

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,
BENGALURU BENCH**

C.A. NO.1/2017

C.A. NO.2/2017

C.A. NO.3/2017

IN

C.P. NO.10/2017

DATED: THE 19TH DAY OF FEBRUARY, 2017

Global Office Suppliers Pvt Ltd, Bengaluru

Shareholders of Stalwart Online Stores Pvt Ltd

Additional Commissioner of Income-tax, Bengaluru

Deputy Commissioner of Commercial Tax, Bengaluru - Petitioners/Applicants

Stalwart Online Stores Pvt Ltd, Bengaluru - Respondent

ORDER

1. In this order, the Tribunal is considering Company Petition No: 10 of 2017 filed by Global Office Suppliers Pvt Ltd, Bengaluru (the petitioner) along with Company Application No: 1 of 2017, Company Application No: 2 of 2017 and Company Application No: 3 of 2017; filed by the shareholders of Stalwart Online Stores Pvt Ltd, Additional Commissioner of Income-tax, Bengaluru and Deputy Commissioner of Commercial Tax, Bengaluru respectively.
2. The main petition was filed under Sections 433(e) and 434(1)(a) of Companies Act, 1956, for winding up Stalwart Online Stores Pvt Ltd, Bengaluru (the respondent), for

its inability to pay debts. The shareholders of the respondent company had filed CA No.1 of 2017 under Section 433(f) of Companies Act, 1956 on just and equitable grounds. The remaining two impleading petitions were filed by the Income Tax Department and Sales Tax Department under Section 280(e) of Companies Act, 2013 for crystallising their claims and also to provide for preferential payment.

3. Before taking note of the arguments raised by the petitioners and the stance taken by the respondent, it is pertinent to briefly go through the basic developments that took place in this matter before the present petition was filed before this Tribunal.
4. Global is a company which is into the business of sale of office equipments to various customers within India and mainly, within Bengaluru. Stalwart is an ecommerce entity which is into the business of selling various stationery items to its customers across India through its online portal. Stalwart follows both inventory model and marketplace model and is a dealer under Karnataka and Tamil Nadu VAT authorities for its inventory model business.
5. Global and Stalwart entered into a Sales-cum-Service Agreement (“SSA”) on January 01, 2015 for its business activities. The agreement had a strict clause whereby, under the inventory model, Stalwart should make the payment for the goods sold by Global within three working days failing which, Stalwart will have to issue Post Dated Cheques (PDCs) on the fourth day towards the invoices raised and if the cheques are dishonoured by Stalwart’s bank, Stalwart will have to pay 24% simple interest per annum on the amount pending and will also have to pay a penalty of INR 20,00,000 lakhs per month until the dues are settled. This penal clause was to ensure prompt payments by Stalwart to Global. On the other hand, Global will have to promptly supply the items to the customers of Stalwart under marketplace model. There was a general arbitration clause in the agreement in case of any disputes between the parties.
6. From July 2015 to December 2015, Stalwart could not settle invoices raised by Global amounting to 1 crore per month. Global continued to supply the required items to Stalwart from January 2016 to June 2016, given the good relations between the parties and raised invoices every month end for INR 1 crore each amounting to INR 6 crores. However, Stalwart was again unable to settle the invoices from January 2016 to June 2016 in addition to the pending dues from July 2015 to December 2015. In the meantime, Stalwart made online transfers amounting to 6 crores without mentioning as to which of the invoices and amounts pending these payments pertain and receipt of this amount was acknowledged by Global. Also, there were instances of deficiency

in the goods delivered by Global during this period. Global admitted its deficiency of services and the drop in quality of goods. From July 2016, Global started to seriously demand Stalwart on the pending amounts including the interest and penalty and also stopped supplying goods to Stalwart under the inventory model as the pending invoices were not settled by Stalwart.

