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By

SBS and Company LLP
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CONTENTS

Dear Readers,

A Happy Diwali to all our readers. Hope this Diwali steer your businesses in bright paths and help to achieve targets.

I am glad to share that we have moved into new office at Sri City. The new office is located in the business centre of Sri City, closer to our clients. Going forward, our office can be reached at such new place.

In this edition, our office has covered certain important topics for your perusal. The article on 'Importance of Other Reconciliations for GST Audit' under GST laws, which will make businesses understand the other reconciliations to keep such things ready for smooth conduct of the GST audit. The article on 'Recent Amendments in ECB Regulations' would appraise you about the ECB regulations in general and the key amendments which were done. I would recommend everyone to read and also to explore funding through ECB routes.

The article on 'Cash Transactions Not Necessarily A Benami Transactions' would help the reader to understand that just because cash is involved, such transactions would not automatically coloured as benami transactions. The judgment is an outcome of search conducted on a party post demonetization. This is important because it dispels the normal presumption that cash and benami go hand in hand.

The recent judgment of Honourable Supreme Court in the case of ArceloMittal India Private Limited v. Satish Kumar Gupta and Others under the IBC space sets out a strong tone in interpretation of Section 29A of Insolvency & Bankruptcy Code. The apex court meticulously after making a contextual interpretation of Section 29A held that both the resolution applicants were ineligible because they were having accounts which were NPA and they cannot be eligible unless such NPAs were made good. The apex court has pierced the corporate veil in public interest and held that the looming presence of promoters was felt through all and rejected the applications and allowed time to make good such applications. This is an important judgment at right time which sets tone and avoid future litigations. The article on Companies Amendment Ordinance 2018 details the various changes in the Companies Act and the Ordinance was made effective from 2nd Nov 18 with the presidential assent.

I hope that you will have good time reading this edition and please do share your feedback. I will also urge clients to mail us topics or issues on which you want us to deliberate in our future editions, so that we can contribute to the same.

Thanking You,

Suresh Babu S
Chairman & Managing Partner

BENAMI ACT

CASH TRANSACTIONS NOT NECISSARILY A BENAMI TRANSACTION

Contributed by CA Suresh Babu S & CA Sri Harsha

The recent judgment of the Honourable Appellate Tribunal[1] of New Delhi in the case of 28 appellants who are the professors of a college, who has received salary advances in cash and the initiating officer (IO) treating such salary advances in cash are benami transactions under the Prohibition of Benami Properties Transactions Act, 1988 (PBPT) and quashing such actions of IO by the Honourable Appellate Tribunal is welcome move as it clears certain vital aspects pertaining to the PBPT Act laying more clarity.

The judgment is taken up for consideration in this article to discuss about the key considerations laid down in the said judgment. The facts of the case are common in all 28 cases with minor changes. Hence, let us consider facts of single case to understand the issue involved.

a) The Appellant is a professor in St Joseph's College of Engineering. The said college is run by St Joseph Institute of Science and Technology Trust (Trust).

b) The appellant has received a salary advance of Rs 50,000/- on 17th November 2016 from the Trust. On the same day, a search was conducted on the Trust under Section 132 of Income Tax Act, 1961 (IT Act).

c) On 23rd November 2016, the said amount which was received as salary advance was insisted by the IT authorities to be returned to the Trust and the same was returned as instructed by the Appellant.

d) A sworn written statement was recorded from the appellant, wherein he stated that he has received an amount of Rs 50,000/- as salary advance. There was never a search conducted by IT authorities on the appellant.

A show cause notice was issued by the IO on 14th December 2016 wherein it was alleged that the appellant has held cash of Rs 50,000/- and also lent his name to be a benamidar. The appellant has made a reply to the notice stating that the notice is contrary to the factual position since the amount is received as salary advance and hence not a benami property.

The IO without considering the representations of the 28 appellants has passed a provisional attachment order under Section 24(3) of PBPT Act and thereby attaching the bank account of the appellants. The IO is of the belief that the Chairman of Trust is the beneficial owner and accordingly passed order attaching all the bank accounts of the employees.

