

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

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

Company Application (CA) 1 of 2017

Company Application (CA) 2 of 2017

Company Application (CA) 3 of 2017

in

Company Petition (CP) 10 of 2017

IN THE CASE CONCERNING WINDING UP PETITION

GLOBAL OFFICE SUPPLIERS PVT. LTD, BENGALURU (APPLICANT)

SHAREHOLDERS OF STALWART ONLINE STORES PVT LTD (APPLICANT)

ADDITIONAL COMMISSIONER OF INCOME-TAX, BENGALURU (APPLICANT)

DEPUTY COMMISSIONER OF COMMERCIAL TAX, BENGALURU (APPLICANT)

v/s

STALWART ONLINE STORES PVT LTD, BENGALURU (RESPONDENT)

MEMORIAL FROM THE SIDE OF RESPONDENT

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2	FINANCE ACT, NO. 32 OF 1994.
3	GENERAL CLAUSES ACT, NO. 10 OF 1897.
4	INCOME TAX ACT, NO. 43 OF 1961.
5	INDIAN CONTRACT ACT, NO. 9 OF 1872.
6	KARNATAKA VALUE ADDED TAX ACT, 2003, NO. 32 OF 2004.
7	THE CENTRAL SALES TAX ACT, NO. 74 OF 1956.
8	THE COMPANIES ACT, NO. 1 OF 1956.
9	THE COMPANIES ACT, NO. 18 OF 2013.
10	THE CIVIL PROCEDURE CODE, NO. 5 OF 1908.

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1	AGREEMENT FOR AVOIDANCE OF DOUBLE TAXATION AND PREVENTION OF FISCAL EVASION, INDIA-SINGAPORE, MAY 27 TH , 1994.
2	VIENNA CONVENTION ON THE LAW OF TREATIES, 23 MAY 1969, UNITED NATIONS, TREATY SERIES, VOL. 1155, P. 331.

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11	KANGA & PALKHIWALA, THE LAW AND PRACTICE OF INCOME TAX (Arvind P Datar <i>eds.</i> ed. 10 th 2014).
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13	SIR DINSHAH FARDUNJI MULLA, THE SALE OF GOODS ACT AND THE INDIAN PARTNERSHIP ACT, (ed. 10 th 2012).

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2	DR. K.R. CHANDATRE, 'RELATED PARTY' UNDER Co. A., 2013 [2015] 53 TAXMANN.COM 57
3	VINOD KOTHARI, FINALLY, SOME EXEMPTIONS TO PVT. COMPANIES, [2016] 65 TAXMANN.COM 167.
4	SHARAD MOUDGAL, 100% FDI PERMITTED IN B2C E-COMMERCE MARKETPLACES (2016) PL (CL) MAY 71.
5	H. PADAMCHAND KHINCHA, INTERPRETATION OF TAX TREATIES VIS-À-VIS JUDICIAL PRECEDENTS, [2016] 75 TAXMANN.COM 19.

THE LIST OF ABBREVIATIONS

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

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C.S.T.	Central Sales Tax
C.S.T.A.	Central Sales Tax Act
C.T.O.	Commercial Tax Officer
C.T.R.	Current Tax Report
D.C.I.T.	Deputy Commissioner of Income Tax.
D.I.T.	Director of Income Tax
D.T.A.A.	Double Taxation Avoidance Agreement
Dy.	Deputy
ed.	Edition
eds.	Editor
I.A.A.	Indian Arbitration Act.
Id.	IBID
In re.	In the matter of
I.T.	Income Tax
I.T.A.	Income Tax Act
I.T.A.T.	Income Tax Appellate Tribunal
I.T.O.	Income Tax Officer
I.T.R.	Income Tax Reporter
J.C.I.T.	Joint Commissioner of Income Tax
KVAT	Karnataka Value Added Tax
KVATA	Karnataka Value Added Tax Act
Ltd.	Limited
L. Rev.	Law Review

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

THE STATEMENT OF JURISDICTION

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

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

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

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

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

³ 446(2): The [*Tribunal*] shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of —

- (a) any suit or proceeding by or against the company;
- (b) any claim made by or against the company (including claims by or against any of its branches in India);
- (c) any application made under [section 391](#) by or in respect of the company;
- (d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company;

Whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960.

THE STATEMENT OF FACTS

HISTORY: Global Pvt. Ltd. a company registered under Companies Act, 1956 and KVAT, having registered office in Bengaluru. Stalwart registered under Companies Act, 2013 has registered office in Bengaluru and corporate office in Chennai. It facilitates buying and selling of goods online. It is a successful company and has 40% market share in marketplace model and 20% in inventory model. Global readily entered into sales and service agreement with Stalwart. If any default Stalwart will have to pay 24% S.I. and 20 lakhs fine per month. There was also an arbitration clause in the contract if any dispute arises.

WINDING UP: Global supplied inferior quality goods to Stalwart's customers. Which decreased their sale and total accumulated default was ₹ 19.32 Cr. out of which ₹ 6 Cr. were given by Stalwart as and when they made profits. Galileo even after the default voluntarily supplied goods to Stalwart but later started asking for the payment. With respect to the disputes Global filed a summary suit. Later, Galileo filed a winding up petition to recover debts. Stalwart's BOD passed a loan to Galileo Investors Pte. Ltd. who held 24% stake in Stalwart against which 26% of shareholders claimed that this loan advancement to be RPT and filed impleading petition in NCLT to wind up. Galileo filed a winding up petition in NCLT to settle the dues of Global.

