

Team Code:

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

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IN THE HON'BLE NATIONAL COMPANY LAW TRIBUNAL, BENGALURU

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P.No. (CIVIL)\_\_\_\_\_

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

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

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

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

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

v.

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

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

OF

THE HON'BLE NATIONAL COMPANY LAW TRIBUNAL, BENGALURU

**MEMORANDUM ON BEHALF OF THE RESPONDENTS**

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<b>LIST OF ABBREVIATIONS</b>
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<b>&amp;</b>	<i>And</i>
<b>¶</b>	<i>Paragraph</i>
<b>AAR</b>	<i>Administrative Appeal Reports</i>
<b>AC</b>	<i>Appeal Cases</i>
<b>Ahmd.</b>	<i>Ahmedabad</i>
<b>AIR</b>	<i>All India Reporter</i>
<b>Anr.</b>	<i>Another</i>
<b>AP</b>	<i>Andhra Pradesh</i>
<b>App.</b>	<i>Appeal</i>
<b>Art.</b>	<i>Article</i>
<b>BCLC</b>	<i>Butterworths Company Law Cases</i>
<b>Bom.</b>	<i>Bombay</i>
<b>CA</b>	<i>Company Application/ Civil Appeal</i>
<b>Cal</b>	<i>Calcutta</i>
<b>Cas</b>	<i>Cases</i>
<b>Ch.</b>	<i>Chancery</i>
<b>Co.</b>	<i>Company</i>
<b>Com</b>	<i>Company</i>
<b>Com Cases</b>	<i>Company Cases</i>
<b>Comp.</b>	<i>Company</i>
<b>Corpt.</b>	<i>Corporate</i>

<b>DB</b>	<i>Division Bench</i>
<b>Ed.</b>	<i>Edition</i>
<b>ELT</b>	<i>Excise Law Times</i>
<b>Eq.</b>	<i>Equity Reports</i>
<b>EWHC</b>	<i>England and Wales Court of Appeal</i>
<b>Gau.</b>	<i>Gauhati</i>
<b>Guj.</b>	<i>Gujarat</i>
<b>HC</b>	<i>High Court</i>
<b>HL</b>	<i>House of Lords</i>
<b>Hon'ble</b>	<i>Honourable</i>
<b>ILR</b>	<i>Indian Law Reports</i>
<b>ITR</b>	<i>Income Tax Reports</i>
<b>Kar.</b>	<i>Karnataka</i>
<b>Ker</b>	<i>Kerala</i>
<b>LJ</b>	<i>Law Journal</i>
<b>LR</b>	<i>Law Reports</i>
<b>Ltd.</b>	<i>Limited</i>
<b>Mad.</b>	<i>Madras</i>
<b>MLJ</b>	<i>Madras Law Journal</i>
<b>Mum.</b>	<i>Mumbai</i>
<b>Ori.</b>	<i>Orissa</i>
<b>Ors.</b>	<i>Others</i>
<b>Ors.</b>	<i>Others</i>

<b>P&amp;H</b>	<i>Punjab and Haryana</i>
<b>P.</b>	<i>Private</i>
<b>Pat.</b>	<i>Patna</i>
<b>Pg</b>	<i>Page</i>
<b>Pvt.</b>	<i>Private</i>
<b>Pvt.</b>	<i>Private</i>
<b>QBD</b>	<i>Queen's Bench Division</i>
<b>Raj.</b>	<i>Rajasthan</i>
<b>SC</b>	<i>Supreme Court</i>
<b>SC</b>	<i>Supreme Court</i>
<b>SCC</b>	<i>Supreme Court Cases</i>
<b>SCL</b>	<i>SEBI &amp; Corporate Laws</i>
<b>SCL</b>	<i>SEBI &amp; Corporate Laws</i>
<b>SCR</b>	<i>Supreme Court Reports</i>
<b>Sec.</b>	<i>Section</i>
<b>Sec.</b>	<i>Section</i>
<b>SOT</b>	<i>Selected Orders of ITAT</i>
<b>STC</b>	<i>Sales Tax Cases</i>
<b>Supl.</b>	<i>Supplementary</i>
<b>T.C.</b>	<i>Tax Cases</i>
<b>Tri</b>	<i>Tripura</i>
<b>UOI</b>	<i>Union of India</i>
<b>v.</b>	<i>Versus</i>

<b>Vol.</b>	<i>Volume</i>
<b>WLR</b>	<i>Washington Law Review</i>

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

**[D] ONLINE DATABASES:**

1. SCC Online ([www.sconline.com](http://www.sconline.com))
2. Manupatra ([www.manupatra.com](http://www.manupatra.com))
3. Taxmann ([taxmann.com](http://taxmann.com))

## STATEMENT OF JURISDICTION

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

### *Section 280 - Jurisdiction of Tribunal*

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

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

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

**STATEMENT OF FACTS**

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

**STATEMENT OF ISSUES**

~ ISSUE 1 ~

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

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~ ISSUE 2~

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

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~ ISSUE 3~

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

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## SUMMARY OF ARGUMENTS

### ~ ISSUE 1 ~

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

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It is humbly contended that the petition filed by Global is not valid as it is not maintainable before NCLT, Bengaluru. Further, the Global had committed a breach of contract and thereby, taking an advantage of its own fault. Also, Stalwart is not presumed to be insolvent as these are merely temporary hiccups. Hence, Stalwart is not liable to be wound up.