7. In February 2016, Stalwart advanced a loan of 50 crores to Galileo Investors Pte. Ltd, a company registered in Singapore, holding 24% stocks in the company. This was done through a single Board resolution in which only the two Indian promoters, Galileo Investors Pte. Ltd. and Sam voted. When the remaining 26% shareholders came to know about the transaction, they felt that it was a case of related party transaction and such loan advancement is prohibited under the Companies Act, 2013.
8. Stalwart filed its income-tax return of income (ROI) for the FY 2015-16 before September 30, 2016. It was noticed by the income-tax department (ITD) that the above said loan advancement by Stalwart to Galileo Investors Pte. Ltd. was a 'dividend' as per the Income-tax Act, 1961 (the IT Act) and therefore, appropriate taxes should have been withheld by Stalwart while advancing the loan amount as per the applicable tax rates either under the IT Act or under the India - Singapore Tax Treaty. Therefore, ITD issued a notice under Section 201 of Income Tax Act, 1961 stating that Stalwart failed to withhold taxes for the loan advancement.
9. Also, the Sales Tax Department of Bengaluru issued a notice to Stalwart stating that it had failed to register as a dealer under the KVAT Act, 2003 on its marketplace model and also failed to discharge VAT and CST liabilities on its marketplace business model because as per the expansive interpretation of the term 'dealer' under the Karnataka VAT Act, 2003 (KVAT Act, 2003), Stalwart was indirectly involved in supplying and distributing goods for a commission and therefore, was a 'dealer' under its marketplace business model also and it was required to pay VAT and CST on its intra state and interstate sales.
10. Global served a legal notice on Stalwart on December 31, 2016 under Section 434(1) (a) read with Section 433(e) of the Companies Act, 1956 to have failed to pay INR 13.92 crores, after adjusting INR 6 crores towards the penalty first and then on the interest. A Summary Suit under Order XXXVII of the Code of Civil Procedure, 1908 was also filed before the City Civil Court, Bengaluru for recovery of this amount, which is still pending. Thereafter, the present petition was filed before this Tribunal.

11. The present petition before this Tribunal requires the appraisal of several issues which can be summarised into the following basic issues:

- i. Whether Stalwart is unable to pay its debt and liable to be wound up under Section 271(a)?
- ii. Whether the winding up petition filed by the shareholders on just and equitable grounds under Section 271(g) is maintainable?
- iii. Whether the impleading petitions filed by the ITD and STD of Bengaluru under Section 280(e) are maintainable?
- iv. Whether the loan advanced to Galileo is dividend under the IT Act, 1961 and whether Stalwart is an assessee-in-default?
- v. Whether Stalwart is a dealer under its marketplace model?

12. The counsel for Global submitted a three-fold argument with regard to the first issue.

The first argument was with regard to the maintainability of the main winding up petition. The Counsel relied on '*State Bank of India v. Hegde and Golay Ltd*¹ in which it was stated that the winding up petition filed by them and the civil suit pending on the same matter are independently maintainable. Also, a creditor has adequate locus standi to present this petition as clearly provided under Section 272 (b). The second argument was that Stalwart is commercially insolvent and incapable of discharging the debt due to Global. The dishonour of all the six cheques issued by Stalwart established the right of the creditor to payment and inability of the company to pay. The third argument was that the appropriation of the part payment of INR 6 crores towards the penalty first and then towards the interest by Global is proper in law as there was no express intimation of the debtor's intention towards appropriation.

In response to the arguments raised by Global's counsel, the counsel for Stalwart stated that winding up is an extreme remedy and it cannot be invoked as a substitute for a civil suit for recovery of an alleged debt. A petition filed by a single creditor for non-payment of INR 13.92 crores cannot be used to wind up a successful start-up company which is facing temporary bottlenecks in its business and has prospects of being revived.² Also, there exists a bona fide dispute as to the debt, especially with regard to the appropriation of part payment. The discretion exercised by the petitioner in appropriating INR 6 crores which is provided under Section 60 of the Indian Contract Act is not applicable in the present case as Sections 59-61 are applicable

¹ State Bank of India v. Hegde and Golay Ltd., (1987) 62 Com Cases 239 (Kar).

