

TEAM CODE:

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

17th – 19th February, 2017

**BEFORE THE HON'BLE NATIONAL COMPANY LAW TRIBUNAL,
KARNATAKA**

COMPANY PETITION (CP) NO. 10 OF 2017

(UNDER SECTION 271 r/w SECTION 272 OF THE COMPANIES ACT, 2013)

IN THE MATTER OF:

GLOBAL OFFICE SUPPLIERS PVT. LTD., BENGALURU **PETITIONER 1**

SHAREHOLDERS OF STALWART ONLINE STORES PVT. LTD. **PETITIONER 2**

ADDITIONAL COMMISSIONER OF INCOME TAX, BENGALURU **PETITIONER 3**

DEPUTY COMMISSIONER OF COMMERCIAL TAX, BENGALURU **PETITIONER 4**

v/s

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

WRITTEN SUBMISSION ON BEHALF OF THE RESPONDENT

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LIST OF ABBREVIATIONS

¶ /Para	Paragraph
&	And
§	Section
%	Percentage
AAR	Authority for Advance Ruling
A/c.	Account
AC	Appeal Cases
ACIT	Additional Commissioner of Income Tax
Addl.	Additional
Ahd	Ahmedabad
AIR	All India Reports
All	Allahabad
Anr.	Another
Art.	Article
AP	Andhra Pradesh
AY	Assessment Year
Bang	Bengaluru
BLR/BOMLR	Bombay Law Report
Board	Board of Directors
Bom.	Bombay

[LIST OF ABBREVIATIONS]

Cal.	Calcutta
CA	Companies Act
C.A.	Company Application
CBDT	Central Board of Direct Tax
Chen	Chennai
CIT	Commissioner of Income Tax
CLA	Company Law Advisor
CLB	Company Law Board
Co.	Company
Comp. Cas.	Company Cases
CP	Company Petition
CPC	Code of Civil Procedure, 1973
CR	Case Report
Cr.	Crore
C.S.T.	Central Sales Tax
CST	Commissioner of Sales Tax
CTBT	Central Board of Direct Tax
CTR	Currency Transaction Report
CTR	Current Tax Reporter
CTO	Commercial Tax Officer
DCCT	Deputy Commissioner of Commercial Tax

DCIT	Director of Income Tax (International Taxation)
Del.	Delhi
DIT	Director of Income Tax
Div. Bench	Divisional Bench
DRT	Debt Recovery Tribunal
DTAA	Double Taxation Avoidance Agreement
DTR	Daily Tax Report
Dy.	Deputy
Ed.,	Edition
Eds.	Editor
Eng.	England
Etc.	Et cetera
FDI	Foreign Direct Investment
FII	Foreign Institutional Investors
FPI	Foreign Portfolio Investors
FY	Fiscal Year
GI	Galileo Investors
GOS	Global Office Suppliers
Gov.	Government
HC	High Court
HNI	High Net worth Investors

[LIST OF ABBREVIATIONS]

Hon'ble	Honourable
i.e.	That is
Ibid	Ibidum
ILR	Indian Law Report
INR	Indian National Rupee
In Re	In Reference
I – T	Income Tax
IT Act	Income Tax Act
ITA, I.T.A.	Income Tax Appeal
ITAT	Income Tax Appellate Tribunal
I.T.D.	Income Tax Department
ITD	Income Tax Tribunal Decisions
ITO	Income Tax Officer
ITR	Income Tax Report
I.T.R.	Income Tax Return
JCIT	Joint Commissioner of Income Tax
Kan.	Karnataka
KVAT	Karnataka Value Added Tax
L.R.	Law Report
Ld.	Learned
Ltd.	Limited
M/s	Messer's

[LIST OF ABBREVIATIONS]

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

[LIST OF ABBREVIATIONS]

SCR	Supreme Court Report
SEBI	Securities and Exchange Board of India
SE	Singaporean Entity
SI	Simple Interest
Sing.	Singapore
SLP	Special Leave Petition
SOS	Stalwart Online Stores
Sh.	Shareholders
SOT	Select Orders of ITAT
SSA	Sales – Cum – Service Agreement
St.	Stalwart
Supp.	Supplementary
Trib.	Tribunal
T.N.	Tamil Nadu
TNVAT	Tamil Nadu Value Added Tax
UOI	Union of India
u/s	Under Section
VAT	Value Added Tax
v/vs	Versus
Vol.	Volume
w.e.f.	With effect from
W.r.t.	With Respect To

STATEMENT OF JURISDICTION

In this Winding – up Petition, originally filed and represented by the opposing counsels, the jurisdiction of this Hon’ble National Company Law Tribunal, Karnataka, has been invoked under s. 271(1) (a) of the Companies Act, 2013¹.

