is a dispute of other claims.⁶

1.2. §424(3)⁷ states the territorial jurisdiction of the Trib. §430⁸ stipulates that no other civil court will adjudicate such proceedings. Thus, only NCLT has the power to adjudicate upon this petition. NCLT is the sole grievance redressal body for Co. law matters⁹. Procedures to wind up a Co. are given u/s 273 of the Co. A., 2013. The inherent power of the Trib. to entertain winding up petition cannot be taken away.¹⁰ §439 stipulates that a petition for

⁴ Fact sheet ¶ 15.

⁵ Union of India v. R. Gandhi, president, Madras Bar Association, (2010) 11 SCC 1 ¶ 121.

⁶ 3, CR Datta, The Co. law, 5957 (ed. 6th 2008)

⁷ Companies Act, 1956, No. 1, Acts of Parliament, 1956. (as notified by organizers in clarification 2).

⁸ *id.* at §430.

⁹ <http://indiacorplaw.blogspot.in/2016/10/nclt-revolutionizing-realm-of-corporate.html>

¹⁰ Smt. Ushar R. Shetty v. Radeesh Rubber Pvt. Ltd. [1995] 84 Comp. Cas. 602 (Kar.).

winding up shall be presented. §439(1)(b) explicitly provides that a creditor can file a winding up petition in NCLT.

1.3. Where the debtor agrees that, some part of the debt is due but the exact amount is disputed then the court will order for winding up without quantifying the debt¹¹. Hence, it is evident from the arguments that the Trib. can wind up the Co. u/s 433(e).

2. ADMISSIBILITY OF THE IMPEADING PETITION.

2.1. It is contended that 26% shareholders have filed the impleading petition on the ground that, Galileo and Stalwart entered in an RPT without informing 26% shareholders.¹² Even in the testamentary proceedings, a person having interest in the estate could be permitted to implead as a party, considering to safeguard his interest effectively in the estate.¹³

2.2. The 26% shareholders are ‘necessary party’ to the winding up petition. A person can be regarded as a necessary party when he can establish that such litigation may lead to the violation of his legal rights.¹⁴ It is said that the interests of the shareholders, who bear the burden of losing the capital invested in the Co., should be looked upon by the court.¹⁵ The rules of natural justice require that a necessary party should be heard in a case, before deciding it.¹⁶ No order can be passed without giving opportunity of hearing to the party who will be affected.¹⁷

¹¹ SICOM Ltd. v. Entertainment World Developers (P.) Ltd, 2016 taxmann.com 212 (Bom.) ¶ 21. Madhusudan Gordhandas v. Madhu Woolen Ind. (1971) 3 SCC 632. ¶ 21

¹² Fact Sheet, ¶ 11,16.

¹³ Indian Associates v. Shivendra Bahadur Singh, AIR 2003 Del. 292 ¶ 30.

¹⁴ Ramesh Chandra Kundan Mittal Mal v. Municipal Corpn. Of Greater Bombay, (1992) 2 SCC 524 ¶ 13, 14.

¹⁵ T.M. Mohandas v. Nectar Laboratories Ltd.,[2007] 140 Comp. Cas. 257 (AP). ¶28

¹⁶ Surana Industries Ltd. and etc. v. M/s. Good Earth Maritime Ltd. & Anr. 2005 SCC OnLine Mad. 641. ¶4

¹⁷ State of Orissa v. Binapani Dei, AIR 1967 SC 1269. ¶12

2.3. A party can be admitted in the petition, if the judgment of any such petition directly or indirectly affect the party. Rule 34¹⁸ states, a person can be allowed to be heard in the petition. It was held that workmen would be allowed to file impleading petition if winding up of the Co. affects them.¹⁹ The Co. should disclose the investment to its shareholders.²⁰ The shareholders have a *locus standi* at the stage of admission of the petition.²¹ *Ubi jus ibi remedium*, the 26% shareholders were oppressed by the management.

3. ALTERNATE REMEDIES NOT A BAR

3.1. It is humbly pleaded that courts in India have various innumerable inherent powers. These alternate remedies can only be availed when the other adjudicator has enough power to adjudicate without violating the principles of Natural Justice and other laws.

a. Arbitrator has no power to wind up the Company

3.2. The contract has a midnight arbitration clause²² but the I.A.A. does not give power to the arbitrator to wind up the Co. It is only NCLT that has the powers to order winding up. The claim in winding up is not for money.²³ Only the disputes b/w parties can be referred to arbitrator²⁴. Even if the contract stipulates, arbitration is no process to wind up the Co.²⁵

3.3. Winding up order has a severe consequence, the jurisdiction is only with the Trib.²⁶ SC held that the winding up is non-arbitrable²⁷. The position will be different if the party filing

¹⁸ Companies (Court) Rules, 1959.