### ~ ISSUE 2~

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

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It is humbly contended that the petition filed by the shareholders of Stalwart is not valid as it is not maintainable before NCLT, Bengaluru. Further, the loan advancement to Galileo does not amount to a related party transaction and is permitted by law. Hence, Stalwart is not liable to be wound up.

### ~ ISSUE 3~

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

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It is contended that the impleading petitions filed by the Tax departments are not valid as they are premature and hence not maintainable. Also, the amount advanced constitutes a loan and not dividend and is thus not taxable. Further, since Stalwart is only a service provider and not dealer under KVAT and CST Acts, no sales tax can be charged on its marketplace model.

**ARGUMENTS**

**~ ISSUE 1 ~**

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

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It is contended that the winding up petition [A] *is not maintainable before NCLT, Bengaluru* and [B] *Stalwart should not be wound up on the ground of inability to pay debts.*

**A. PRESENT PETITION IS NOT MAINTAINABLE BEFORE NCLT, BENGALURU**

It is contended that the present petition to wind up the respondent company is not maintainable because, [A.1] *there are alternative remedies available*, [A.2] *it cannot be used as remedy for realizing the existing debts* and [A.3] *that it is a remedy of last resort.*

**A.1. WINDING UP IS NOT ORDERED WHEN THERE ARE ALTERNATIVE REMEDIES**

If the petitioner has any other remedy available, other than filing a winding up petition, then the court refused to order winding up.<sup>1</sup> Winding up can be admitted only when compelling circumstances exist.<sup>2</sup> As per the agreement entered by Global1, [A.1.1] *there is an arbitration clause between the parties.*<sup>3</sup> Further, [A.1.2] *the Summary Suit proceedings initiated by the Petitioner No. 1 is also an alternative remedy.*<sup>4</sup>

**A.1.1. THERE IS EXISTENCE OF AN ARBITRATION AGREEMENT BETWEEN THE PARTIES**

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<sup>1</sup>JivebhaiMarghabhai Patel v. Extrusion Processes (P) Ltd., (1966) 2 Comp LJ 74 (Bom).

<sup>2</sup>DaulatMakanmalLuthria v. Solitaire Hotels (P.) Ltd., (1993) 76 Comp Cas 215 (Bom); Lokenath Gupta v. Credits (P) Ltd., (1968) 38 Comp Cas 599.

<sup>3</sup>¶ 5, Moot Proposition.

<sup>4</sup>¶ 14, Moot Proposition.

The arbitration clause should be given priority,<sup>5</sup> where the question of indebtedness arises.<sup>6</sup> It is a statutory mandate on the judicial authorities to refer the parties to arbitration first,<sup>7</sup> when an action brought is the subject matter of an arbitration agreement.<sup>8</sup> The agreement between Global and Stalwart, contains an arbitration clause.<sup>9</sup> Therefore, NCLT may refer the dispute to be dealt by way of arbitration.

#### **A.1.2. THE SUMMARY SUIT FILED IN CITY CIVIL COURT IS AN ALTERNATIVE REMEDY**

The underlying principle behind filing a summary suit in a Civil Court under Order XXXVII of the CPC, 1908 is expeditious disposal of suits within a prescribed time frame.<sup>10</sup> Further, where the creditor had already resorted to a civil suit, the Court had dismissed the winding up petition.<sup>11</sup> Global had already filed a summary suit before the City Civil Court,<sup>12</sup> which is an alternative remedy. Therefore, the winding up petition has to be dismissed.

#### **A.2. WINDING UP CANNOT BE USED AS A MEANS FOR REALIZING EXISTING DEBTS**

A winding up petition should not be utilized merely as a means for realizing debts due from a company,<sup>13</sup> as it is not to be sought for a short cut and cheap device to coerce payment.<sup>14</sup> This is because the object of winding up petition is to sub-serve the interests of companies which

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<sup>5</sup>Re Duet Real Estate Partners 1 LP (unreported, 7 June 2011).

<sup>6</sup>Re Times Property Holdings, [2011] CILR 223.

<sup>7</sup>Rusant Ltd. v. Traxys Far East Ltd., (2013) EWHC 4083 (Ch).

<sup>8</sup>UNCITRAL Model Law on International Commercial Arbitration, Article 8(1), 1985; Section 8, Arbitration and Conciliation Act, 1996; P. AnandGajapati Raju v. PVG Raju, (2000) 4 SCC 539.

<sup>9</sup>¶ 5, Moot Proposition.

<sup>10</sup>Neebha Kapoor v. JayantilalKhandwala, AIR 2008 SC 1117

<sup>11</sup> State Trading Corporation of India Ltd. v. Punjab Tanneries Ltd., (1989) 66 Com Cases 634 (P&H).

<sup>12</sup>¶ 14, Moot Proposition.

<sup>13</sup>AsimPharmachem Industries v. NilsinUltrachem Ltd. (2013) 176 Com Cases 460 (Guj.); Ambey Flour Mills (P.) Ltd. v. Vimal Chand Jain, (1991) 70 Comp. Cas. 459 (Bom).