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

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

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

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

The Hon’ble Tribunal has tagged the impleading petitions with the main petition and it is a specially ordered matter. The respondent reserves the right to oppose the same, in the light of the issues raised, arguments advanced and authorities cited in this written submission. The respondent has challenged the maintainability of the main petition, maintainability of all the impleading petitions and merits on all counts.

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

¹ The Companies Act, No. 18 of 2013.

STATEMENT OF FACTS

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

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

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

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

STATEMENT OF ISSUES

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

SUMMARY OF ARGUMENTS

- [I] **(i)Winding up petition filed by GOS is not maintainable as:** A. This is a *prima facie* debt recovery suit, which is barred by law. B. No winding up, if any alternative remedy is available. C. Forum Shopping is a sheer abuse of process of law. **(ii)Impleading petition filed by shareholders is per se not maintainable as:** This Tribunal is *forum non conveniens*.
- [II] **Stalwart cannot be wound up as:** A. There are assured hopes for revival. B. No winding up, if petitioner does not come with clean hands. C. No winding up, on mere ground of inability to pay disputed debt. D. No winding up as, it's a *bona fide* disputed debt on substantial grounds.
- [III] **The minority shareholders cannot file for the winding up as:** A. The loan advancement is within the ambit of statutory provision. B. Private Limited companies have been granted exemptions w.r.t. RPT. C. The minority shareholders have not been oppressed because of the doctrine of indoor management.
- [IV] **The impleading petition by both the tax departments are not maintainable as:** A. Petition filed by the ITD is premature. B. STD of Karnataka has no valid tax claim as corporate office lies in Chennai.
- [V] **ITD cannot claim tax on the loan advanced by Stalwart as:** It is not a dividend per both the Income Tax Act and India-Singapore DTAA.
- [VI] **Stalwart is not liable to pay any sales tax as:** It does not come under the meaning of dealer per KVAT Act. Stalwart only acts as a facilitator between buyers and actual sellers.

ARGUMENTS ADVANCED

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

[I.A] THAT THE INSTANT WINDING UP PETITION IS NOT MAINTAINABLE.

[¶ 1] It is humbly submitted before this Hon'ble Tribunal that the instant Winding-up petition, is *per se* not maintainable and should be dismissed on false and frivolous grounds.²

[I.A. 1.] This is prima facie a debt recovery suit.

[¶ 2] (1.) The first and foremost demand of GOS was payment of due amount, along with interest and penalty,³ *prima facie* intention of the petitioner is to get the pending amount recovered from SOS, which has been exaggerated in this petition, thereby amounting to oblique purpose⁴. (2.) The Apex court has held that, the jurisdiction for the adjudication of liability and execution of the debt payable is within the exclusive jurisdiction of the DRT and/or civil court, and in such a case the jurisdiction of the Company Court stands ousted.⁵ (3.) The Apex court established a legal jurisprudence that such an exercise of using this Tribunal as a means of realising debt is barred by law and amounts to abuse of law.⁶

² Page 5, ¶15, Case Data.

³ Page 3, ¶10, Case Data.

⁴ Mohan Lal Ghosh v. East India Wires, (2004) 52 SCL 332.

⁵ Allahabad Bank v. Canara Bank, (2000) 4 SCC 406.

⁶ Anika International v. Tungabhadra Sugar Works Mazdoor Sangh, (2016) 9 SCC 44. Also in – Trilok Chand Jain v. Swastika Strips (P.) Ltd., (1991) 70 CC 197, I.T.C. Ltd. v. Fomento Hotels Ltd., (1991) 70 CC 459.

[ARGUMENTS ADVANCED]

[I.A. 2.] No winding up, if alternative remedy is available.