¹⁹National Textile Workers' Union and others v. P. R. Ramakrishnan, (1983) 1 SCC 228 ¶71.

²⁰ Philips Carbon Black Ltd. v. Anil Kumar Poddar, 2010 SCC OnLine Cal. 2129, ¶4.

²¹ Keerat Kaur and Others v. Patiala Exhibitors Private Ltd. Patiala 1990 S.C.C.OnLine P&H. 677 ¶6. Severn Trent Water Purification Inc v. Chloro Controls (India) Pvt. Ltd. & other (2008) 4 SCC 380. ¶49

²² Fact Sheet, ¶5.

²³ Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd.,(1999) 5 S.C.C. 688 ¶ 5.

²⁴ Integrated Broadcasting Co. (P.) Ltd. v. Netlinx Ltd. [2012] 23 taxmann.com 371 (A.P.). ¶10.

²⁵ Times Guaranty Financial Services Ltd. V. Perfect Pipes (P.) Ltd, [2004] 52 SC.L178 ¶ 2.

²⁶ *id.*

the winding up petition is also the party which initiates the arbitration for settling the claim²⁸. Winding up proceedings couldn't be made to wait till adjudication of arbitration proceedings²⁹. Thus, it can be interpreted that; arbitrator has no power to wind up the Co.

b. Summary Suit doesn't prohibit from filing winding up.

3.4. The court has the power to entertain winding up even if alternate remedy exists or is availed³⁰. Winding up proceeding are no substitute of the remedy provided by the Civil Suit under XXXVII to recover debts or specific performance³¹, for they are filed for different purposes³². Hence, mere filing of a Summary Suit will not bar filing of a winding up petition as both are filed for different availing different remedies.

II. STALWART IS LIABLE TO WOUND UP UNDER 433(e) AND UNDER 433(f) OF THE COMPANIES ACT, 1956.

It is submitted, that Stalwart is incapable to reimburse its debts. Therefore, the Trib. should order the Co. to wind up as more than one order can be passed in a winding up petition³³.

1. STALWART IS LIABLE TO BE WOUND UP UNDER SECTION 433(e)

1.1. It is humbly pleaded that Stalwart is liable to be wound up u/s §433(e) because it is 'unable to pay its debt' of INR 13.92 Crores to its creditor³⁴. Where the Co. failed to pay or

²⁷A. Ayyasamy v. A. Paramasivam & others (2016) 10 SCC 386 ¶21.

²⁸ Madhya Pradesh Iron & Steel Co. v G.B. Springs (P.) Ltd. 2002 SCC OnLine Del. 1371. ¶3.

²⁹ Corporate Ispat Alloys Ltd. v. Jayaswal Neco Industries Ltd. 2016 SCC OnLine Bom. 70 ¶¶14, 15.

³⁰ Haryana Telecom Ltd. v. Sterlite, Industries (India) Ltd., (1999) 5 SCC 688.

³¹ Kamadenu Enterprises v. Vivek Textile Mills P. Ltd. (1984) 55 Comp. Cas. 68 (Kar.). ¶ 4.

³²Krishna Kilaru v. Maytas Properties Ltd., 2012 SCC OnLine AP 1049 ¶ 43; Cotton Corpn. of India Ltd. v. United Industrial Bank Ltd.,(1983)4 SCC 625, ¶ 22.

³³ Official liquidator of Piramal Financial Services Ltd. V. R.B.I. (2004) 118 Comp. Cas. 27. ¶84

³⁴ Fact Sheet, ¶14.

neglected to pay or chooses not to pay,³⁵ the company is deserved to wind up³⁶. If there is no doubt that the Co. owes debt to the creditor, even then a winding up can be ordered without requiring the creditor to quantify the debt precisely³⁷. “If a debt undisputedly owes, then it has to be paid and if defence is set up against this, it will be moonshine and sham”³⁸

1.2. Where the co. admits the principle debt but disputes the claim for the balance amount, the Trib. should decide the matter instead of relegating the parties to another litigation³⁹. It is well settled that, “dispute as to quality of goods sold and delay in supply is not *bonafide*”⁴⁰.

1.3. As long as admitted amount exceeds minimum amount stipulated u/s 434(1)(a), despite service of a statutory notice, respondent Co. fails to pay that amount, it is deemed that Co. is unable to pay its debts⁴¹. The claim that the respondent is a running Co. is not a relevant material.⁴²

2. STALWART IS LIABLE TO BE WOUND UP UNDER §433(f)

2.1. The applicant submits, that 26% shareholder have filed winding up petition u/s 433(f) on the ground that they are oppressed and were kept in dark about the loan advancement.⁴³

“Wherever unfairness and opaqueness is found, the aggrieved party will have a right to

³⁵ SICOM Ltd. v. Entertainment World Developers (P.) Ltd. [2016] 71 taxmann.com 212 (Bom.) ¶ 21.