<sup>14</sup>Chellaradh& Co. Ltd. v. MVK Sundaram, AIR 1955 Mys 122;.

have not paid their debts or which are unable to pay their debts.<sup>15</sup> Global had initiated winding up proceedings merely to recover its existing debts by appointing an Official Liquidator.<sup>16</sup> Therefore, the petition is liable to be dismissed.

### **A.3. WINDING UP IS A REMEDY OF LAST RESORT**

A petition for winding up is the remedy of last resort.<sup>17</sup> Prior to the final order of winding up, the court can order the company to revive its functioning and play a constructive role,<sup>18</sup> by ordering the petitioner to rectify its deficiency in services and the respondent to secure payment.<sup>19</sup> Global had admitted that there was a deficiency of services on its part, because of which the respondent could not make its contractual payments. Therefore, the court in such a situation orders the former to rectify its defects and the latter to make payments.

### **B. STALWART SHOULD NOT BE WOUND UP FOR ITS INABILITY TO PAY GLOBAL'S DEBT**

It is contended that Stalwart should not be ordered to be wound up because [B.1] *there was a breach of a contract on the part of the Global*, [B.2] *Stalwart should not be ordered to be wound up for inability to pay debts*.

#### **B.1. THERE WAS A BREACH OF THE CONTRACT**

A party to a contract has to perform the contract in the manner prescribed in the contract.<sup>20</sup> Failing which it amounts to breach. The essential factor of the agreement between Global and Stalwart is that the former has to promptly supply qualitative goods to the

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<sup>15</sup>B. Viswanathan v. Seshasayee Paper & Boards Ltd., (1992) 73 Comp. Cas. 136 (Mad).

<sup>16</sup>¶ 15, Moot Proposition.

<sup>17</sup>Gadadhar Dixit v. Utkal Flour Mills (P) Ltd., (1989) 66 Comp. Cas. 188 (Ori.); Kiritbhai R. Patel v. Lavina Construction and Finance Ltd. (1999) 20 SCL 158; S. Palaniappan v. Tirupur Cotton Spg. & Wvg. Mills Ltd. (2004) 50 SCL 293.

<sup>18</sup>Kermeen Foods Ltd., *In Re*, (1985) 58 Com Cases 156.

<sup>19</sup>Jyoti Ltd. v. UEE Electrical Engineers P. Ltd., (2000) 25 SCL 506, 508.

<sup>20</sup> Sec. 50, Indian Contract Act, 1872.

customers under its marketplace model business.<sup>21</sup> But, Stalwart had received several complaints from the customers with regard to the quality and specification of goods delivered by Global.<sup>22</sup> Therefore, there is a breach of contract by Global.

### **B.1.1. PARTY TO A CONTRACT CANNOT TAKE ADVANTAGE OF ITS OWN FAULT**

One party to a contract to take advantage of his own acts to defeat the other's rights,<sup>23</sup> as per a common law maxim, *nullus commodum capere potest de injuria sua propria*. There was a breach of contract by Global,<sup>24</sup> during the same period, there was a sudden rise in competition in the market.<sup>25</sup> As a result there was a dip in the sales of Stalwart's business because of the deficiency in services by Global, which were not improved. Therefore, Global should not be allowed to take an advantage of its own fault.

### **B.2. WINDING UP SHOULD NOT BE ORDERED ON GROUND OF INABILITY TO PAY DEBTS**

It is contended that the court should not wind up a company for inability to pay debts, [B.2.1] *the company's defence against the claim on dues of the petitioner is bona fide*, [B.2.2] *there is a dispute about a substantial part of the debt*.<sup>26</sup>

### **B.2.1. THE DEFENCE OF STALWART FOR NON-PAYMENT OF DEBT IS *BONA FIDE***

Where the respondent has a bona fide claim for non-payment, inability to pay debts will not be inferred.<sup>27</sup> If the goods supplied to the company are sub-standard, winding up is

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<sup>21</sup>¶5, Moot Proposition.

<sup>22</sup>¶ 8, Moot Proposition.

<sup>23</sup> Thompson v. ASDA - MFI, Group Plc, (1988) 2 WLR 1093; Alghussein Establishment v. Eton College, (1988) 1 WLR 587 (HL).

<sup>24</sup>Issue B.1.

<sup>25</sup>¶ 6, Moot Proposition.

<sup>26</sup> Kothari Industrial Corporation Ltd. v. Kotak Mahindra Bank Ltd., [2010] 97 SCL 119 (Mad.); Sheela Rani Textiles Ltd. v. Sri Anjaneya Cotton Mills (P.) Ltd., [2012] 112 SCL 286.

refused.<sup>28</sup>The dispute raised by the Stalwart is bona fide as after the first six PDCs got dishonored, Global voluntarily continued to supply goods to Stalwart,<sup>29</sup> without claiming interest and penalty. Thus, intermittent payments should be appropriated towards the principal.