¶ 3 (1.) GOS has two legal and upright forums to adjudicate this money dispute *i.e.* Summary Suit and Arbitration proceedings.⁷ (2.) Availability of an alternate remedy debars the jurisdiction of this Tribunal.⁸⁹ (3.) The rightful remedy to be resorted by creditor should be a civil suit, which is already exhausted.¹⁰ (4.) After resorting to legitimate civil remedy, it is not legitimate to seek admission of the winding up petition on the basis of the same debt.¹¹ (5.) The basis of this suit is breach of payment clause, leading to debt dispute between parties, which should be resolved, by invoking mandatory arbitration clause and should be dismissed.

[I.A. 3.] Forum Shopping is sheer abuse of process of law.

¶ 4 Two simultaneous petitions in different forums with the core issue of recovery of disputed debt have been filed by GOS.¹² Such invocation of parallel jurisdiction is a glaring example of forum shopping, which is nothing but abuse of process of court.¹³ The Hon'ble Apex court stated that, "A litigant cannot be permitted 'choice' of the 'forum' and every attempt at 'forum shopping' must be crushed with a heavy hand."¹⁴ It demands dismissal with heavy costs.¹⁵

⁷ Page 5, ¶15, Case Data.

⁸ Prashant Glass Works v. Banaras Beads, (2002) 39 SCL 314.

⁹ H.Q. Chemicals Ltd. v. Care Formulators (P.) Ltd., (2001) 34 SCL 988.

¹⁰ I.T.C. Ltd. v. Fomento Resorts & Hotels Ltd., (1991) 70 Comp. Cas. 459.

¹¹ Indian Seamless Steel and Alloys Ltd., In re (2002) 35 SCL 894.

¹² Page 5, ¶14, Case Data.

¹³ Anand v. Registrar, Delhi High Court, (2009) 8 SCC 106; Also in – Takshila Hospital v. Jagmohan Mathur, (2002) 39 SCL 423.

¹⁴ Chetak Construction Ltd. v. Om Prakash, (1998) 4 S.C.C. 577.

¹⁵ Roxann Sharma v. Arun Sharma, (2015) 8 SCC 318.

[ARGUMENTS ADVANCED]

[I.B] THAT THE INSTANT IMPEADING PETITION BY THE SHAREHOLDERS IS NOT MAINTAINABLE.

[¶ 5] A lawsuit brought by the shareholders, against the officers and/or directors of the corporation for mismanagement or other malfeasance that caused harm to the shareholders' interest in the corporation is a derivative law suit¹⁶. In Aronson¹⁷, the Hon'ble Court held that "Prior to commencing a shareholder derivative suit, the plaintiff shareholder must first formally demand of the company's board that it act in the manner that the shareholder requires." Therefore, it is the procedural requirement of the legislation, that if a minority shareholder has been oppressed by the majority shareholders, then a complaint must be made to the Board and same should be put before it u/s 100 of the CA¹⁸. Hence, the Tribunal stands *forum non conveniens* to adjudicate upon this matter.

[ISSUE II] WHETHER THE COMPANY IS LIABLE TO BE WOUND UP ON THE GROUND OF COMMERCIAL INSOLVENCY, AS IT WAS UNABLE TO AOY ITS DEBT?

[¶ 6] It is humbly submitted that the court should dismiss this petition to avoid scandalous abuse of the winding up procedure of the court. The contentions have been stated as :

¹⁶ Aronson v. Lewis, (1984) 473 (SC) 805.

¹⁷ The Companies Act, No.18 of 2013, § 100.

[ARGUMENTS ADVANCED]

[II.A] THERE ARE ASSURED HOPES FOR REVIVAL.

[¶ 7] In *SK Gupta*,¹⁹ Apex court held that “winding up is a civil death of a company and it must be ultimate resort of the court. A living workable scheme infusing life into a sick unit is always preferred.”

[¶ 8] (1.) Stalwart is a newly incorporated startup, successful, profit earning and an upcoming entity.²⁰ (2.) It nowhere seems to be insolvent or a non – working entity. It’s a matter of temporary hiccup and winding up is opposed to the larger interest of the company as a whole.²¹ (3.) There is reasonable positive prospect for revival and growth,²² and it is the duty of the Tribunal to welcome revival rather than affirm death sentence to the company, which could be given only in rarest of rare cases.²³ In *Ashokan*, “temporary difficulty cannot be ground of liquidating company, when company is on verge of revival.”²⁴

[II.B] PETITIONER HAS NOT COME WITH CLEAN HANDS.