³⁶ Sojitz Corporation v. Teracom Ltd. [2013] 36 taxmann.com 83 (Bom.) ¶ 32. ; Hegde & Golay Ltd. v. S.B.I. 1985 SCC OnLine Kar. 428.¶¶34, 41

³⁷Tweeds Garages Ltd. *in re*;[1962] 2 W.L.R. 38; S.B.I. v. Hegde & Golay Ltd. [1987] 62 Comp.Cas. 239(Kar.) ¶17.

³⁸ IBA Health (I) (P.) Ltd. v. Info-drive systems SDN BHD [2010] 10 S.C.C. 553., ¶22.; Mediquip Systems (P) Ltd. v. Proxima Medical Systems (2005) 7 SCC 42 ¶19.

³⁹ Unisystems Pvt. Ltd. v. Stepan Chemical Ltd., 1985 SCC OnLine P&H 504. ¶7; Vijay Industries v. NATL Technologies Ltd. (2009) 3 SCC 527. ¶34

⁴⁰ Joti Prasad Bala Prasad v. A.C.T. Developers, 1989 SCC OnLine Del. 234. ¶5, 6.

⁴¹ Integrated Broadcasting Co. (P.) Ltd. v. Nettlinx Ltd. [2012] 23 taxmann.com 371 (AP) ¶ 9.

⁴² Imperial Corporate and Services (P) Ltd. v. Aruna Sugars and Enterprises Ltd., 2002 SCC. OnLine Mad. 659, ¶8.

⁴³ Fact sheet, ¶ 16

protect his interest by proceeding against the Co. where its money has gone”.⁴⁴ “Merely raising a dispute & having no support from reality, would not be regarded as defence to resist a winding up proceeding”.⁴⁵ For running the Co. it is essential to disclose all the material related party transactions.⁴⁶ The substantive rights of shareholders cannot be defeated by mere technicalities.⁴⁷

[a] The loan is not in accordance with Law & Oppression of Shareholders.

2.2. The applicant humbly submits, the right of taking a decision in the affairs of the Co. is inbuilt in corporate democracy and is one of the rights of the shareholders.⁴⁸ The scheme under § 397, 398 & 402 aims at granting relief to minority shareholders.⁴⁹ The power exercised by the directors must obey the following (i) the interest of Co. (ii) not on a wrong principle; or (iii) with an oblique motive or for a collateral purpose.⁵⁰

2.3. Arm’s length is only valid under ‘ordinary course of business’. The ordinary course of business means the ordinary or current routine of business.⁵¹ The remaining 26% shareholders are sufferers of oppression done by Stalwart. The body of shareholders and BOD’s operate in their respective fields but the overall and ultimate control is exercised by general body of shareholders⁵². A simple majority cannot confirm a transaction which

⁴⁴ CPI India Real Estate Venture Ltd. v. Perpetual Infracon (P.) Ltd. [2014] 49 taxman.n 25 (CLB - New Delhi), ¶37.

⁴⁵ Mechalec Engineers and Manufacturers v. Basic Equipment Corporation (1976) 4 SCC 687.

⁴⁶ <http://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf> G20/Oecd Principles of Corporate Governance, Oecd 2015, Pg 45.

⁴⁷ B.V. Satyanarayanan v. Vivek Kulkarni, (2009) 150 Comp. Cas. 216 (CLB) ¶ 6.

⁴⁸ VIL Ltd. v. Raibareilly Allahabad Highway (P.) Ltd. [2016] 69 taxmann.com 260 (CLB - New Delhi), ¶19.

⁴⁹ Cosmosteels (P.) Ltd. v. V Jairam Das Gupta (1978) 1 SCC 215. ¶9

⁵⁰ Sangramsinh P. Gaekwad and Ors. v. Shantadevi p. Gaekwad (dead) through lrs. & Ors.(2005) 11 S.C.C.314. ¶69.

⁵¹ Dilip Kumar Swain v. Executive Officer, Cuttack Municipal Corporation 1996 S.C.C. OnLine Ori 236, ¶8.

⁵² 5, Taxmann, Co. Law, 5647(ed.,2014).

requires concurrence of greater majority⁵³. When the BOD's decisions are prejudicial to minority shareholders then the shareholders are free to approach the Trib.⁵⁴

[b] Siphoning of Funds by Stalwart.