² New Swadeshi Mills of Ahmedabad Ltd. v. Dye- Chem Corpn., (1986) 59 Com Cases 402.

only for appropriating distinct debts and not in case of single debts³. The counsel for the respondent also pointed that the deficiency of services provided by Global with regard to prompt and quality delivery of goods to Stalwart's customers is one of the major reasons for Stalwart's dip in sales and decline of profits. Stalwart had repeatedly raised the issue of deficient services provided by Global and the same was admitted by Global much before the filing of the present petition. This clearly indicates that the dispute is of a bona fide nature and the existence of such a dispute negates the presumption of inability to pay.

In the light of the aforesaid discussion, this Tribunal is of the opinion that the present petition can be admitted to be heard as Section 271(a) can be invoked even by a single creditor and the pendency of a civil suit does not bar the present petition as the proceedings are of a different nature. However, the merits of this petition stand questioned as this Tribunal is satisfied that there exists a bona-fide dispute as to the debt in question especially with regard to the appropriation of 6 crores by the petitioners. The right of appropriation exercised by the petitioner is not applicable in the present case as clearly pointed out by the respondent. The ratio of the Supreme Court in '*Industrial Credit and Development Syndicate v. Smithaben H Patel*'⁴ is applicable here. Hence, it is found that there is no sufficient ground to allow the petition filed by this petitioner for winding up the respondent.

13. With regard to the second issue, the Counsel for the Petitioner, i.e., 24% resident shareholders had filed the impleading petition under Section 241 of the Companies Act, 2013 and the petitioner has resorted to the remedy under the just and equitable jurisdiction. The fact that the Companies Act, 2013 provides umpteen numbers of remedies as to the question of oppression clearly evidences the legislature's intention that just and equitable jurisdiction can be resorted to only in extreme cases as held in '*J. Kadavil v. Malabar Industrial Co. Ltd.*'⁵ The Tribunal is not satisfied with the respondent's plea that the present loan advancement is not prohibited as the "save as otherwise" clause cannot be used to exclude loans otherwise prohibited under Section 185 within the non-prohibited side of Section 186. The respondent has argued that there is a considerable amount of conflict between the provisions of Section 2(76)(iv) and 2(76)(viii) of the Companies Act, 2013. However, the reason behind the non-

³ Industrial Credit and Development Syndicate v. Smithaben H Patel, A.I.R 1999 S.C 1036; (1999) 3 S.C.C 80

⁴ *Id*

⁵ J. Kadavil v. Malabar Industrial Co. Ltd., (1986) 59 Comp Cas 969 (Ker).

inclusion of associated companies as 'related party' clearly evidences that there were some exclusions specifically offered to private companies. However, this is a question of law and even if a Related Party transaction, as alleged, had taken place, a resolution has been approved and the voting of the Related Parties does not invalidate the meeting. The Tribunal is not satisfied with the argument of the petitioner that the interests of the shareholders need to be looked into while construing the MCA Notification as that would render the notification invalid. The Petitioners have not proven as to how the action of giving a loan has resulted in oppression and without relying on any alternate remedies, a blanket winding up order cannot be passed by the Tribunal. Hence, this impleading petition is dismissed without costs.