### **B.2.2. THERE IS A DISPUTE ABOUT A SUBSTANTIAL PART OF THE DEBT**

If there is an unascertained and *bona fide* dispute as to a substantial part of the debt in a winding up petition due to inability to pay debts,<sup>30</sup> an order for winding up is not justified.<sup>31</sup> Therefore, as proved in the previous issue, respondent company raised a *bona fide* dispute with regard to the claim. Therefore, winding up should not be ordered.

### **B.3. INABILITY TO PAY DEBT DOES NOT AMOUNT TO INSOLVENCY**

A company is not presumed to be insolvent, when the existing assets are sufficient to meet its liabilities,<sup>32</sup> that is a company has to be commercially insolvent.<sup>33</sup> Further, it has to be noticed that, [B.3.1.1] *mere admission of liability*, [B.3.1.2] *dishonor of cheques* and [B.3.1.3] *temporary difficulties in paying debts by a company is not sufficient proof for insolvency*.

#### **B.3.1.1. ADMISSION OF LIABILITY IS NOT SUFFICIENT PROOF FOR INSOLVENCY**

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<sup>27</sup> Ashok Aggarwal v. Amitex Polymers (P) Ltd., [2014] 49 Taxmann.com 127 (Delhi); *In re*, Federal Chemical Works Ltd., (1964) 34 Com Cases 963 (All); Sharma Enterprises v. J.N. Hotels Pvt. Ltd., (1994) 14 Corpt LA 90 (Pat-Ranchi Bench).

<sup>28</sup> Surat Goods Transport Service v. Golkonda Engg. Enterprises Limited, (2012) 169 Com Cases 24; U.V. Shenoy v. Karnataka Engineering Products Co. P. Ltd., (1981) Com Cases 116 (Kar).

<sup>29</sup> ¶ 6, Moot Proposition.

<sup>30</sup> Madhusudan Gordhandas & Co. v. Madhu Woollen Industries Pvt. Ltd., (1972) 42 Comp. Cas. 125.

<sup>31</sup> Virgin Records (I) Pvt. Ltd. v. Milestone Music Distributors Pvt. Ltd., (2002) 35 SCL 320 (Bom); Co. v. Rameshwar Singh, AIR 1920 Cal 1004; Piara Singh (S) v. S.H.R Properties Pvt. Ltd., (1993) 10 Corpt LA 83 (Del); A Company (No 006685 of 1996), *re*, (1997) 1 BCLC 639 (Ch D).

<sup>32</sup> Coimbatore Transport Ltd. v. Governor General in Council, (1948) 61 LW 459; *In re*, Europe Life Insurance Society, (1869) 9 Eq 122; Krishna Iyer & Sons v. New Era Manufacturing Co. Ltd., (1965) 35 Com Cases 410 (Ker.); Tinsukia Vastra Bhandar v. Assam Tea Corporation Ltd., (1991) 72 Com cases 178 (Gau.).

<sup>33</sup> European Life Assurance Society, *re*, (1869) LR 9 Eq 122; Registrar of Companies v. Sohanmull Golcha P. Ltd., (1972) 42 Com Cases 386 (Raj.).

The mere admission of the amount due, is not a sufficient proof for insolvency.<sup>34</sup> The respondent company had admitted its liability,<sup>35</sup> this itself does not constitute inability to pay debts. Therefore, the respondent company cannot be presumed to be insolvent.

#### **B.3.1.2. DISHONOR OF CHEQUES NOT SUFFICIENT PROOF FOR INSOLVENCY**

The mere dishonor of a company's cheques is not necessarily an evident proof of inability.<sup>36</sup> Thus, dishonour of cheques issued by the Stalwart,<sup>37</sup> is not a sufficient proof for insolvency.

#### **B.3.1.3. TEMPORARY DIFFICULTIES BY A GROWING COMPANY IS INSUFFICIENT TO PROVE INSOLVENCY**

Any growth-oriented company suffering from a temporary setback cannot be wound up for being insolvent.<sup>38</sup> The respondent company is an upcoming company having a great track record by holding around 40% and 20% market shares in its marketplace and inventory model business respectively.<sup>39</sup> Therefore, mere non-payment to one creditor because of some temporary hiccups in the market, is not a proof for insolvency.

#### **B.4. WINDING UP OF STALWART IS OPPOSED TO PUBLIC INTEREST**

When a winding up petition is being heard, the interests of not only the creditors,<sup>40</sup> but also those of its employees,<sup>41</sup> shareholders and general public have to be considered.<sup>42</sup> If the

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<sup>34</sup>Smt. Vijayalakshmi v. Hari Hara Ginning & Pressing, (1999) 96 Comp Cases 723.

<sup>35</sup>¶ 8, Moot Proposition.

<sup>36</sup>Re, A Company (No 0010 656 of 1990), 1991 BCLC 464 (Ch D).

<sup>37</sup>¶ 6, Moot Proposition.

<sup>38</sup> American Express Bank Ltd. v. Core Health Care Ltd., (1999) 96 Com Cases 841.

<sup>39</sup>¶ 3, Moot Proposition.

<sup>40</sup>Ramdeo Ranglal v. Ghooronia Tea Co. (P) Ltd., (2005) 60 SCL 449; Bhalchandra Dharmajee Makaji v. Alcock, Ashdown & Co Ltd., (1972) 42 Comp Cas 190 (Bom).