2.4. The test for siphoning off funds would be whether the Co. entered into such transaction to save its own skin or not.⁵⁵ Action of Directors must be set aside if oppressive, capricious and corrupt or *malafide*.⁵⁶ The Doctrine of 'Legitimate Expectation' enables the court to adjudicate on legitimate expectations arising from the agreements of the members *inter se*⁵⁷.

2.5. The applicant submits that u/s 129(5), the Co. shall disclose in its financial statements, the deviation from the accounting standards, the reasons for such deviation and the financial effects, if any arising out of such deviation.⁵⁸ There was no written loan agreement between the parties.

[c] Galileo, Stalwart and Sam are Related Parties

2.6. It is submitted that parties come under the ambit of §2(76). The object and the intent of the statute is the governing factor.⁵⁹ The duty of good faith requires not violating generally accepted standards applicable to the conduct of business⁶⁰. The interpretation of word 'means' in §2(76) is inclusive. True sense is arrived by considering the meaning of the words used in the enactment in light of any discernible purpose which comprehends the mischief

⁵³ Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (1982) 2 W.L.R. 31. ¶16.

⁵⁴ http://www.mca.gov.in/Ministry/latestnews/Draft_Report_NareshChandra_CII.pdf.

⁵⁵ P.G. Vivekanandan v. R.P.S. Benefit fund Ltd. [2004] 49 SCL 671 (MAD.) ¶ 40.

⁵⁶ Dale & Carrington Pvt. Ltd and Anr. v. P.K. Prathapan & ors., (2005) 1 SCC 212 ¶ 11,12.

⁵⁷ Dr. K.R. Chandratre, Minority Oppression- is The Doctrine of 'Legitimate Expectation' Inapplicable In Respect of Proceedings Under § 397 of The Companies Act, [2009] 91 SCL 31 (MAG.).

⁵⁸ Tata Advanced Materials Limited v. Nil, 2016 SCC OnLine Kar. 1899. ¶ 9.

⁵⁹ Govindlal Chhaganlal Patel v. Agriculture Produce Market Committee, Godhra & ors. (1975) 2 SCC 482 ¶ 13.

⁶⁰ Deborah DeMott, Defining Good Faith in the MBO Context, 25 WAKE FOREST L. REV. 15 (1990).

and its remedy to which the enactment is directed.⁶¹ This is also known as “cardinal principle of construction”.⁶²

2.7. The SC held that if a shareholder has 70% of holding in the co., he definitely has the power to control the management and policy of the board⁶³. Member of a related party is not entitled to vote on a resolution relating to any contract or arrangement with a related party⁶⁴.

[d] Company should be Wound up under § 433(f)

2.8. The applicant submits that misappropriation of resources, money and acts of mismanagement may necessitate a winding up order⁶⁵. A petition was admitted when it was filed for mis-utilising funds of the co. which resulted in deadlock of management⁶⁶. The court orders winding up when differences b/w two groups which are not conducive to carry on the business of the co.⁶⁷ If shareholders have majority of power over affairs of a co. and the wrong has been done then the court will order winding up.⁶⁸ SC laid test for Just and Equitable ground, unfair abuse of powers & impairment of confidence in the probity of the company's affairs, from mere resentment on the part of a minority at being outvoted on some issue of domestic policy.⁶⁹

⁶¹State of Himachal Pradesh v. Kailash Chand Mahajan, A.I.R. 1992 SC 1277.

⁶²Union of India v. Elphinstone Spinning and Weaving Co. Ltd. A.I.R. 2001 SC 724.

⁶³In Re: Issuance of Optionally Fully Convertible Debentures by Sahara India Real Estate Corporation Limited and Sahara Housing Investment Corporation Limited; MANU/SB/0045/2011

⁶⁴Secretarial Standard on General Meetings of Shareholders: Next step towards Good Governance ; [2016] 75 taxmann.com 316 (Article)

⁶⁵Waryam Singh v. Bhatinda Transport Co. P. Ltd., (1963) 33 Com. Cases 897 (Punj.) ¶2, 4

⁶⁶Smt. P. Sridevi v. Cherishma Housing P. Ltd., 2008 SCC OnLine A.P. 864 ¶41

⁶⁷Daulat Makanmal Luthria v. Solitaire Hotels (P.) Ltd. [1993] 76 Comp. Cas. 215 (Bom.) ¶16

⁶⁸Re, Anglo Continental Produce Co. Ltd. (1939) 1 All ER 99; K.P Chackochan v. The Federal Bank & ors. 1989 S.C.C. OnLine Ker. 108. ¶20

⁶⁹M.S.D.C Radharamanan V. M.S.D Chandrasekara Raja & Another (2008) 6 SCC 750 ¶ 19

III. THE IMPEADING PETITIONS FILED BY THE TDS ARE MAINTAINABLE

It is humbly submitted before the Tribunal that the impleading petitions filed by the TDs are maintainable. *Firstly*, the NCLT has the jurisdiction to hear the parties. *Secondly*, both TDs can be impleaded in the winding up petition.