14. The third issue is with regard to the maintainability of the impleading petitions filed by the tax departments. The impleading petitions by the ITD and STD, Bengaluru were filed under Section 280 of the Companies Act, 2013. Now, this section grants the Tribunal jurisdiction to entertain questions of priorities in any matter arising out of or in relation to the winding up of company. This doesn't mean that the section shall commence to operate only after an order of winding up is made as the section clearly says "before or after the order for the winding up of the company is made". This section shall be read with Section 420(1) of the Companies Act which says- "*The Tribunal may, after giving the parties to any proceeding before it, a reasonable opportunity of being heard, pass such orders thereon as it think fit.*" Thus, the Tribunal shall give the parties a reasonable opportunity to hearing before making any order on this behalf. However, maintainability of a petition does not solely depend upon a court's competent jurisdiction. It shall exist only when the adequate locus standi of the parties is hereby proved. The present case has been brought before this Tribunal under Section 327 of Companies Act, 2013 demanding preferential payments. The applicability of this section arises only when the tax has to be "due and payable" by the company. In the present case, the question of tax being 'due and payable' does not even arise as only a show-cause notice has been issued so far. The petitioners still have to undergo numerous procedural compliances before claiming for preferential payments. Therefore, the Tribunal having the jurisdiction to entertain a petition of this nature shall hear the matter on merits and analyse the position. However, the claims of both the ITD and STD are very premature and cannot be granted at this stage.

15. The question as to whether the loan advancement to the Singaporean entity is a deemed dividend has also been looked into. Section 2(22)(e) of the Income Tax Act, 1961 says dividend shall be paid out of accumulated profits. Here, whether the company possess accumulated profits or not can only be determined after realising the assets of the company. This was held by the Supreme Court in the case of '*CIT v. Urmila Ramesh*⁶'. Additionally, in the case of '*Sunil Sethi v. Dy. CIT*⁷', it was held that amounts advanced by a company to its director under a board resolution, for specific purpose, would not fall under the mischief of Section 2(22)(e) of the Act. Applying the same ratio in the present case, the respondent has advanced actual and valid loans to Galileo after passing a board resolution and hence cannot be brought under the scope of Section 2(22)(e). Similarly, Article 10.4 of the India Singapore Tax Treaty ("ISTT") says dividend means income from 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 the distribution is a resident. Therefore, if any income from corporate rights are treated as taxable income from shares under the domestic law of the company distributing the income, it is dividend under the ISTT. However, the said loan advancement of the respondent does not amount to dividend under the domestic law in their resident State due to above mentioned grounds; therefore it cannot be deemed to be dividend under ISTT as well. However, the discussion falls back to the question based on its charge against the company treating them as assessee-in-default for having failed to deduct tax at source. Here, the company was not made liable to have evaded tax but to have failed to deduct tax at source while distributing amount to a foreign company as mandated under Section 195 of Income Tax Act, 1961. The biggest advantage of deducting tax at source is that it is a mere precautionary step of Income Tax Dept. as they shall refund the deducted tax at source when it is found that it does not actually fall under the heads of taxable dividend. Therefore, the respondent could have deducted tax at source and later after realising the assets and finally determining if its accumulated profits or not, could have asked for TDS refund if it were to be proved that the loan was not out of accumulated profits.
16. The final issue is whether Stalwart is a dealer under its marketplace model. This Tribunal is of the opinion that there is no need for any expansive interpretation and

⁶ CIT v. Urmila Ramesh, A.I.R 1998 S.C 2640.

⁷ Sunil Sethi v. Dy. CIT , (2008) 26 SOT 95 (Del).

analysis of the term 'dealer' as no law in question has defined the said term with reference to the marketplace model. However, The Ministry of Commerce and Industry of the Govt of India had issued Press Note No: 3 which provide 'Guidelines for FDI on E-Commerce'. In this Press Note, Clause iv of 2.1 defines marketplace model of e-commerce as:

'Marketplace model of e-commerce means providing of an information technology platform by e-commerce entity on a digital and electronic network to act as a facilitator between buyer and seller'.

Additionally, clause 2.3 of the guideline also says the post sales, delivery of goods to the customers and customer satisfaction will be the sole responsibility of the seller. Thus, Stalwart is not required to register as a dealer under the KVAT/CST authorities. Even if the STD has a valid claim on this behalf, it is still not sufficient as they also have merely issued a notice on this behalf and therefore the question of preferential payment does not even arise. Therefore the petition is liable to be dismissed lacking merits.

17. On the above mentioned grounds, the main winding up petition along with the three impleading petitions is dismissed by this Tribunal with no order as to costs.