<sup>41</sup> Rishi Enterprises, *In Re*, (1992) 73 Com Cases 271, 272, 275 (Guj.); Ramdeo Ranglal v. Ghooronia Tea Co. (P) Ltd., (2005) 60 SCL 449; KCP Ltd. v. Pridential Sugar Corporation Ltd., (2005) 127 Com Cases 66.

winding up of Stalwart is ordered, then the same would adversely affect the investors, shareholders including thousands of workers.

Therefore, it is submitted Stalwart should not be wound up for its inability to pay debts.

~ ISSUE 2 ~

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

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It is contended that Stalwart should not be wound up because [A] *the present petition is not maintainable before NCLT, Bengaluru*, [B] *the loan advancement is valid by law*, [C] *related party transactions are not applicable to private companies*, [D] *majority shareholders have approved the transaction* and [E] *it does not amount to oppression*.

**A. THE PRESENT PETITION IS NOT MAINTAINABLE BEFORE NCLT, BENGALURU.**

It is contended that the present petition is not maintainable before NCLT because, [A.1] *it is not just and equitable to wind up the company due to presence of alternative remedies* and [A.2] *winding up is a remedy of last resort*.

**A.1. IT IS NOT JUST AND EQUITABLE THAT THE COMPANY BE WOUND UP**

A petition for winding up filed under just and equitable grounds is dismissed where there is an alternative remedy available.<sup>43</sup> Shareholders have an alternative remedy, therefore, Stalwart should not be wound up.

**A.1.1. ALTERNATIVE LEGALLY PERMISSIBLE REMEDIES ARE AVAILABLE**

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<sup>42</sup>Veeramachineni Seethiah v. Body Venkatasubbiah, AIR 1949 Mad 675; Cine Industries & Recording Co. Ltd., *Re*, AIR 1942 Bom 231; KCP Ltd. v. Pridential Sugar Corporation Ltd., (2005) 127 Com Cases 66. Manjulalbai v. Jayanth Vitamins Ltd. 1991 Comp Case 443 MP; Ramdeo Ranglal v. Ghooronia Tea Co. (P) Ltd., (2005) 60 SCL 449; KCP Ltd. v. Pridential Sugar Corporation Ltd., (2005) 127 Com Cases 66.

<sup>43</sup> Kapil N. Mehta v. Shree Laxmi Motors Ltd. (1999) 19 SCL 420; Ashutosh Sharma v. Torque Cables (P.) Ltd. (2013) 37 taxmann.com 431 (Delhi).



The petitioner must not only convince the court that there are just and equitable grounds for winding up of the company, but also that there is no alternative remedy open to him.<sup>44</sup>For allegations of misuse of funds and fraudulent transactions, the remedy is under sec. 241 and winding up is refused.<sup>45</sup>As the shareholders have a remedy under section 241, the winding up petition should not be admitted.

### **A.2. WINDING UP IS A REMEDY OF LAST RESORT**

The remedy of winding up is a remedy of last resort.<sup>46</sup>Where the only grounds alleged show oppression and mismanagement, winding up should not be ordered.<sup>47</sup>

### **B. LOAN ADVANCEMENT IS VALID BY LAW**

The Board may by its resolutions passed at a meeting grant loans to a committee of directors, the managing director etc.<sup>48</sup> Therefore, loans should not be given to Galileo. Further, section 185(1) begins with the phrase, "Save as otherwise provided in this Act", which means that it is subject to exceptions provided under this Act. Thus, loans which fall within the ambit of Section 186, complying with that section are outside the purview of the bar in section 185(1) and in advancing a loan which does not extend to 60% of its paid-up share capital, it would be sufficient if a resolution sanctioning it is passed at a meeting of the Board with the consent of all the directors present at the meeting.<sup>49</sup> Whereby advancing a loan of 50 Crores which is

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<sup>44</sup>Atul Drug House Ltd., *In Re*, (1971) 41 Com Cases 352 (Guj.); Jivebhai Marghabhai Patel v. Extrusion Processes (P) Ltd., (1966) 2 Comp LJ 74 (Bom.).

<sup>45</sup>M. Mohan Babu v. Heritage Foods India Ltd., (2002) 108 Comp Cas 771 (AP); K. Mohan Babu v. Heritage Foods India Ltd., (2002) 108 Comp Cas 793.

<sup>46</sup>Gadadhar Dixit v. Utkal Flour Mills (P) Ltd., (1989) 66 Comp. Cas. 188 (Ori.); Lokenath Gupta v. Credits (P.) Ltd., (1968) 38 Comp Cas 599; Daulat Makanmal Luthria v. Solitaire Hotels (P.) Ltd., (1993) 76 Comp Cas 215 (Bom.).

<sup>47</sup>Jose J Kadavil v. Malabar Industrial Co. Ltd., (1986) 59 Com Cases 969 (Ker); Bhaskar Stoneware Pipe P. Ltd., v. Rajinder Bhaskar, (1988) 63 Com Cases 184 (Delhi - DB).

<sup>48</sup>Sec. 179(3)(f), Companies Act, 2013.