INCOME TAX: On filing of Return of income the ITD issued a notice claiming the amount advanced as dividend income in the hands of Galileo on which TDS should have been deducted. Since, it was not done ITD treated Stalwart as an *assessee in default*.

SALES TAX: KVAT authorities also issued notice to Stalwart for not registering as a dealer and not discharging sales tax liabilities for the sales made under the marketplace model. Both ITD and KSTD filed impleading petitions along with the winding up petition for recovery of the tax due from Stalwart. NCLT will adjudicate on all issues and decide the case on merit.

THE STATEMENT OF ISSUES

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

-ISSUE I-

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

-ISSUE II-

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

-ISSUE III-

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

-ISSUE IV-

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

-ISSUE V-

WHETHER STALWART IS LIABLE TO PAY SALES TAX IN KARNATAKA?

THE SUMMARY OF ARGUMENTS

ISSUE I: It is submitted that the main winding up petition and the impleading petition filed under section 433(e) and 433(f) respectively are not maintainable as the petitioner has no substantial grounds to wind up the company as the debt of the company is disputed and both the petitioners have not exhausted their alternate remedies.

ISSUE II: It is submitted that the company is a running company and has made already made the interim payment. Moreover, the delay in payment is due to the bad services provided by Galileo and also due to *force majeure* event i.e. change in FDI policies. The loan advancement also does not under the ambit of related parties i.e. u/s 2(76) and section 188.

ISSUE III: It is humbly submitted that *firstly* the tax departments are neither necessary nor proper party to the winding up petition as their presence is not necessary for an effective decree. *Secondly*, the tax claims cannot be paid first at par with other secured creditors.

ISSUE IV: It is humbly submitted that Stalwart is not an assessee in default because *firstly*, the provisions of the Income Tax Act will not be applicable in the present case & *secondly*, the said advancement is not a dividend under DTAA.

ISSUE V: It is humbly submitted that Stalwart is not liable to pay sales tax in Karnataka because *firstly*, it is rendering service as a facilitator in connecting the buyer with the seller and has been discharging service tax liability for the same & *secondly*, the situs of sale is at Chennai and not Karnataka.

THE ARGUMENTS ADVANCED

I. THE WINDING UP PETITION AND THE IMPEADING PETITION ARE NOT ADMISSIBLE IN THE NATIONAL CO. LAW TRIBUNAL (NCLT).

The respondent humbly pleads that the winding up petition is not maintainable when the creditors have *malafide* intentions to recover the debt which is disputed⁴. The Trib. cannot wind up the Co. u/s 433(f) just because there is lack of confidence among the shareholders.⁵

1. THE WINDING UP PETITIONS ARE NOT ADMISSIBLE

1.1 It is humbly pleaded that, the respondent Co. received a statutory notice that Global has filed a winding up petition⁶ u/s 433(e) of the C. A., 1956 in NCLT. The petition as to winding up is the remedy of last resort.⁷ Therefore, winding up cannot be sought as a means of recovery of debt.⁸ The mere fact that the Co. is unable to pay its debt doesn't entitle the court to order winding up under §433(e) of the C. A., 1956.⁹

[a] Petition filed u/s 433(e) should be dismissed

1.2 It is contended that Stalwart has already paid its part of Rs, 6 crores. Stalwart is unable to pay the remaining amount because their earnings are reduced due to inferior quality of goods and services provided by Global, to which they agreed.¹⁰

⁴ CR DATTA, THE CO. LAW 5944 (6th ed. 2008).

⁵ Bhaskar Stoneware Pipes Pvt. Ltd. v. Rajinder Nath Bhasker, (1988) 63 Comp. Cas. 184 (Del.) (DB.) ¶30.

⁶ Moot Compromis ¶14

⁷ Kirti D. Shah and Others v. Deluxe Roadlines P. Ltd. 2011 SCC OnLine Kar. 3946. ¶12.

⁸ Cotton Corporation Of India Limited V. United Industrial Bank Limited And Others (1983) 4 SCC 625. ¶22.

⁹ T.M. Mohandas v. Nectar Laboratories Ltd. [2007] 140 Comp. Cas. 257 (A.P.) ¶9.

¹⁰ Moot Compromis ¶9

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1.3 A creditor is entitled to an order of winding up only if claims are valid and undisputed by the Co.¹¹ It is well settled that if the debt is *bonafide* disputed and where the debt is not just, the Trib. should refer the case to the competent Civil Court¹² and dismiss the petition.¹³ A petition for winding up will be dismissed if the Co. is commercially solvent, financially sound and the suffering of loss or inability to pay debts are no grounds for the winding up of the Co.¹⁴ A petition will not be admitted if it is made to coerce the respondent Co. to pay the debt.¹⁵ Hence, the petition should be dismissed by the Trib. as the motive of filing this petition is *malafide*.

[b] Petition filed u/s 433(f) should be Dismissed.