1. THE NCLT HAS THE JURISDICTION TO HEAR THE PARTIES

1.1. The Tribunal has the power to decide the questions of recovery of tax.⁷⁰ It can deal with the question on the extent to which tax claims are to be paid.⁷¹ SC has held that the liquidation court has the power to adjudicate upon the lawful liability of the tax determined.⁷² Recovery proceedings for IT can be initiated in case the assessee is in default.⁷³ An assessee is deemed to be in default **u/s 201 of ITA**. The liability to pay tax automatically arises when default in TDS takes place and at no point depends on passing of any order.⁷⁴ A certificate **u/s 220 of ITA** can be drawn in case of 'deemed default' covered **u/s 201 of ITA**.⁷⁵

1.2. In the present case, an order was made by the AO after issuance of the notice to the assessee and hearing the assessee.⁷⁶ The recovery proceedings have been initiated⁷⁷ **u/s 42 of KVATA** after required assessment has been done **u/s 38 of KVATA**.

⁷⁰ State of Kerala v. Official Liquidator, (1987) 62 Comp. Cas. 742 (Ker.).

⁷¹ Shahdara (Delhi) Saharanpur Light Railway Co. Ltd. v. ITO (1988) 63 Comp. Cas. 627 (Cal.).

⁷² SV Kandoskar, Official Liquidator & Liquidator of the Colaba Land & Mills Co. Ltd. v. V.M. Deshpande, Income Tax Officer, [1972] 83 ITR 685 ¶17.

⁷³ UOI v. Calcutta Hardware & Iron Syndicate [1984] 145 ITR 115 ¶6.

⁷⁴ PILCOM v. CIT (TDS), Kolkata, [2012] 347 ITR 410 ¶10.

⁷⁵ *id.* at ¶11.

⁷⁶ CIT v. M/s Kingfisher Airlines Ltd., 2014 SCC Online Kar 7700 ¶38.

⁷⁷ Fact sheet, ¶ 13.

2. THE TAX DEPARTMENTS CAN BE IMPEADED IN THE WINDING UP PETITION

2.1. Both the TDs have sizeable tax claims against Stalwart and are entitled towards realization of the same.⁷⁸ At the stage of admission of the company petition, parties who may be interested other than the parties to the winding up have right and *locus-standi* to be heard.⁷⁹ Income tax claims are considered to be debt.⁸⁰ The claims referred in 446(2) include debt due.⁸¹ The Apex Court in Imperial Chit Funds (P) Ltd v. ITO, held that the income tax provides for catching of income at the earliest possible time instead of waiting for too long.⁸²

2.2. Once tax becomes due, the relationship between the assessee and the tax department is that of a debtor & creditor.⁸³ The Apex court held that the income-tax has the status of 'secured creditors' for the tax dues.⁸⁴ The tax departments can be considered as secured creditors of the company on a *pari-passu* basis in terms of 529A of the companies Act, 1956.⁸⁵ The test for impleadment as laid down in Krishnan, S v. Rathinaval Naicker⁸⁶, is being satisfied in the present case as the relief sought will be binding on the TDs and the ultimate outcome will affect them adversely as the realization of the claims of the TDs will depend on the outcome of the winding up petition.

⁷⁸ State Bank of Bikaner & Jaipur v. National Iron & Steel Rolling Corpn, (1995) 2 SCC 19.

⁷⁹ Keerat Kaur v. Patiala Exhibitors Pvt. Ltd., 1990 SCC OnLine P&H. 677.

⁸⁰ C.C.E. v. Sri Krishna Rajendra mills.,[1992] 1992 taxmann.com 402 (CEGAT- New Delhi).

⁸¹ Official Liquidator, Radel Services (P.) Ltd. vs. Southern Screws (P.) Ltd., [1988] 63 Comp. Cas. 749 (Mad.).

⁸² Imperial Chit Funds (P) Ltd. v. ITO, 1996 Indlaw SC 2731 ¶17.

⁸³ Vikas R. Koteswar ,Recovery of tax Dues in winding up proceeding ,An analysis of conflicting laws and judicial pronouncements [2006] 66 SCL 162 (MAG.).

⁸⁴ Imperial Chit Fund (P.) Ltd. v. ITO, (1996)8 SCL 151 ¶16 (SC).

⁸⁵ State of Maharashtra v. Official Liquidator of Reliance Heat Transfer (P.) Ltd., MANU/MH/0127/2004.