[¶ 9] This petition is liable to be dismissed as the intention of the petitioner was to ruin the company and thus, should not be entertained,²⁵ if full and material facts are not disclosed²⁶.

¹⁹ *SK Gupta v. K.P. Jain*, (1979) 49 Comp. Cas. (SC) 342.

²⁰ Page 2, ¶3, Case Data.

²¹ *Rishi Enterprises, In re*, (1992) 73 Comp. Cas. 271.

²² *Canara Bank v. Arihant Industries Ltd.*, (2002) 38 SCL 82.

²³ *American Express Bank v. Core Health Care Ltd.*, (1999) 15 SCL 363.

²⁴ *D Ashokan v. ST Reddiar & Sons*, (2002) 40 SCL 351.

²⁵ *M.A. Kureshi v. Argus Footwear Ltd.*, (1931) 1 Comp. Cas. 277.

²⁶ *Patel Kashiram Gangaram v. Unicare remedies P. Ltd.*, (2005) 61(Guj) SCL 21 ; Also in – *Nagarjuna Constructions v. Sharat Industries*, (2001) 33 SCL 726, *Agrawal Industries v. Golden Oil Industries*, (1999) 21 SCL 34.

[ARGUMENTS ADVANCED]

[II.C] NO WINDING UP, ON MERE GROUND OF INABILITY TO PAY DEBT.

[¶ 10] In *Tata Iron & Steel*²⁷, mere ground of inability to pay would not constitute a ground empowering for the court, to wind up a company. Inability may arise for several reasons and the court is obliged to consider financial status, strength and substratum of the company in overall context.²⁸ The facts clearly state that, (1) Stalwart had all the good faith and intention to pay, as and when he made good sales. (2) He has already paid and discharge his liability towards half of his interest amount. (3) This is a *prima facie* case of temporary financial stringency. (4) Company has full capacity to discharge its debt commercially.²⁹ Thereby, the ground invoked for winding up, is not sufficient.

[II.D] IT IS A BONA FIDE DISPUTED DEBT ON SUBSTANTIAL GROUNDS.

[¶ 11] In *Mediquip Systems (P.) Ltd.*,³⁰ the Apex court laid down – First, it is a bona fide dispute on reasonable grounds, non – payment of which, amounts to neglect to pay.³¹ Second, if there is no neglect, the deeming provision does not come into play and winding up on the ground that the company is unable to pay its debts is not substantial.³² Third, a debt about the liability to pay which at the time of service of the statutory notice, there is a bona fide dispute, is not ‘due’ within the ambit of this petition.³³ Four, disputed debt is the pure jurisdiction of

²⁷ *Tata Iron and Steel Co. v. Micro Forge (India) Ltd.*, (2000) 27 SCL 419.

²⁸ *Kanchanganga Chemical Industries v. Mysore Chipboard Ltd.*, (1998) 91 Comp. Cas. 646.

²⁹ *Karnataka Leasing and Commercial Corporation Ltd. v. Smt. Lalitha Holla*, (1995) 83 CC 127.

³⁰ *Mediquip Systems (P.) Ltd. v. Proxima Medical Systems GMBH*, (2005) 59 SCL 255.

³¹ *Conart Engineers Pvt. Ltd. v. Laffans Petrochemicals Ltd.*, (2001) 29 SCL 388.

³² *Softsule (P.) Ltd., In re*, (1977) 47 CC 438; *Ofu Lynx Ltd. v. Simon Carves India Ltd.*, (1971) 41 CC (Cal.) 174.

³³ *Mohandas v. Nector Laboratories Ltd.*, (2007) 140 Comp.Cas. 257.

[ARGUMENTS ADVANCED]

the civil court.³⁴ Last, the company is capable to discharge its liabilities. This petition, on such ground, should on merits, good faith and for the sake of justice and integrity of the people at large be dismissed.

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

[¶ 12] It is humbly submitted that the company is not liable to be wound up as no just and equitable grounds for the winding up have been arisen in the instant case.

[III.A] THE LOAN ADVANCEMENT IS NOT VIOLATIVE OF THE STATUTE.

[¶ 13] (1.) Per s. 186(2)(a) of the Act, a Co. cannot advance a loan to any other body corporate, provided, the loan amount must not exceed beyond sixty per cent of the total paid up capital of the company. (2.) The paid up capital of the company was INR 350 Cr. and speaking mathematically, the loan transaction in the instant petition was within the ambit of the prescribed limits.