1.4 It is humbly pleaded that, the shareholders cannot plead for winding up of the Co. by the mere act of oppression by the Co. Moreover, the Co. is not liable for RPTs under the C. A., 2013. It is a settled proposition of law¹⁶ that parties cannot be added for the introduction of a new cause of action.¹⁷ It is not imperative for the court to make a winding up order even if it forms the opinion that it was just and equitable to do so.¹⁸ When a shareholder files a petition u/s 433(f) due to lack of confidence the Trib. has to consider all such cases short of winding up and the petitioner can be given any other remedy if possible".¹⁹ As per the notification dated 05-06-2015,

¹¹ Rhein Chemie Rheinau GmbH v. Standard Oil Additive Pvt. Ltd. 2005 S.C.C. OnLine Kar. 326. ¶4.

¹²T. Srinivasa v. Flemming (India) Apotheke Pvt. Ltd.,(1990) 68 Comp. Cas. 506 (Kar.) ¶ 4.

¹³ Steel Equipment and Construction Co. Pvt. Ltd. 1966 S.C.C. OnLine Cal 44 ¶19.

¹⁴ Cinco Laboratories Pvt. Ltd., In re,(1973) 43 Comp. Cas. 550 (Pat.) ¶ 5.

¹⁵ Punjab Ceramics Ltd. v. Punjab State Industrial Development Corporation Ltd.,(1991) 70 Comp.Cas. 415. (P&H.) (DB.) ¶ 12; K. Appa Roa v. Sarkar Chemicas Pvt. Ltd., (1995) 84 Comp. Cas. 670 (A.P.) ¶17,18.

¹⁶ Smt. P. Sridevi v. Cherishma Housing (P.) Ltd. [2009] 147 COMP CASE 130 (A.P.).

¹⁷ 2, MULLA, THE CODE OF CIVIL PROCEDURE, 85 (B.M. PRASAD. 17th ed. 2007);

¹⁸Smt. P. Sridevi v. Cherishma Housing (P.) Ltd. [2009] 147 COMP CASE 130 (A.P.) ¶ 3.

¹⁹ Bhaskar Stoneware Pipes Pvt. Ltd. v. Rajinder Nath Bhasker, (1988) 63 Comp. Cas.184 (Del.)(DB.) ¶ 24.

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Pvt. Co.'s are given exemptions to perform RPT with its holding, subsidiary or associate Co. or subsidiary of its holding Co." ²⁰ Oppression is no ground to wind up the co.

1.5 The impleading petition should be dismissed on the grounds that Stalwart and Galileo are not related party u/s 2(76) read with § 188 of the C. A., 2013 hence not liable to wind up u/s 433(f).

2. ALTERNATE REMEDIES ARE NOT EXHAUSTED.

2.1 It is humbly pleaded that Stalwart and the remaining 26% of shareholders have not used all the alternate remedies available before approaching NCLT. The Trib. has framed their own rules of limiting the exercise of powers to selective situations, even when the remedy of arbitration was introduced by Stalwart in the contract.²¹

[a] Pendency of Civil Suit

2.2 It is respectfully submitted that, Summary Suit under order XXXVII of C.P.C., 1908 is already pending²² hence; the petition for winding up cannot be admitted. The law provides a clear position that in view of the pendency of Civil Suit, the winding up cannot be ordered²³. A creditor is only entitled to an order of winding up if the claims are valid and undisputed by the Co.²⁴. It is unreasonable to file petition for winding up in order to recover alleged debts to pressurize the respondent Co.²⁵. The proceedings of winding up are not to settle financial matters, therefore winding up is not a substitute of Civil Suit²⁶.

²⁰ V.S. Datey, Bitter taste ends with sweet exemptions; 64 taxmann.com 302, (2015).

²¹ Moot Compromis ¶5.

²² Moot Compromis ¶14.

²³ J. R. Srinivasa v. Sree Gururaja Enterprises (P.) Ltd. [2016] 72 taxmann.com 152 (Kar.) ¶6.

²⁴ 3 C.R DATTA, The CO. LAW, Page. 5938, ¶4.

²⁵ Bennet, Coleman and Co. Ltd. v. RSA Fox Advertising Pvt. Ltd., (2001) 107 Comp. Cas. 766 (P&H.) ¶5.

²⁶ Kamadenu Enterprises v. Vivek Textile Mills P. Ltd., (1984) 55 Comp. Cas. 68 (Kar.) ¶3.

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2.3 It is well established that the Trib. will not entertain any winding up petition if there is a *bonafide* dispute on debt. The Trib. will leave the parties to resolve the dispute in appropriate proceedings²⁷. Moreover, when the petitioner has alternate remedies available of their own and has already filed the proceeding to ventilate the grievances against the respondent, the winding up petition is liable to be dismissed u/s 443(2) of the Act²⁸. Hence, when the remedy of summary suit is not exhausted and debt is disputed, the winding up petition cannot be filed directly.

[b] The matter is to be adjudicated in arbitration.

2.4 It is submitted that the contract itself explicitly provides the provision that all the disputes will be solved through an arbitrator²⁹. Hence, the petitioner has no *locus standi* to directly approach the Trib. Arbitration and winding up are different proceedings. Arbitration is sought when there is dispute of debt or any other dispute b/w parties³⁰.