⁸⁶ Krishnan S v. Rathinaval Naicker, 2006 Indlaw MAD 1973 ¶16.

IV. STALWART CANNOT BE CONSIDERED TO BE AN ASSESSEE IN DEFAULT

It is humbly submitted that Stalwart is an AID u/s 201 of ITA. *Firstly*, the benefits of the DTAA will not be applicable. *Secondly*, the said loan advancement is subject to TDS under the ITA.

1. THE BENEFITS OF DTAA WILL NOT BE APPLICABLE.

1.1. The purpose for entering into certain arrangements for securing favorable tax position is subject to the object and purpose of the relevant treaty provisions.⁸⁷ Following the General rules for interpretations⁸⁸, a treaty should be interpreted in good faith in accordance with the ordinary meaning of the terms⁸⁹ in the light of its object & purpose.⁹⁰

1.2. Dividend may also include benefits like disguised distribution of profits⁹¹ and the relief provided under Art. 10. This is applicable as long as the State of which the paying company is resident pays the taxes therein for these benefits irrespective of the source of such payment (e.g. current profits or reserves) of such benefits.⁹² Such benefits are dividends in the hands of shareholders.⁹³ Dividends also include distribution in form of payments of loans and advances to shareholders.⁹⁴

1.3. Deemed dividend to any shareholder comes under a disguised distribution of profits as it is not a usual distribution of profit, rather it is payment of loan or advances out of the

⁸⁷ OECD, Commentaries on the articles of the modern tax convention, 2014, ¶ 9.5.

⁸⁸ *H.Padamachand Khincha*, Interpretation of tax treaties vis-à-vis Judicial Precedents, [2013] 36 taxmann.com 351 (Article).

⁸⁹ 2, KANGA & PALKHIVALA, THE LAW & PRACTICE OF INCOME TAX 1198 (Arvind P Datar eds., ed. 10th 2014) .

⁹⁰ Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, pg. 331, Art. 31.

⁹¹ D.P. MITTAL, INDIAN DOUBLE TAXATION AGREEMENT & TAX LAWS 705 (7th ed 2014).

⁹² *Supra* note 87 at art. 10 ¶28.

⁹³ *id* at ¶29.

⁹⁴ *Supra* note 90.

accumulated profits of a company. Thus, the benefits that are received by the shareholder Galileo out of the payment as deemed dividend made by Stalwart is subject to TDS at India u/s 195 of ITA.

2. THE LOAN ADVANCEMENT IS SUBJECT TO TAX IN INDIA

2.1. Stalwart is an assessee in default **u/s 201 of ITA** because the loan advanced by stalwart is a dividend & **[a]** the same is subject to TDS in India **[b]**.

[a] *The loan advancement is a dividend*

2.2. The advancement of loan made by Stalwart to Galileo is a dividend u/s 2(22)(e) of the ITA as the essentials therein are simultaneously satisfied.⁹⁵

The payment of loan⁹⁶ was made by a closely held company⁹⁷ to a beneficial and registered shareholder⁹⁸ having a substantial interest and holding more than 10% of voting power⁹⁹ out of the accumulated profits¹⁰⁰ which includes general reserves¹⁰¹ and sale proceeds¹⁰².

[b] *The loan advancement is subject to TDS in India*

2.3. It is obligation u/s 195(1) to deduct TAS for payment of income chargeable to tax in the hands of non-resident recipient.¹⁰³ ‘Any other sum’ **u/s 195** of ITA signifies sum on which IT

⁹⁵ DCIT v. Encore Technologies Pvt. Ltd., 2016 SCC OnLine ITAT 143 ¶ 5.2; Naresh Sharma v. ITO, 2015 SCC OnLine ITAT 6940 ¶8, 10; CIT v. Raj Kumar, [2009] 181 Taxman 155 (Del.) ¶ 9.

⁹⁶ Asstt. CIT v. Pravin C. Pandya, [2013] 38 taxmann.com 408 ¶ 3.2; Bagmane Constructions (P.) Ltd. v. CIT, [2015] 57 taxmann.com 120 (Kar.) ¶ 25.

⁹⁷ Asstt. CIT v. Y.V. Rajashekhara Babu, [2011] 13 taxmann.com 232 (Visp.) ¶ 7.

⁹⁸ Madura Coats (P.) Ltd., In re, [2005] 145 Taxman 366 (AAR-New Delhi) ¶ 6; Asstt. CIT v. Bhaumik Colour (P.) Ltd., [2009] 118 ITD 1(Mum.) ¶ 23, 24; CIT v. National Travel Services, [2011] 14 taxmann.com 14 (Del.) ¶ 19; CIT v. Standipack, [2012] 20 taxmann.com 19 (Del.); Dep. CIT v. Atul Engg. Udyog, [2011] 133 ITD 1 ¶18.