[III.A.1] A special resolution in a general meeting is not required to be called for.

[¶ 14] (1.) S. 186(3) of The CA states that prior approval at a general meeting of shareholders, sanctioning the transaction via a special resolution, is required only in cases wherein the amount to be given exceeds the prescribed limits in sub-section (1), which is not the case

³⁴ Bennet Coleman & Co. Ltd. v. RSA Fox Advertising (P.) Ltd., (2001) 34 SCL 993.

[ARGUMENTS ADVANCED]

herein. (2.) Rule 13 of the CR³⁵ is relevant and enumerates the same principle w.r.t. the requirement of a special resolution by shareholders, in cases of exceeded loan amount.

[III.A.2] Proper quorum was constituted for approving the instant loan advancement.

[¶ 15] (1.) In *Needle Industries (India) Ltd.*,³⁶ the Hon’ble Supreme Court ruled that “quorum implies directors who are competent to vote on business before the Board”. (2.) S. 174(3) of the Act³⁷ states that the directors who are not interested directors and present at the meeting being not less than two shall be the quorum. The very fact that the two Indian promoters were present and voting, *prima facie* establishes a valid statutory quorum for the approval of the loan in the instant case.

[¶ 16] Hence, in the light of the above mentioned provisions, it is pertinent to note here that there was no requirement for calling of a shareholders’ general meeting and the question of a special or ordinary resolution does not even arise.

[III.B] THE PRIVATE LIMITED COMPANIES HAVE BEEN GRANTED CERTAIN EXEMPTIONS.

[III.B.1] Exemption in related party transactions.

[¶ 17] Per the provision of s. 2(6) of the Act, GI is an “associate company” of Stalwart due to its shareholding pattern in it³⁸. (1.) The Central Government under its power to exempt classes of companies from the provisions of the Act, as mentioned in s. 462 has provided

³⁵ The Companies (Meetings of Board and Its Powers) Rules, 2014.

³⁶ *Needle Industries (India) Ltd v. Needle Industries Newey (India) Holding Ltd.*, (1981) 51Comp. Cas. (SC) 743.

³⁷The Companies (Amendment) Bill, 73 of 2016.

³⁸ Page 3, ¶ 10, Case Data.

[ARGUMENTS ADVANCED]

certain exemptions to Pvt. Ltd companies vide a notification. Under this exemption clause, the notification provides that, in relation to a private company, the entities specified in s. 2 (76)(viii) of The CA (i.e., an associate company) would not be considered related parties for the purposes of s. 188. As a result of this relaxation, private companies shall not be required to obtain the approval of the board or the shareholders, for the purpose of entering into a contract/ arrangement with an associate company.

III.C] THE MINORITY SHAREHOLDERS HAVE NOT BEEN OPPRESSED

[¶ 18] The doctrine of “Indoor Management³⁹” lays down that persons dealing with a company having satisfied themselves that the proposed transaction is not in its nature inconsistent with the memorandum and articles, are not bound to inquire the regularity of any internal proceeding. In other words, while persons contracting with a company are presumed to know the provisions of the contents of the memorandum and articles, they are entitled to assume that the provisions of the articles, they are entitled to assume that the officers of the company have observed the provisions of the articles. It is no part of duty of any outsider to see that the company carries out its own internal regulations. This applies to the board of directors too. The shareholders have no right to inquire into the decisions so taken by the Board, provided they are consistent with the provisions of the Act. In Lakshmi Ratan Cotton Mills⁴⁰, the Hon’ble Apex Court upheld that where any loan transaction is advanced within the prescribed scope of the legislation by the Board, then an outsider other than the Board, cannot inquire into the legality of it.

³⁹ Royal British Bank v. Turquand, (1856) 6 E & B 327, 119 ER 886.

⁴⁰ Lakshmi Ratan Cotton Mills Co. Ltd. v. J. K. Jute Mitts Co. Ltd., AIR (1957) All 311.

[ISSUE IV] WHETHER THE IMPEADING PETITION BY ITD AND STD ARE MAINTAINABLE OR NOT?

[¶ 19] It is humbly submitted that the Hon’ble NCLT lacks jurisdiction to entertain matters related to ITD and STD. NCLT has been established to exercise and discharge powers and functions, as conferred under the CA.⁴¹ It is contended that the IT Act has provision for appeal in ITAT u/s 253(2) where CIT can direct assessing officer to appeal to Appellate Tribunal.