2.5 The Trib. should adjourn the petition when arbitration is pending for deciding disputed debt³¹. The claim pertaining to specific relief is arbitrable, even discretionary reliefs which are granted by the courts could be referred to arbitration as arbitrator has same powers as the court³². The Trib. will not make a winding up order u/s 433(e) unless proved that there is no alternate remedy left³³.

²⁷ Ofu Lynx Ltd. v. Simon Carves India Ltd., (1971) 41 Comp. Cas. 174 (Cal.). ¶9.

²⁸ Smt. Saraswathi Gopalakrishnan v. Surana Textile Mills Ltd. [2004] 119 Comp.Cas. 917 (Mad.) ¶ 11.

²⁹ Moot Compromis, ¶5.

³⁰ In re. Shree Gauri Shanker Jute Mills Ltd.,(1982) 2 Comp. LJ 607 (Cal.).

³¹Gurcharan Singh v. Raghbir Cycles Pvt., Ltd.,(1995) 82 Comp. Cas. 203 (P&H.) ¶ 52.

³² Compact Griha Nirman v. Kusum Alloys Ltd. 2007 S.C.C.Online Kar. 180 ¶14.. ; JUSTICE S.B. MALIK, COMMENTARY ON THE ARBITRATION AND CONCILIATION ACT 181, (7TH ed. 2015).

³³ Kiritbhai R. Patel v. Lavina Contruction and Finance Pvt. Ltd.(2000) 99 Comp. Cas 75 (Guj.) ¶ 6.

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[c] The 26% shareholders approached the Tribunal directly.

2.6 The shareholders can invoke § 237, 397³⁴ for misconduct or intent of fraud in a Co. Where alternate remedy is available the court will not order for winding up³⁵. An arbitrator should be approached in deciding the dispute regarding the quality of goods or a civil court can also be approached under Sales of Goods Act, 1930. Therefore, the winding up petition filed u/s 433(e) and 433(f) should be dismissed.

<p align="center">II: STALWART IS LIABLE TO WOUND UP UNDER 433(e) AND UNDER 433(f) OF THE COMPANIES ACT, 1956.</p>

It is humbly submitted that the petitioner is also the creditor of Stalwart has filed a winding up petition³⁶ u/s 433(e) C. A., 1956 and the remaining 26% shareholders have filed the petition³⁷ u/s 433(f) of the C. A., 1956. The petitioner is not entitled *ex debito justitiae* to an order of winding up of Co.³⁸ Stalwart is not liable to be wound up u/s 433(e) and u/s 433(f) of the C. A., 1956. Instead, the co. should be allowed to function.

1. THE COMPANY IS NOT LIABLE TO BE WOUND UP UNDER SECTION 433(E)

1.1 It is respectfully pleaded that Stalwart is not liable to wind up u/s 433(e) because Stalwart has made interim payments³⁹ as and when the co. made profits. Thus, cannot be termed as ‘inability

³⁴ Companies Act 1956, No. 18, Acts of Parliament, 1956 (India).

³⁵ Rameshbhai Ramanlal Patel v. Shree Bansidhar P. Ltd., (2005) 58 S.C.L. 396. (India) ¶ 9.

³⁶ Moot Compromis, ¶15.

³⁷ Moot Compromis, ¶16.

³⁸ Reliance Infocomm Ltd. and Another v. Sheetal Refineries P. Ltd. 2007 S.C.C. OnLine A.P. 935 ¶ 46.

³⁹ Moot Compromis, ¶7.

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to pay debts'. Invoices of such payment were raised but they were wrongly adjusted towards the pending amount.

1.2 The court enjoys the discretion to try to save the interest of the co.⁴⁰ and avoid winding up⁴¹.

The principles on which the court acts are a) the defence of the co. is in good faith and one of substance; b) the defence is likely to succeed in point of law; c) the co. adduces prima facie proof of the facts on which the defence depends⁴².

1.3 Stalwart's default is due to *force majeure* event i.e. a contractual term by which one (or both) of the parties are excused from performance of the contract⁴³, in whole or in part, can claim an extension of time for performance, on the happening of a specified event beyond control⁴⁴. ¶18)

The doctrine of frustration of contract is a part of law of discharge of contract due to supervening impossibility of the act agreed to be done and comes within the purview of § 56⁴⁵. Stalwart had to bear losses due to change in FDI regulations and also due to competition in the market.

1.4 Even in those cases where the co. is closed, the court should welcome revival rather than affirm the death of the co. It is wrong to say that creditors can insist on winding up of the co.⁴⁶ Inability to pay its debts in commercial sense means that the co. was unable to meet the current

⁴⁰ Paramjit Lal Badhwar v. Prem Spg. & Wvg. Mills. Co. Ltd., (1986) 60 Com Cas. 420 (All.) ¶ 22.

⁴¹ Shrabony Dey Howrah Motor Co. Ltd., (2004) 122 Com Cases 597, (India) ¶ 39.

⁴² Madhusudan Gordhandas and Co. v. Madhu Woollen Industries Pvt. Ltd., (1971) 3 SCC 632 ¶¶ 20,21; Allahabad Bank v. Kothari Petrochemicals Ltd.; 2003 SCC OnLine Mad 899 ¶ 13.

⁴³ 1, SWEET & MAXWELL, CHITTI ON CONTRACT, 1227-28 (32nd ed. 2015).