<sup>49</sup>3RAMAIYA A, GUIDE TO THE COMPANIES ACT4952 (17th ed. 2010).

not exceeding 60% of the paid-up share capital of Stalwart, is permitted by law and cannot be held to be invalidated by law under Section 185. Further, this transaction is approved at the Board meeting by the directors of Stalwart namely, HNI's, Galileo and Sam.

### **C.RPT DOES NOT APPLY TO PRIVATE LIMITED COMPANIES**

Sec. 2(76)(viii) of the Act, is now not applicable to a private company with respect to Sec. 188.<sup>50</sup> It lays down that a contract by a private company with its associate company will not be regarded as a RPT.<sup>51</sup> Therefore, Galileo is not a related party because private limited companies which are associate company to the main company,<sup>52</sup> are exempted.

### **C.1. LOAN ADVANCEMENT IS NOT A TRANSACTION FOR THE PURPOSE OF RPT**

Sec. 188 of the Act lays down the list of transactions for the purpose of it being called a RPT.<sup>53</sup> This list does not contain granting loans to the directors governed by sec. 185. Hence, loan advancement to the directors (Galileo) is not a transaction for the purpose of sec.188.

### **D. MAJORITY SHAREHOLDERS HAVE APPROVED THE TRANSACTION**

The loan advancement has been approved by majority shareholders, thereby, **[D.1]** *does not require prior approval from the other shareholders.*

### **D.1. NO NEED TO TAKE APPROVAL FROM ANY OTHER SHAREHOLDERS**

Only where the aggregate of the loans advanced exceeds the limit specified under Sec. 186(2) of the Act which is 60% of the paid up share capital, the question of authorization by a special resolution passed in a general meeting arises.<sup>54</sup> The loan advancement which is INR 50 crores does not exceed the paid-up share capital of INR 350 crores. Therefore, the contention to hold a general meeting and pass a special resolution does not stand.

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<sup>50</sup>Notification on June 5, 2015, Ministry of Corporate Affairs.

<sup>51</sup>Companies (Amendment) Act, 2015.

<sup>52</sup> Sec. 2(6), Companies Act, 2013.

<sup>53</sup> Sec. 188, Companies Act, 2013.

<sup>54</sup> Sec. 186(2), Companies Act, 2013; Rule 13(1), Companies (Meetings of Board and its Powers) Rules, 2014.

**D.1.1. ALTERNATIVELY: CONSENT OF THE BOARD IS SUFFICIENT TO ENTER INTO RPT**

*Arguendo*, where the consent of the Board is obtained at its meeting to enter into a contract or an arrangement with a related party, such transaction remains valid.<sup>55</sup> The disputed transaction has received the approval of the Board.<sup>56</sup> Therefore, there is no need to take any approval from the shareholders.

**D.1.2. RULE IN *HOSS V. FARBOTTLE***

If the majority shareholders support the contract entered by the directors, the minority shareholders' approval is not required.<sup>57</sup> The directors who have approved the transaction in the board resolution,<sup>58</sup> constitute 74% of the voting stocks in the respondent company.<sup>59</sup> Therefore, the approval of the shareholders' is not needed for the said loan advancement.

**E.DOES NOT AMOUNT TO OPPRESSION**

In order to establish that the conduct of the majority shareholders was oppressive to the minority, there must be a visible departure from the standards of fair dealing,<sup>60</sup> which must not be considered in isolation,<sup>61</sup> because it will not suffice the requirement to order winding up under just and equitable grounds.<sup>62</sup> If the alleged acts would be within the powers of the company and the intention of the majority of the shareholders is clear, then it does not

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<sup>55</sup> Sec. 188, Companies Act, 2013.

<sup>56</sup> ¶ 11, Moot Proposition.

<sup>57</sup> *Rajahmundry Electric Supply Co. v. Nageshwara Rao*, AIR 1956 SC 213.

<sup>58</sup> ¶ 11, Moot Proposition.

<sup>59</sup> ¶ 10, Moot Proposition.

<sup>60</sup> *In Re, Long Thai Sawmill (Miri)* and (1974) 2 MLJ 227.

<sup>61</sup> *Chatterjee Petroleum v. Haldia Petrochemicals*, (2011) 10 SCC 466; *Shanti Prasad Jain v. Kalinga Tubes Ltd.*, (1965) 35 Com Cases 351 (DB - Orissa); *Chander Krishan Gupta v. Pannalal Girdhari Lal (P.) Ltd.*, 184 55 Comp Cas 702 Delhi; *V.M. Rao v. Rajeshwari Ramakrishnan*, (1987) 61 Com Cases 20 (Mad - DB);

<sup>62</sup> *Re diamond Fuel Co. Ltd.* (1879) 13 Ch. D. 151.

amount to oppression.<sup>63</sup> A mere apprehension that they will be oppressed in future is not sufficient to invoke this section.<sup>64</sup> The shareholders had failed to establish that there are continuous acts leading to oppression. Further, the loan advancement is valid by law,<sup>65</sup> thereby, it cannot be said that there was a departure from fair dealing in the company. The majority had approved the transaction,<sup>66</sup> which shows the intention of the majority in favour of the resolution. Therefore, the said transaction does not amount to oppression.

Therefore, it is submitted that the respondent company should not be wound up.