[IV.A] IMPEADING PETITION BY ITD IS ‘PREMATURE’.

[¶ 20] The ITD is entitled to claim of tax payable by company when official liquidator is appointed.⁴² Official liquidator is appointed once the Tribunal passes the order of winding up.⁴³ Therefore, even if the ITD has any claim over the loan advancement, that shall be done through procedure provided by the respective statute after the winding up is ordered.⁴⁴

[¶ 21] Moreover, u/s 124 of the IT Act, the assessing officer has the jurisdiction in the place where person carries on his business i.e. the *‘place of business.’*⁴⁵

[IV.B] STD, KARNATAKA LACKS JURISDICTION FOR ANY TAX CLAIM.

[¶ 22] It is humbly submitted that even if there is any liability to pay VAT and CST, that would arise in TN and not in Karnataka as the corporate office of Stalwart is located in

⁴¹ The Companies Act, No. 18 of 2013, § 408.

⁴² The Income Tax Act, No. 43 of 1961, § 178.

⁴³ The Companies Act, No. 18 of 2013, § 275.

⁴⁴ Imperial Chit Fund (P) Ltd. v. Income Tax Officer, (1996) 8 SCC 303.

⁴⁵ The Income Tax Act, No. 43, § 124(1) (a).

[ARGUMENTS ADVANCED]

Chennai.⁴⁶ Principal place of business is where the governing power of the corporation is exercised.⁴⁷ Corporation's '*principal place of business*' is the place where a corporation's officers direct, control and coordinates the corporation's activities, also referred as '*nerve center*'.⁴⁸ The tax is payable where principal place of business is located.⁴⁹ There have always been certain business that chose to locate their corporate headquarters in states that offer low/no tax regulation and this practice is entirely legal in the name of '*tax planning*'.⁵⁰

[ISSUE V] WHETHER ITD HAS CLAIM FOR TAX OVER LOAN ADVANCED BY STALWART OR NOT?

[¶ 23] It is humbly submitted that ITD has no claim of any tax over the loan advanced by Stalwart to its shareholder Galileo.

[V.A] THE LOAN ADVANCEMENT CANNOT BE TAXED, PER THE IT ACT.

[¶ 24] ITD has no claim on the loan advancement per the Act. The IT Act is inapplicable in this case. Moreover, even if the previous contention is not accepted, this loan advancement is not income according to The IT Act.

⁴⁶ Page 1, ¶ 2, Case Data.

⁴⁷ *Mayar (H.K.) Ltd. v. Vessel M. v. Fortune Express*, (2006) 3 SCC 100.

⁴⁸ *Hertz Corporation v. Friend*, 559 U.S. 77 (2010).

⁴⁹ The Karnataka Value Added Tax Act, No. 32 of 2004.

⁵⁰ SUBHAJIT BASU, 'GLOBAL PERSPECTIVE ON E-COMMERCE TAXATION LAW', 180

[ARGUMENTS ADVANCED]

[V.A.1] The Income Tax Act, 1961 is not applicable.

[¶ 25] It is a well established and settled principle that in a conflict between the terms of agreement and taxation statute, the agreement alone would prevail.⁵¹ Where a specific provision is made in the treaty that provision alone would prevail.⁵²

[¶ 26] S. 90(2) of the IT Act specifically provides that in relation to the assessee to whom agreement for avoidance of double taxation of the income applies, the provisions of the IT Act shall apply only to the extent they are more beneficial to the assessee. It has been held by the Hon'ble Supreme Court in P.V.A.L. Kulandagan Chettiar,⁵³ that where tax liability is imposed by the Act, the agreement may be resorted to either for reducing the tax liability or altogether avoiding the liability and in case of any conflict between the provisions of the agreement and the Act, the provisions of Act would prevail over the provisions of the Act.⁵⁴

[V.A.2] The loan advancement is not 'income' per the Act.