The matter has travelled to the adjudicating authority and the same was confirmed by the adjudicating authority and the said authority under Section 26(3) of PBPT Act, upheld the order of IO. Such orders of adjudicating authority were challenged before the Honourable Appellate Tribunal.

Tribunal for SAFEMA, FEMA, PMLA, NDPS, PBPT Acts

The Honourable Appellate Tribunal while dealing with the 28 appellants has made certain important observations which are discussed as under.

Attachment under PBPT can be only 'Benami Property' unlike 'Any Property' in PMLA:

a) The Honourable Appellate Tribunal has stated that the actions of IO attaching the bank accounts of the appellants is without jurisdiction and without application of mind. The Tribunal has stated that what is allowed to attach under Section 24(3) of PBPT Act is only 'property held benami' and not 'any property'.

b) The Appellate Tribunal has stated that the IO has ignored the fact that the salary advances which were received by the appellants were paid back to the Trust on the insistence of IT authorities as a result of search on Trust and there is nothing left with such appellants (even assuming such transaction is a benami transaction) which allowed the IO to attach the bank account of appellants.

c) The Appellate Tribunal further held that vide Section 2(u) of Prevention of Money Laundering Act, 2002 (PMLA) which deals with the definition of phrase 'proceeds of crime', 'any property .....' is covered and accordingly the attachment under PMLA can be wide which legalises attachment of any property if it can be substantiated that such property has nexus with the proceeds of crime.

d) However, in the PBPT Act, the attachment is confined only to the 'benami property' and nothing more or less. Hence, the action of IO and subsequent ratification by adjudicating authority attaching the bank account of the appellant which is not a 'benami property' is set aside.

Every Cash Transaction cannot be termed as 'Benami':

e) The Appellate Tribunal after considering the definitions of 'attachment', 'benami transaction' and 'benamidar' as laid down in PBPT Act has in principle agreed with the contention of the appellant, that every cash transaction cannot be held as 'benami transaction'. To call a transaction as 'benami transaction', it has to satisfy twin conditions that (i) the property being held by a person who has not provided the consideration, (ii) the property is held by that person for the immediate or future benefit, direct or indirect of person who has provided the said consideration'.

f) Thus, every transaction where cash is paid to person in lieu of a future promise cannot be a 'benami transaction' as there is no lending of name. There can be no 'benami transaction' if the future benefit is due from the person who is holder of the property.

Order of IO and Adjudicating Authority is Illegal:

g) The Appellate Tribunal has held that order passed under Section 24(4) of PTBT Act is illegal as it relates to a property which does not exist at all. The order is unsustainable as it punishes the appellants for wanting to defeat the purposes of demonetization, which has no direct nexus with the PTBT Act and beyond the purview of the Act.

h) The Appellate Tribunal further stated that the impugned order assumes that the object of disbursement was to bring undisclosed amount into circulation by depositing into 3rd party accounts, who did not own the money legitimately. This action of the IO is without any material on record and there is nothing on the record to show that the professors owned the money illegitimately.

Concluding Remarks:

i) Appellate Tribunal has concluded stating that ***'the benami act is a special act. All the provisions are stringent provisions. Once the appeals are dismissed by this Tribunal (and its order is became final in higher court), the criminal prosecutions have to be initiated against the parties. It is also settled law that once the provisions of Special Law are clearly worded, the question of importing any expression or omitting any part of the provision does not arise. The same have to be read as it is. The simple meaning is to be given. The question of any perception and personal notion does not arise. In the Benami Act, there is no specific provision which mandates that any movable or immovable property cannot be attached in value of such property unlike in Section 2(u) of PMLA, 2002, which is other special act. Any provisions of PMLA, 2002 cannot be invoked in the Benami Act. The members of the adjudicating authority have failed to appreciate the same law while passing the impugned order. In the present case, the amount was not held by the appellants, it was an advance salary received from the employers. It is not the case of the respondent, the appellants were involved in any link and nexus in the crime or they have hatched any conspiracy or arrangement between the employee and employer.***