~ ISSUE 3 ~

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**WHETHER THE IMPEADING PETITIONS FILED BY THE TAX  
DEPARTMENTS AGAINST STALWART ARE VALID.**

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It is contended that the impleading petitions filed by the Tax departments against Stalwart are not valid as [A] *they are premature and not maintainable*, [B] *The claims of the Income Tax Department and* [C] *the Sales Tax Department are not justifiable.*

**A. THE IMPEADING PETITIONS ARE PREMATURE & NOT MAINTAINABLE**

Under Sec. 143(3)&(2), the Assessing Officer will issue a notice to the Assessee to take the case in scrutiny. After hearing such evidence as the Assessee may produce and after taking into account all the relevant materials, he shall pass an Assessment Order in writing to determine the amount the Assessee is bound to pay.<sup>67</sup> Application to the court is a mode of

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<sup>63</sup>Menier v. Hooper's Telegraph Works (1874) L. R. 9 Ch. App. 350.

<sup>64</sup>Krishna Prasad v. Andhra Bank Ltd., 1983 53 CompCas 73 AP

<sup>65</sup>Issue B.

<sup>66</sup>Issue D.1.2

<sup>67</sup>VINOD SINGHANIA, TAXMANN GUIDE TO INCOME TAX (56<sup>th</sup>ed. 2017).

recovery by the Assessing Officer.<sup>68</sup> In the present case, the tax department's dues have not been ascertained as no assessment order has been made and the petition is premature.

### **B. THE CLAIMS OF THE INCOME TAX DEPARTMENT ARE NOT JUSTIFIABLE**

The claims of the Income Tax Department are not justifiable as [B.1.] *obligation of repayment constitutes a loan and not dividend*, [B.2.] *Sec. 90 proposes to use the law which is more beneficial to assessee*, [B.3.] *Amount advanced is not 'dividend' under the India Singapore Treaty* and [B.4.] *Arguendo: Loan advanced is not deemed dividend under the IT Act*.

#### **B.1. OBLIGATION OF REPAYMENT CONSTITUTES A LOAN AND NOT DIVIDEND**

Loan is an act of lending or a grant of something for temporary use.<sup>69</sup> The first consideration in determining whether a shareholder's withdrawals or advances from a corporation constitute loans or constructive dividends is whether, at the time of the withdrawals or advances, the shareholder intended to repay the amounts received and the corporation intended to be repaid.<sup>70</sup> As the loan advanced by Stalwart will be returned at some later point in time<sup>71</sup>, it cannot be treated as loan.

#### **B.2. SEC. 90 PROPOSES TO USE THE LAW WHICH IS MORE BENEFICIAL TO ASSESSEE**

Relief in case of existence of an international treaty, depends on the assessee's discretion for the application of the provisions.<sup>72</sup> Since Stalwart relied on the treaty<sup>73</sup> for the definition of dividend<sup>74</sup>, provisions of the treaty will have an overriding effect on the provisions of IT Act.

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<sup>68</sup> Sec. 226, Income Tax Act, 1961.

<sup>69</sup> Black's Law Dictionary, 7<sup>th</sup> Edition, 1999.

<sup>70</sup> Bruecher v. Commissioner, T.C. Summary Opinion 2005-52 (T.C. 2005).

<sup>71</sup> ¶ 12, Moot Proposition.

<sup>72</sup> Sec. 90(2), Income Tax Act, 1961.

<sup>73</sup> India Singapore Double Taxation Avoidance Agreement, Art. 10, 1994

<sup>74</sup> ¶ 12, Moot Proposition

**B.3.AMOUNT ADVANCED IS NOT 'DIVIDEND' UNDER THE INDIA SINGAPORE TREATY**

'Dividend' under the Treaty means income from shares or other rights, not being debt-claims.<sup>75</sup> Anything that is due and which a person is entitled to collect is in the nature of a debt claim.<sup>76</sup> Debt claims under the Treaty are regarded as loans.<sup>77</sup> Since the amount advanced by Stalwart is a debt claim or loan, it is not dividend under the Treaty.

**B.4.ALTERNATIVELY, LOAN ADVANCED IS NOT DEEMED DIVIDEND UNDER THE IT ACT**

A requirement for loan advanced to be characterized as deemed dividend is that the loan or advance should be distributed from the accumulated profits of the company.<sup>78</sup> Accumulated Profits mean income retained and not paid out in dividends or dissipated by losses<sup>79</sup>, that is, commercial profits<sup>80</sup>, which are determined after computing allowance of charge of normal depreciation<sup>81</sup> and other expenses.<sup>82</sup> The present loan has been given out of sales proceeds<sup>83</sup> which do not include deduction of expenses and hence are not commercial profits or accumulated profits. Loan advanced thus cannot be called deemed dividend.

**C.THE CLAIMS OF THE SALES TAX DEPARTMENT ARE NOT JUSTIFIABLE**

The claims of the Sales Tax Department are not justifiable because [C.1.] *company providing online retail distribution is only a service provider*, [C.2.] *E-commerce companies are not agents of the sellers* and [C.3.] *Revenue Neutrality must be maintained*.

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<sup>75</sup> United Nations Model Double Taxation Convention, New York, Commentary on Articles, 2011.