[¶ 27] U/s 2(22) of the IT Act, the liability to tax attaches to the extent it possesses accumulated profits at the moment the loan is borrowed.⁵⁵ Moreover, in general, dividend may be said to be paid, within the meaning given in The Act when the company discharges its liability and makes the amount of dividend unconditionally available to member.⁵⁶

⁵¹ UOI v. Azadi Bachao Andolan, (2003) 263 ITR 706 (SC); Advance Ruling A No. P.11 of 1995, (1997) 228 ITR 55 (AAR); See also – Ostime v. Australian Mutual Provident Society, (1960) AC 459 (H.L.).

⁵² Central Board of Direct Taxes, Circular No. 333, (F. No. 506/42/81-FTD) (1982) 137 ITR (St.) 1.

⁵³ CIT v. P.V.A.L. Kulandagan Chettiar, (2004) 267 ITR 654.

⁵⁴ *Id.*

⁵⁵ Tarulata Shyam v. CIT, (1997) 108 ITR 345 (SC).

⁵⁶ J. Dalmia v. CIT, 1964 SCR (7) 579.

[ARGUMENTS ADVANCED]

[V.B] NO TAX IS PAYABLE UNDER INDIA-SINGAPORE DTAA.

[¶ 28] Stalwart can take benefit of the DTAA per s. 90A⁵⁷ and it can use the treaty to minimize and also avoid the payable tax.⁵⁸

[V.B.1] The loan advancement is not a ‘dividend’ per India-Singapore DTAA.

[¶ 29] The loan advancement here is not dividend per DTAA. ITAT Delhi Bench in *Rajiv Makhija*,⁵⁹ held that such loan advancement is not dividend. ITAT held, “only the income from shares or other rights, not being debts claims, participating in profits, as well as income assimilated to income from shares by the taxation laws of the state of which the company making the distribution is resident, falls within the term dividend.”⁶⁰

[¶ 30] If the income is attributed to the taxpayer then each item of the income would have to be treated under the relevant provisions of DTAA. Even if the amount is treated as a deemed dividend, then also, it is by no means clear whether the taxable amount is to be regarded as a dividend within the meaning of Art. 10 of DTAA or as “other income” within the meaning of Art. 21.⁶¹ Residence country cannot obscure the normal operation of the affiliation exemption.

[V.B.2] Payment is not an ‘unconditional amount’.

[¶ 31] The applicability of Article 10 arises where dividends are ‘paid’ by a company.⁶² It has been held that dividend also includes payments where amount is unconditionally made

⁵⁷ The Income Tax Act, No. 43 of 1961, § 90A.

⁵⁸ S. RAJARATNAM & B. V. VENKATRAMAN, TAX PLANNING, 1225 (8th. 2015).

⁵⁹ Rajeev Makhija v. Director of Income Tax, ITA No. 3148/ Del/ 2008.

⁶⁰ *Id.*

⁶¹ OECD Model Commentary 2014- commentary on Article 10.

⁶² OECD Model Commentary 2014- commentary on Article 10.

[ARGUMENTS ADVANCED]

available to another person.⁶³ Herein, the loan advancement cannot be said as an ‘unconditional’ payment since there is an obligation on Galileo to return the amount.

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

[¶ 32] It is humbly submitted that Stalwart has no obligation to discharge its VAT and CST liability in Karnataka for its marketplace model.

[VI.A] STALWART IS NOT A DEALER AS PER KVAT ACT.

[¶ 33] Per the definition of ‘dealer’, a person must carry on the business of selling and/or supplying goods.⁶⁴ The tax cannot be imposed unless the assessee can be said to have carried on the business of selling the goods whether as principal or agent.⁶⁵ It is asserted that Stalwart is neither ‘directly selling’ the goods nor ‘indirectly’ as a ‘commission agent’. These contentions are proved through following arguments.

[V.A.1] Stalwart is not involved in buying, selling, supplying or distributing goods directly.

[¶ 34] It is humbly submitted that SOS, per contact,⁶⁶ is not involved in any of the above activities that are essential to make it a dealer.⁶⁷ Marketplace based model of e-commerce means providing of an information technology platform by an e-commerce entity on a digital

⁶³ Benaras Bank v. CIT, AIR 1970 SC 281.

⁶⁴ PRAKASH SAHAY, ‘PRINCIPLES OF VAT IN INDIA’, 205 (2010).

⁶⁵ State of Madhya Pradesh v. Dayaram Rathod, (1961) 12 STC 572 (MP).

⁶⁶ Page 2, ¶ 5, Case Data.

⁶⁷ Karnataka Value Added Tax Act, No. 32 of 2004, § 2(12).