j) Further, in Para 44, ***'The facts of the present case are clear that the property was never held by the appellants. The amount received by them are returned. Even the question of any arrangement in the present case does not arise as the appellants have received the advance salary from the employer under oral contract at the asking of respondent, the same was immediately returned. The said factual position has not been denied by the respondent. This is also not a case where the person providing the consideration was not traceable or fictitious. The admitted position is that the management/employer was very much traceable, his statement was recorded, the money returned by the appellants was dealt by the department'.***

The Appellate Tribunal has stated that existence of the 'benami' transaction has to be proved by the authorities i.e., the person who alleges the transaction by placing reliance on the judgment of Sitaram Agarwal vs Subrata Chandra 2008 7 SCC 716. Since the authorities have failed to discharge the burden of proof. The Tribunal has stated that the authority has purely gone on the premise that cash is transferred from one person to another, with an object to defeat demonization, which is insufficient to establish a benami transaction and has provided relief to all appellants and ordered to release the attachments.

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GST

IMPORTANCE OF OTHER RECONCILIATIONS IN GST AUDIT

Contributed by CA Sri Harsha & CA Manindar

INTRODUCTION:

With the requirement to get the records audited annually under GSTLaws, the auditor is required to come up with reconciliation of turnover, input tax credit availed, taxes paid between Financial Statements and GST Records maintained. The said reconciliation statement is required to be prepared in the format as prescribed under Part A of Form GSTR-9C as notified under Notification 49/2018-Central Tax dated 13.09.2018.

Upon careful consideration of this reconciliation statement, the information sought therein for reconciliation cannot be readily extracted from books of accounts or from GST records. It is required to draw certain other reconciliation statements before we proceed to work on the reconciliation required under GSTR-9C. This article focusses on such other reconciliation statements to be prepared for smooth preparation of the reconciliation statement as prescribed in GSTR-9C. These statements are indicative and are not exhaustive and would vary from one tax payer to another tax payer depending on their business structure, manner of record maintenance etc.

RECONCILIATION OF TURNOVER BETWEEN GSTR-3B AND GSTR-1:

In order to compare the turnover and tax payment with that of books of accounts, it is every important to understand what is the exact turnover that is disclosed in returns filed under GSTfor the Financial Year as a whole and how much tax has been paid in this regard. This information is required to be obtained from the monthly filings of GSTR-1 and GSTR-3B returns.

The GSTR-3B return is a summary return assessing the tax liability for a month. It captures information about taxable, exempted, exported turnover and the corresponding tax payable thereon. Further, it also captures the ITC availed, reversals made and the details of GST payment by using ITC as well as cash.

On the other hand, GSTR-1 return is a declaration about details of supplies undertaken during a month. This return can be amended by making necessary changes in subsequent returns. In this return, the invoices issued by registered person for B2B supplies are to be declared individually. The invoices issued by registered persons for exports or for deemed exports or for supplies to SEZ are also required to be declared individually. The invoices issued by registered persons for exempted supplies, B2C supplies are to be declared on consolidated basis except in cases where the individual invoice value is more than Rs 2,50,000 (each invoice is required to be declared separately in these cases). The adjustments if any made to invoices by way of debit notes or credit notes shall be declared individually for B2B supplies and on consolidated basis in case of B2C supplies.

The turnover declared in these two returns could be different as GSTR-3B cannot be amended while the turnover declared in GSTR-1 return of a particular month can be amended in GSTR-1 return to be filed for subsequent months by way of debit notes/credit notes or amendment to invoices. Further, while filing

annual return in GSTR-9, it is required to aggregate the value of supplies declared in GSTR-1 returns filed for the months of July 2017 to March 2018 alone. Sometimes, invoices issued for FY 2017-18 may not be declared in GSTR-1 returns filed during July 2017 to March 2018 and there could be adjustments by way of debit notes or credits or amendments or cancellations of invoices declared in GSTR-1 returns for the above period. These details are generally disclosed in GSTR-1 returns filed for the months of April 2018 to September 2018.