⁴⁴ Krishna Kilaru v. Maytas Properties Ltd. [2013] 36 taxmann.com 24 (A. P.) ¶ 58.

⁴⁵ The Indian Contract Act, 1872, No. 9, Acts of Parliament, 1872.

⁴⁶ In re, Rishi Enterprises, [1992] 73 Comp Cas 271 (Guj). ¶ 3; Allahabad Bank v. Kothari Petrochemicals Ltd.' 2003 SCC OnLine Mad. 899 ¶ 14.

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demand⁴⁷. If it is able to meet its current demands then the existing probable asset suffice to meet the future demands⁴⁸.

1.5 If the portion of debt is paid even during the pendency of petition then it cannot be alleged that the company is unable to pay debts⁴⁹. The disputes related to interest levied on the principle amount should be adjudicated by the competent court⁵⁰. If the amount of debt is indefinite and *bonafide* dispute or a dispute of the quantity or quality of supply is raised, then the Trib. cannot order winding up⁵¹.

1.6 The Trib. is under obligation to see that no running co. be pushed into winding up due to one or two defaults. The Trib. has power to refuse the winding up order⁵². The co. shouldn't be wound up because of the following reasons a) the winding up petition is filled with *malafide* intentions; b) the debt is *bonafidely* disputed; c) default in payment due to *force majeure* event; d) Stalwart made interim payments therefore it cannot be termed 'unable to pay debts'.

2. THE COMPANY IS NOT LIABLE TO WOUND UP UNDER SECTION 433(f)

2.1 It is submitted that Stalwart is not liable to wind up u/s 433(f) i.e. winding up on just and equitable grounds. A heavy burden lies on the shareholders to clearly show how they consider that the Co. has lost its substratum.⁵³ The petitioner has to satisfy the requirements of § 439(4)(b)

⁴⁷Pradeshia Industrial & Inv. Corpn. of U.P. v. North India Petro Chemicals [1994] 79 Comp. Cas. 835 (SC) ¶22.

⁴⁸Ranbaxy Laboratories Ltd. vs M.S. Shoes East (I) Ltd. 1998 93 Comp.Cas. 296 (Del.) ¶ 11.

⁴⁹Hindustan Sanitary and Hardware Store v. J.C.T. Electronics Ltd., (1990) 67 Comp. Cas. 585 (P&H.) ¶ 6.

⁵⁰Gangeshwar Ltd. v. India Coal Traders, (2007) 139 Comp. Cas. 138 (All.) (DB.)(India) ¶ 9.

⁵¹ Vijay Industries v. NATL Technologies Ltd. [2009] 89 SCL 205 (S.C.)(India) ¶ 33.

⁵²§ 443(2) of the Co. A., 1956; 3,CR DATTA,THE CO. LAW,5951(6th ed. 2008); Jagdamba Polymers Ltd. v. Neo Stock Ltd. (2006) 129 Comp. Cas. 160 (M.P.) ¶ 6.

⁵³ Malabar Industrial Co. Ltd. v. A Join Anthrapper , (1985) 57 Com. Cas. 717 (Ker.—DB.) ¶ 1.

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in order to file a petition for winding up.⁵⁴ The bifurcation of a cause of action is impermissible.⁵⁵ The Court should consider two ground rules for ordering winding up presented by a shareholder u/s 433(f): i) the court is unwilling to interfere with shareholders in the management of their own affairs; ii) whether the jurisdiction of winding up is supported by majority of shareholders.⁵⁶

2.2 If the majority shows confidence in the continuance of the business of the Co., the Court will not interfere.⁵⁷ Events of oppression have to be consecutive and not in isolation to constitute ‘oppressive’ conduct of the majority.⁵⁸ Thus, participation in the management of Co. would not constitute an act of oppression of minority shareholders by majority shareholders.⁵⁹

2.3 Moreover, § 2(76) of the C. A., 2013 states that a ‘company’, on the other hand, Galileo Investors is not a Co. but a ‘body corporate’ i.e. they are not registered under any C. A. and are incorporated outside India⁶⁰. The definition clause in any statute uses the word “means”, intending to speak restrictively.⁶¹ Hence Galileo and Sam are not a Related Parties.⁶²

2.4 The requirement in case of RPTs is that the resolution in General Meeting has to be approved by a vote of the unrelated parties only. This provision has been taken off in case of Pvt.

⁵⁴ Vasant Holiday Homes P. Ltd. v. Madan V. Prabhu, (2003) 116 Com. Cas. 172 ¶ 24.

⁵⁵ Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya, (2003) 5 S.C.C. 531 ¶ 16.

⁵⁶ In Re, Standard Aluminium and Brass Works Ltd., A.I.R. 1929 Bom 8 ¶ 12.

⁵⁷ Cine Industries & Recording Co., A.I.R. 1942 Bom. 231 ¶ 17; Etisalat Mauritius Ltd. v. Etisalat DB Telecom Pvt. Ltd 2015 S.C.C. OnLine Bom. 3613.

⁵⁸ Shanti Prasad Jain v. Kalinga Tubes Ltd., AIR 1965 SC 1535 : (1965) 35 Comp Cas 351 ¶ 14.