[ARGUMENTS ADVANCED]

& electronic network to act as a facilitator between buyer and seller.⁶⁸ Under the marketplace model SOS only acts as a facilitator in connecting its online buyers with the actual sellers.⁶⁹ There is no legal element of ‘sale’ or ‘agreement to sell’⁷⁰ on the part of Stalwart. A similar question of law was dealt by the Kerala HC in the *Flipkart case*⁷¹ where the Court held that the petitioner had nothing to do with the transaction of sale and purchase that took over its online portal and therefore, was not a dealer.⁷²

[¶ 35] It is humbly submitted that the burden of proving that the assessee was carrying on the business of selling or buying goods is upon the sales tax authorities. The reference cannot sustain if they came to a conclusion merely because of frequency and volume of any sales made.⁷³

[VI.A.2] Stalwart cannot be considered as a ‘commission agent’.

[¶ 36] Where an agent for a commission merely canvassed orders and forwarded them over to the principal for acceptance and execution by the latter at his discretion, the agent was mere broker and not a dealer.⁷⁴

⁶⁸ Press Note 3, Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, (2016).

⁶⁹ Page 1, ¶ 2, Case Data.

⁷⁰ The Karnataka Value Added Tax Act, No. 32 of 2004, § 2(29); The Sales of Goods Act, No. 3 of 1930, § 4.

⁷¹ Flipkart Internet Pvt. Ltd. v. State of Kerala, 2015 (5) KHC 522.

⁷² *Id.*

⁷³ Dy. Commr. v. Travancore Rubber & Tea Co., (1967) 20 STC 520 (SC); Dy. Commr. v. Midland Rubber Produce Co., (1970) 25 STC 57 (SC); Dy. Commr v. Subramanian Chettiar, (1977) 40 STC 434 (Mad).

⁷⁴ Mahadayal Premchand v. C.T.O. (1958) 9 STC 482 (SC); State v. Sait Nagiee Purusottam & Co. Ltd. (1958) 9 STC 574 (Ker); N. Ayyanna Sethy & Sons v. State of Mysore (1961) 12 STC 731 (Mys).

[ARGUMENTS ADVANCED]

[¶ 37] It should be proved by the assessing authorities that they either own the goods or have the right to dispose them by passing a valid title over them to the purchasers.⁷⁵ Thus, merely bringing the sellers and the buyers together without having a right to pass the property over the goods cannot be considered as dealers.⁷⁶ The onus of proving that a person sought to be treated as a dealer within the definition in this clause, is on the assessing authorities.⁷⁷

[VI.A.3] There is no control of the Stalwart over the goods sold.

[¶ 38] The fact remains the same that marketplace companies do not directly sell goods and only provide a platform for sellers and buyers to connect and hence there should be no VAT applicable to them but rather, payable by the actual sellers.⁷⁸ Companies in marketplace models are barred from giving any discounts. Moreover, e-commerce marketplace may provide support services to sellers in respect of warehousing, logistics, order fulfillment, call centre, payment collection and other services.⁷⁹ It shall be noted that there is no control of e-commerce entity on sale through price control.⁸⁰

⁷⁵ *Kandula Radhakrishna Rao v. Province of Madras*, (1952) 3 STC 121 (Mad); See also *Bagalkot Cement Co. v. State of Mysore* (1976) 37 STC 73 (SC).

⁷⁶ *Id.*; *Chowringhee Salws Bureau v. C.I.T.* (1973) 31 STC 254 (SC).

⁷⁷ *Nilambur Rubber Co. v. State of Kerala*, (1999) 112 STC 654 SC.

⁷⁸ Kunal Wadhwa, Keyur J. Shah, 'E-commerce and indirect taxation in India', 62 (2015) 62.

⁷⁹ Press Note 3, Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, (2016).

⁸⁰ *Id.*

[PRAYER]

PRAYER

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

1. That, Stalwart cannot be wound up on the grounds of inability to pay debt and 'justice and equity'.
2. That, Stalwart is not liable to pay any tax liabilities, to the Income tax department.
3. That, Stalwart is not liable to discharge its VAT and CST liabilities, towards the Sales Tax Department.
4. That, this petition should be dismissed, with or without costs.

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

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

Place: Karnataka

Sd/-

Dated: February, 2017

(Counsel for the Respondent)