⁹⁹ Chandrasekhar Maruti v. ACIT, [2016] 71 taxmann.com 239 ¶ 8.

¹⁰⁰ Punjab Distilling Industries Ltd. v. CIT, [1965] 57 ITR 1 (SC) ¶10; CIT v. Mahesh Chandra Mantri, [2015] 234 Taxman 158 (Cal.) ¶ 3.

¹⁰¹ CIT v. K Srinivasan, [1963] 50 ITR 788 ¶ 4, 5.

¹⁰² Parmod Kumar Dang v. Jnt. CIT, [2006] 6 SOT 301 ¶ 10.

¹⁰³ G.E. Technology Centre (P.) Ltd. v. CIT, [2010] 327 ITR 456 ¶ 7.

is leviable.¹⁰⁴ If any payment falls under the definition ‘dividend’ u/s 2(22) of ITA, it shall be applicable to every provision containing the term ‘dividend’.¹⁰⁵ Income of any non-resident shall include income that arises or is deemed to accrue in India.¹⁰⁶ Payment of any dividend by an Indian Company outside India is an income accruing in India.¹⁰⁷

2.4. Thus deemed dividend is a non-exemptible¹⁰⁸ income in the hands of Galileo and is subject to TDS u/s 195. The assessee not deducting the same becomes an AID **u/s 201** of the ITA.

ISSUE V: STALWART IS LIABLE TO PAY SALES TAX IN KARNATAKA

It is humbly submitted before the Trib. that Stalwart is liable to discharge VAT & CST liabilities¹⁰⁹ in Karnataka. *Firstly*, Stalwart is a dealer under KVATA. *Secondly*, the situs of sale for the sales made under the marketplace model is at Karnataka.

1. STALWART IS A DEALER

1.1. ‘Dealer’ has been interpreted widely by the courts.¹¹⁰ Dealer *inter alia* includes a person¹¹¹ who indirectly carries on the business of selling, distributing & supplying goods¹¹² for a commission.¹¹³

¹⁰⁴ Transmission Corpn. Of A.P. Ltd. v. CIT, [1999] 105 Taxman 742 (SC) ¶ 9.

¹⁰⁵ CIT v. Mysodet (P.) Ltd., [1999] 103 Taxman 336 ¶ 10.

¹⁰⁶ §5(2)(b), ITA, No. 43 of 1961.

¹⁰⁷ *id* at §9(1)(iv).

¹⁰⁸ ITO v. Kalyan Gupta, [2007] 11 SOT 530 (Mum.) ¶20.

¹⁰⁹ Khazan Chand & Ors. v. State of J & K & Ors., AIR 1984 SC 762 ¶ 16.

¹¹⁰ Assitt Commissioner v. Hindustan Urban Infrastructure Ltd., [2015] 53 taxmann.com 331 ¶ 43.

¹¹¹ §2(42), General Clauses Act, No. 10 of 1897.

¹¹² Tata Consultancy Services v. State of A.P., (2005) 1 SCC 308 ¶ 81.

¹¹³ §2(12), KVATA 2003, No. 32 of 2004.

1.2. It is submitted that Stalwart is a dealer under the exhaustive¹¹⁴ definition of ‘dealer’.

[a] *Stalwart is indirectly involved in the business of selling*

1.3. A commission agent who is a dealer is liable to pay tax u/s 8 of KVAT.¹¹⁵ If an agent is authorized to sell¹¹⁶ the goods¹¹⁷ for cash or deferred payment then the agent is said to sell the goods on behalf of his principal.¹¹⁸ A commission agent who has the possession over the goods during the customary course of business¹¹⁹ which are sold for a price¹²⁰ is a dealer. A sale by an agent requires authorized possession of goods by the agent.¹²¹

1.4. Possession by an agent can be in form of a constructive¹²² possession.¹²³ Constructive possession means a person has knowledge and the ability to control the object irrespective of *de facto* possession.¹²⁴ Control is synonymous with authority to direct, restrict or regulate.¹²⁵

[b] *Stalwart is indirectly involved in supplying and distributing goods*

1.5. The words ‘buying’, ‘selling’, ‘supplying’ or ‘distributing’ are disjunctive in nature and carrying the business of any one only is sufficient to be a dealer.¹²⁶ ‘Indirectly’¹²⁷ as under the means something that is associated with but not immediately connected to.

¹¹⁴ Executive Engineer & Anr. v. Shri Seetaram Rice Mills, 2011 Indlaw SC 822, ¶32.