⁵⁹ Somashekara Rao v. Canara Land Investment Ltd. [2011] 16 taxmann.com 264 (Kar.) ¶ 36.

⁶⁰ 2(11) of the C. A., 2016

⁶¹ Executive Engineer and another v. Shri Sitaram Rice Mills. 2011 Indlaw S.C. 822. ¶32.

⁶² K.R. Chandratre, ‘Related party’ UNDER C. A., 2013 [2015] 53 taxmann.com 57 (Article)

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companies.⁶³ Advancing a loan to any shareholder does not come under RPT according to § 188 of the C. A., 2013. Therefore, the petitioner has no ground to seek remedy under this section.

III: THE IMPEALING PETITIONS FILED BY THE TDs ARE NOT MAINTAINABLE

It is humbly submitted before the Trib. that the impleading petitions filed by the TDs are not maintainable. *Firstly*, the TDs are neither necessary nor proper party. *Secondly*, the claims of the TDs cannot be paid at par with other secured creditors.

1. THE TDs ARE NEITHER NECESSARY NOR PROPER PARTY

1.1 The SC in *Ramesh Hirachand Kundanmal v. Municipal Corpn. of Greater Bombay & Ors* has held that the question of impleadment of a party has to be decided on the touchstone of Order 1 Rule 10 which provides that only a necessary or proper party may be added.⁶⁴

1.2 A necessary party is one without whom no order can be made effectively whereas a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding.⁶⁵ A necessary party is one in whose absence no decree can be passed where as a proper party is one whose presence enables the court to adjudicate the dispute effectively and completely.⁶⁶

1.3 In the present case both the TDs are neither necessary nor proper party as their presence is not essential for an effective or complete & final⁶⁷ determination of the issues involved.⁶⁸

⁶³ Vinod Kothari ,Finally some exemptions to pvt. companies, [2016] 65 taxmann.com 167 (Article)

⁶⁴ Ramesh Hirachand Kundanmal v. Minicipal Corpn. of greater Bombay & Ors. (1992) 2 SCC 524 ¶6.

⁶⁵ Udit Narain Singh Malpaharia v. Additional Member Board of Revenue, Bihar and another, AIR 1963 SC 786 ¶7.

⁶⁶ Canara Bank v. Metallica Industries Ltd.,1997 SCCOnline Bom. 136 ¶6.

⁶⁷ State of Assam v. UOI & Ors., (2010) 10 SCC 408 ¶16.

⁶⁸ Thompson Press (India) Ltd. v. Nanak Builders & Investors (P) Ltd., (2013) 5 SCC 397 ¶31.

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1.4 Questions *vis-à-vis* issues involved in a suit refers to the issues involved b/w parties to a suit.⁶⁹ In the present case the issues involved in the suit is the *winding up of the company for inability to pay its debt*. It is humbly submitted that the court can effectively adjudicate upon the issue of winding up irrespective of the presence of the TDs in the proceedings because the scrutiny of the tax claims is not connected to the subject matter⁷⁰ of the petition.

2. TAX CLAIMS CANNOT BE PAID AT PAR WITH THAT OF SECURED CREDITORS

2.1 The section of ‘**Overriding preferential payments**’ was added to the companies act in amendment of 1985 which contained a *non obstante* clause while §178 ITA, 1961 despite of having a *non obstante* clause would not override §529A of the Companies act as that of 529A would prevail being coming into existence later in time.⁷¹ The claim of a secured creditor would prevail over the tax authorities.⁷² The priority of government dues can only be enforceable as between unsecured creditors and not above secured creditors.⁷³

2.2 Thus it is humbly submitted at the instant that as the *non obstante* clause of §178 & that of §17 of ITA & CSTA respectively would not prevail thus the claims of the government cannot be realized on a *pari passu* basis with those of secured creditors.

⁶⁹ Motiram Roshanlal Coal Co v. District Committee, Dhanbad AIR 1962 Pat 357; B Somaiah v. Amina Begum AIR 1976 AP 182.

⁷⁰ Kaka Singh v. Rohi Singh AIR 1978 P&H 30; Narayan Chandra v. Matri Bhandar AIR 1974 Cal 358.

⁷¹ Syndicate Bank v. Official Liquidator, AIR 1999 Bom. 243. Pg. 247.

⁷² ICICI Bank Ltd. v. Official Liquidator, MANU/TN/0013/2005.

⁷³ ITO v. KA Govindaswamy, [1978] 113 ITR 593 (Mad.).

IV: STALWART CANNOT BE TREATED AS AN ASSESSEE IN DEFAULT.

It is humbly submitted before the Trib. that Stalwart cannot be considered as an assessee in default because *firstly*, the provisions of the ITA will not be applicable & *secondly*, loan advancement cannot be considered as dividend income under DTAA.