<sup>76</sup> *Ansaldo Energia SPA v. Commissioner of Income-tax*, (International Taxation), Chennai, [2016] 69 taxmann 369 (Madras); *Union of India v. Tata Chemicals Ltd.*, [2014] 363 ITR 612.

<sup>77</sup> United Nations Model Double Taxation Convention, New York, Commentary on Articles, 2011.

<sup>78</sup> Sec 2(22)(e), Income Tax Act, 1961.

<sup>79</sup> *CIT v. M.V. Murugappan*, [1970] 77 ITR 818(SC).

<sup>80</sup> *CIT v. Viramgam Mills Co. Ltd.*, [1961] 43 ITR 270 (Guj).

<sup>81</sup> *Navintal C. Jhaveri v. CIT*, [1971] 80 ITR 582( Bom).

<sup>82</sup> *Assistant Commissioner of Income Tax v. Yasin Hotels (P) Ltd.*, [2009] 30 SOT 47.

<sup>83</sup> ¶ 11, Moot Proposition.

**C.1. COMPANY PROVIDING ONLINE RETAIL DISTRIBUTION IS ONLY A SERVICE PROVIDER**

A company providing an online retail distribution channel is only a service provider and not a dealer, As long as legal ownership of goods is not transferred to the company, it doesn't become a dealer.<sup>84</sup> Since Stalwart only facilitates sale<sup>85</sup> and does not sell the goods itself, it is not liable to pay VAT or CST.

**C.2. E-COMMERCE COMPANIES ARE NOT AGENTS OF THE SELLERS**

An agent is a person employed to do any act for another or to represent another in dealings with third persons.<sup>86</sup> E-commerce companies provide services on principal to principal basis.<sup>87</sup> Stalwart transacts business through its own website<sup>88</sup> and does not represent Global. Essence of agency to sell is the delivery of goods to a person who is to sell them.<sup>89</sup> Global delivers the goods directly under the marketplace model<sup>90</sup> and Stalwart only connects the online buyers with the actual sellers.<sup>91</sup> This does not constitute agency to sell.

**C.2.1. PRINCIPLE OF *NOSCITUR A SOCIIS* MUST BE APPLIED**

*Noscitur a Sociis* means that the meaning of a word is to be judged by the company it keeps.<sup>92</sup> It is a legitimate rule of construction to construe words in an Act with reference to words found in immediate connection with them.<sup>93</sup> Thus, the words 'supply' and

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<sup>84</sup>M/s. Amazon Seller Services Pvt. Ltd. v. The Commissioner of Central Excise, AAR/ CE/04/2012

<sup>85</sup> ¶ 2, Moot Proposition

<sup>86</sup> Sec. 182, Indian Contract Act, 1872

<sup>87</sup> M/s. Amazon Seller Services Pvt. Ltd. v. The Commissioner of Central Excise, AAR/ CE/04/2012

<sup>88</sup> ¶ 2, Moot Proposition

<sup>89</sup> State of Tamil Nadu v. State Trading Corporation of India Ltd., (1968) 61 STC 341 (Mad HC).

<sup>90</sup> ¶ 4, Moot Proposition.

<sup>91</sup> ¶ 2, Moot Proposition.

<sup>92</sup>Oswal Agro Mills Ltd. v. Collector of Central Excise, AIR 1993 SC 2288

<sup>93</sup> Angus Robertson v. George Day, (1879) 5 AC 63; M/s Bhayana Builders (P) Ltd. &Ors. v. CST, Delhi &Ors., 2013 (32) S.T.R. 49 (Tri. – LB).

‘distributing’ should be interpreted in light of *Noscitur a Socii*. As Stalwart is not engaged in supplying or distributing the goods, it cannot be said to be selling the goods.

### **C.3. REVENUE NEUTRALITY MUST BE MAINTAINED**

Under Finance Act, 1984, ‘*business auxiliary service*’ includes any service incidental or auxiliary to any activity specified and includes services as a commission agent<sup>94</sup>, where ‘commission agent’ means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person collects payment of sale price of such goods or services.<sup>95</sup>Now, revenue neutrality entails that there should not be any undue gain at the hands of the tax departments.<sup>96</sup>Thus, wrongfully imposing sales tax liabilities on Stalwart by the state would lead to violation of principle of tax neutrality as Stalwart is a service provider who provides ‘business auxiliary service’ and is thus already discharging service tax liabilities.

Therefore, the tax department's claims are not valid.

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<sup>94</sup> Sec. 65(19), Finance Act, 1984.

<sup>95</sup> Explanation (a) to Sec. 65(19)(vii), Finance Act, 1984.

<sup>96</sup>Commr. Of Central Excise v. Crystal Crystal Quinone (P) Ltd., 2009 (233) E.L.T. 499 (Tri. - Ahmd.)



**PRAYER**

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

**Dismiss** the main winding up petition with all impleading petitions as they are not maintainable.

**OR/ Alternatively**

- 1. Declare** that Stalwart should not be wound up for inability to pay debts or on just and equitable grounds.
- 2. Hold** that the claims of Income Tax Department and Karnataka Sales Tax Department are invalid.

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

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

*Sd/-*

*(Counsels on behalf of the Respondents)*