¹¹⁵ Subban Beigh v. Govt. of Mysore, AIR 1953 Mys 19 ¶ 3.

¹¹⁶ Amit Bajaj, Transfer of Right to use goods – Deemed sale or service, [2011] 21 taxmann.com 40 (Article).

¹¹⁷ BSNL v. UOI & Ors., (2006) 3 SCC 1 ¶35.

¹¹⁸ Bagalkot Cement Co. Ltd. v. State of Mysore , 1970 SCCOnline Kar 261 ¶ 11.

¹¹⁹ Chowringhee Sales Bureau (P) Ltd. v. CIT, (1973) 1 SCC 46 ¶ 10.

¹²⁰ Kandula Radhakrishna Rao & Ors. v. The province of Madras, (1952) 65 LW 250, 255 - 256.

¹²¹ SIR DINSHAH FARDUNJI MULLA, THE SALE OF GOODS ACT AND THE INDIAN PARTNERSHIP ACT, 78-79(ed.102012).

¹²² B. Gangadhar v. B.G. Rajalingam, (1995) 5 SCC 780 ¶ 5.

¹²³ ‘constructive possession’, P Ramanatha Aiyar: The Major Law Lexicon.

¹²⁴ Gunwantlal v. State of M.P., AIR 1972 SC 1756 ¶ 4; Madan Lal v. State, (2003) 7 SCC 465 ¶ 24.

¹²⁵ Shamrao Vithal Coop. Bank Ltd. v. Kasargode Panduranga Maliya, (1972) 4 SCC 600 ¶6.

1.6. ‘Supply’ means to give, provide or afford something.¹²⁸ Supplier is a person engaged directly or indirectly in the business of making a product available to the consumers.¹²⁹ ‘Distribution’ means to allot and embraces *inter-alia* the system of dispersing goods.¹³⁰ The act of putting objects into circulation for sale, or otherwise making objects available to third parties, especially members of the public is covered under distribution¹³¹.

1.7. In this case, goods were made available to the buyers because of the online platform of the Stalwart along with the distribution network¹³² that have been developed by Stalwart.

2. STALWART IS LIABLE TO DISCHARGE VAT AND CST LIABILITIES IN KARNATAKA FOR THE SALES MADE UNDER THE MARKETPLACE MODEL

2.1. The sale of goods¹³³ is deemed, to have taken place in the state if the goods are within the state at the time the contract of sale is made¹³⁴. For the purpose of CST u/s 3(a), the sales tax is chargeable in the state from where the movement of goods commences¹³⁵.

2.2. It is thus humbly submitted that Stalwart is liable to pay CST & VAT liabilities for the sale of goods whose movement were initiated in Karnataka for being sold under the marketplace model.

¹²⁶ State of Tamil Nadu v. M.K. Kandaswami, [1975] 4 SCC 745.

¹²⁷ ‘Indirect’, P Ramanatha Aiyar: The Major Law Lexicon.

¹²⁸ ‘Supply’ in P Ramanatha Aiyer: The Major Law Lexicon.

¹²⁹ ‘Supplier’, Black’s law dictionary, 9th edn., pg 1577.

¹³⁰ State of Karnataka v. Ranganatha Reddy, (1977) 4 SCC 471 ¶ 82

¹³¹ ‘Distribution’, P Ramanatha Aiyar: The Major Law Lexicon.

¹³² Fact Sheet, ¶¶2-5.

¹³³ §6, KVATA, 2003, No. 32 of 2004.

¹³⁴ Bharat Heavy Electricals Ltd. v. Union of India [1996] 102 STC 373; Builders’ Assn. of India v. State of Karnataka, (1993) 1 SCC 409; Iyanahalli Bakkappa and Sons v. State of Mysore, (1972) 4 SCC 523; Anwar Khan Mehboob Co. v. CST, (1970) 2 SCC 294 ¶¶7, 8.

¹³⁵ Union of India v. K.G. Khosla, (1979) 2 S.C.C. 242.

THE PRAYER

Wherefore, in the light of the facts presented, issues raised, argument advanced and authorities cited, it is most humbly prayed before the learned Tribunal that it may be pleased to adjudge and declare that:

1. The main winding up petition and all the impleading petitions are maintainable before NCLT.
2. The Company Stalwart is liable to wind up under section 433(e) and also 433(f).
3. The said loan advancement is income thus Stalwart is an assessee in default.
4. Stalwart is a dealer and thus is liable to pay sales tax in Karnataka.

The Hon'ble Court 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 Applicant shall duty bound forever pray.

Place: Bangaluru, Karnataka

Sd/-

Dated: 31st December, 2016

(Counsel for the Applicant)