1. THE PROVISIONS OF ITA WILL NOT BE APPLICABLE IN THE PRESENT CASE

1.1 Following the principle of *generalia specialibus non derogant* the provision of DTAA being special laws⁷⁴ will prevail over that of ITA.⁷⁵ The SC in UOI v. Azadi Bachao Andolan⁷⁶ held that the provisions of the DTAA will apply even if they are inconsistent with the provisions of the ITA⁷⁷ otherwise there is no point in entering into a DTAA.⁷⁸ The provision of DTAA would prevail⁷⁹ over that of ITA in case of a conflict of provision and can be used either to reduce or avoid tax liability.⁸⁰ The definition of ‘dividend’ is restrictive in the DTAA whereas in the ITA it is broader in its content and is less beneficial⁸¹. Therefore the definition of ‘dividend’ in DTAA will be applicable by virtue of **§90 of ITA**.⁸² Thus Art. 10 will prevail over §2(22)(e).⁸³

⁷⁴ D.P. MITTAL, INDIAN DOUBLE TAXATION AGREEMENTS & TAX LAWS 150 (7th ed. 2014).

⁷⁵ UOI v. India Fisheries (P.) Ltd., [1965] 57 ITR 331 (SC) ¶7.

⁷⁶ UOI v. Azadi Bachao Andolan, [2003] 263 ITR 706 (SC); CIT v. Muthaiah, [1993] 202 ITR 508 (Kar.) ¶8.

⁷⁷ CIT v. Visakhapatnam Port Trust, [1983] 144 ITR 146 (AP) ¶38.

⁷⁸ CIT v. Davy Ashmore India Ltd., [1991] 190 ITR 626 (Cal.) ¶8.

⁷⁹ Circular No. 333, CBDT, dated 2-4-1982.

⁸⁰ CIT v. P.V.A.L Kulandagan Chettiar, [2004] 137 Taxman 460 (SC) ¶5.

⁸¹ CIT v. Estienne Andre, [2000] 242 ITR. 422 (Bom.) ¶3; Arabian Express Line Newspaper Ltd. of UK v. UOI, [1995] 212 ITR. 31 (Guj.) ¶7.

⁸² CIT v. Samsung Electronics Co. Ltd., [2012] 345 ITR. 494 (Kar.) ¶16.

⁸³ Shri. Rajiv Makhija v. Dy. Director of Income Tax., ITA No.3148/Del/2008 ¶ 4.

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2. THE LOAN ADVANCEMENT IS NOT A DIVIDEND UNDER ART. 10 OF THE DTAA

2.1 The words employed in the treaty are to be given a general meaning.⁸⁴ For interpretation of tax treaties the ordinary meaning of the words should be looked into coupled with the object & purpose.⁸⁵ Dividend under DTAA means⁸⁶ *firstly*, income from shares & *secondly*, income from other corporate rights.

[a] The loan advancement is not income from shares or other corporate rights

2.2 The notion of dividends basically concerns with participation on the distribution of profits to the shareholder⁸⁷ decided by annual general meetings of the shareholders.⁸⁸ Dividends are income from capital which they have made available to the company as shareholders.⁸⁹

2.3 Income from other rights provides that dividends broadly and flexibly cover all the arrangements that yield a return on equity investment⁹⁰ and participation in the distribution of profits is the basic requirement, whatever nomenclature assigned.⁹¹

2.4 On the contrary a loan is coupled with an act of lending, payment of interest⁹² and an obligation of repayment⁹³ and thus is not a return on the equity investment or income from capital invested by the shareholder.

⁸⁴ CIT v. Boston Consulting Group Pte. Ltd., [2005] 94 ITD 31 (Mum.).

⁸⁵ New Skies Satellites N.V. v. Asstt. DIT, [2009] 121 ITD 1 (Del.) ¶207.

⁸⁶ Executive Engineer & Anr. v. Shri Seetaram Rice Mills, 2011 Indlaw SC 822, ¶32.

⁸⁷ OECD, Commentary on Model Tax Convention, 2014, Art. 10, ¶26.

⁸⁸ *Supra* note 74 at 705.

⁸⁹ *Supra* note 87 at ¶2.

⁹⁰ *Supra* note 87 at ¶3.

⁹¹ *Supra* note 74 at 702.

⁹² Uco Bank v. Service Tax, 2014 SCC OnLine CESTAT 3770 ¶ 12.

⁹³ Commissioner of Income Tax v. Raj Kumar [2009] 181 Taxmann 155 (Del.) ¶ 10.5.

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2.5 Nowhere deemed dividend has been brought into tax net under Art. 10 and the amount of loan paid cannot be treated as a dividend paid as defined in Art. 10 of the treaty.⁹⁴

2.6 The Apex Court has held that the assessee is bound to deduct TAS for income chargeable in the hands of the non-resident.⁹⁵ By the authoritative judgment of the court, the said loan advancement not being a dividend income in the hands of Galielo is not subject to TDS by Stalwart and hence cannot be treated as an assessee in default for the same.

V: STALWART IS NOT LIABLE TO PAY VAT & CST IN KARNATAKA

It is humbly submitted that Stalwart is not liable to discharge sales tax liabilities in Karnataka. *Firstly*, they are only service provider and not dealer. *Secondly*, the situs of sale for the sales made under the marketplace model is at Tamil Nadu & not Karnataka.

1. STALWART IS ONLY A SERVICE PROVIDER AND NOT A DEALER

1.1 Dealer is a person who is involved in the business of selling, supplying and distributing of goods.⁹⁶ Service means any activity carried out by a person for another except transfer in the title of goods, delivery & supply or deemed sale within Article 366(29-A) of the Constitution.⁹⁷

[a] Stalwart is not involved in selling, supplying or distributing goods

1.2 Delivery means voluntary transfer of possession from one person to another.⁹⁸ Supply is the delivery of the goods as delivered by the seller or notification that they are available for delivery

⁹⁴ *Supra* note 83 at ¶6.

⁹⁵ G.E. Technology Centre (P.) Ltd. v. CIT, [2010] 327 ITR 456 (SC) ¶ 7.

⁹⁶ §2(12) Karnataka Value Added Tax Act, 2003, No. 32, 2004.

⁹⁷ §65B(44) The Finance Act 1994, No. 23, 2012.

⁹⁸ §2(22), Sale of goods Act 1930, No. 3, 1930.

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if they are to be collected by the buyer.⁹⁹ It is humbly submitted that Stalwart never had possession or control¹⁰⁰ of the goods as they were delivered by the suppliers upon the receiving the orders from the customers. Moreover the transfer of property is between the actual seller and buyer and Stalwart at no point in possession of the goods sold under the marketplace model. The entire dominion or control over the goods is always with the actual seller who physically transfers the same without Stalwarts involvement.¹⁰¹ Thus Stalwart in not involved in selling of goods.

[b] Stalwart is not liable to pay sales tax for the services rendered

1.3 A person canvassing orders for another dealer and causing sale of goods directly to third parties does not become 'seller' himself and cannot be made liable to sales-tax.¹⁰² Where an assessee was acting as a selling platform where sellers were bringing goods and buyers were buying goods was considered to be a service provider.¹⁰³ If a person merely acts as an agent and the property in the goods do not pass onto him then that person shall not be liable to pay sales tax.¹⁰⁴ A person involved in collection of payment from the customers is not a dealer since he is not involved in sale of goods, but is merely providing service.¹⁰⁵ A registered dealer or a dealer

⁹⁹ Rees v. Munday (1974) 3 All ER 506, 509.

¹⁰⁰ Shamrao Vithal Coop. Bank Ltd. v. Kasargode Panduranga Maliya, (1972) 4 SCC 600 ¶ 6.

¹⁰¹ ¶¶2-5 of Moot Proposition.

¹⁰² CCT v. N.K. Poduval & Co., [2014] 42 taxmann.com 49 (Ker.) ¶ 3.

¹⁰³ CCE v. Salem Starch [2013] 39 taxmann.com 69 (Mad.) ¶ 16.

¹⁰⁴ Pench Valley v. State of MP, (1973) 31 S.T.C. 64 (M.P.).

¹⁰⁵ CTO v. Coal & Coke Supplies Corpn., (2007) 8 VST 699.

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liable to be registered is liable to pay tax.¹⁰⁶ Stalwart was a mere facilitator in the marketplace model.¹⁰⁷

1.4 The primary liability to pay the sales tax so far as the State is concerned is on the seller¹⁰⁸. The assessment of sales tax must be on the sale of goods.¹⁰⁹ In the present case Stalwart is working as a mere facilitator and only providing a service for which Stalwart is discharging service tax and not liable to pay VAT and CST.

2. THE IMPUGNED SALES TAX WILL NOT BE PAYABLE IN KARNATAKA

2.1 The location or delivery of goods within the state cannot be made basis for levy of tax on sales of goods merely because the goods are located or delivery of which had been effected within the state would not be situs of sale or deemed sale if the transfer of right to use has taken place in another state¹¹⁰ and the right to use of goods will be transferred when the parties enter into a formal contract irrespective of place where the goods are located or delivered¹¹¹. Where the sale takes place outside the State, the State cannot impose Sales Tax.¹¹²

2.2 In the present case, the contract b/w the buyer and the seller was entered into on the online portal which was situated at Tamil Nadu¹¹³ and hence following the authoritative judgment of the SC, the sales made under the marketplace model will not be taxable at Karnataka but at Chennai.

¹⁰⁶ §4, KVATA,2003, No. 32 of 2004.

¹⁰⁷ Sharad Moudgal, 100% FDI Permitted in B2C E-Commerce Marketplaces (2016) PL (CL) May 71.

¹⁰⁸ Tata Iron and Steel co. v. State of Bihar, AIR 1958 S.C. 452.¶ 17

¹⁰⁹ Haleema Zubair v. State of Kerala, (2008) 16 S.C.C. 504 ¶ 9.

¹¹⁰ Sandan Vikas (India) Ltd. v. State of Haryana [2013] 40 taxmann.com 672 (P & H.).

¹¹¹ 20th Century Finance Corpn. Ltd. v. State of Maharashtra, (2000) 6 SCC 12 ¶ 25.

¹¹² India Const. art. 286, cl. 1.

¹¹³ ¶¶ 2-5 of Moot Proposition.

THE PRAYER

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

1. The main winding up petition and all the impleading petitions are not maintainable before NCLT.
2. The Company Stalwart is not liable to wind up under section 433(e) and also 433(f).
3. The said loan advancement is not an income thus Stalwart is not an assessee in default.
4. Stalwart is not a dealer and thus is not liable to pay sales tax in Karnataka.

The Tribunal may be pleased to pass any other order as it deems fit in the interest of

Justice, Equity and Good Conscience.

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

Place: Bangaluru, Karnataka

Sd/-

Dated: 31st December, 2016

(Counsel for the Petitioner)