The turnover declared in GSTR-3B returns is not considered for filing annual return while tax payment would be made only when the turnover is declared in GSTR-3B returns. The impact of the adjustments/amendments to GSTR-1 returns filed during July, 2017 to March 2018 and during the period April 2018 to September 2018 are required to be appropriately considered in GSTR-3B returns and accordingly the tax adjustments or additional payments are required to be undertaken.

In view of the above reasons, it is required to prepare a reconciliation statement of turnover declared in GSTR-1 returns and GSTR-3B returns. This reconciliation will help us in understanding the following;

a) The exact amount of taxable turnover considered for GST compliance for the period July 2017 to March 2018
b) Whether the applicable tax for taxable turnover has been appropriately paid along with interest if anyby making necessary disclosures in GSTR-3B returns filed up to the month of September 2018.
c) The amount received towards if any during the period July 2017 to March 2018 and the extent of these advances that remained unadjusted by way of invoices issued during the said period. This information is required for filing column 5B of GSTR-9C .This amount will not be part of the turnover recorded in books of account.
d) The amount of taxable turnover on account of deemed supplies under schedule I will also be identified. This information is required for filing Sl.No. 5D of GSTR-9C. This amount will not be part of the turnover recorded in books of account.
e) The aggregate value of adjustments made by way of debit notes and credit notes and their corresponding impact on the amount of GST paid and their treatment in GSTR-3B returns.

Upon reconciling the difference between GSTR-3B and GSTR-1 returns filed, the resultant turnover details can be compared with that of books of accounts to reconcile the turnover between financial records and GST records as per the requirements of GSTR-9C.

DRAWING UP OF TURNOVER OF A PARTICULAR GSTN:

In case of a business entity having multiple units located in different states, then registration under GST is required to be taken separately for each state. The audit under GST is required to be carried independently for each of the registration. In such cases, the auditor is required to determine the turnover of a registration for which audit is being conducted as such amount will not be readily available in financial statements. Therefore, a statement is required to be prepared drawing up registration wise turnover as per financial records and the aggregate of the same should match with the turnover shown in financial statements.

RECONCILIATION OF ITC AVAILED BETWEEN GSTR-2A AND GSTR-3B:

It is important to note that GSTR-2A is a facilitation measure given to recipient of supply to ensure that the corresponding supplier is depositing the taxes collected from him with Government. This fact of non-reflection of supply in GSTR-2A does not impact the ability of recipient tax payer to avail ITC on self-assessment basis.The apprehension that no ITC can be availed in the event of non-reflection of supply details in GSTR-2A is without legal basis. This position has been clarified by CBIC vide their press release dated 18.10.2018.

However, Sl.No 8 of GSTR-9 (Annual Return) requires the tax payer to compare ITC availed with that of GSTR-2A statement and is expected to reconcile the difference. The ITC availed as per GSTR-9 return shall be the aggregate of GSTR-3B returns filed for the period July 2017 to March 2018. The corresponding suppliers might have declared some of these supplies in their GSTR-1 returns filed for the period April 2018 to September 2018 also. Therefore, it is required to prepare a reconciliation statement of ITC availed as per GSTR-3B returns filed upto March 2018 with GSTR-2A statements updated upto September 2018.Out of the differential input tax credit between GSTR-2A statements and ITC availed through GSTR-3B up to March 2018, it is required to ascertain the following for reporting in GSTR-9;

a) ITC available as per GSTR-2A statements but not availed (Sl.No 9E)
b) ITC available as per GSTR-2A statements but not eligible (Sl.No. 9F)

Upon reconciliation of credit availed between GSTR-2A returns and GSTR-3B returns filed, the following can be identified.

a) The list of suppliers whose invoices are not at all reflected in GSTR-2A return but ITC availed in GSTR-3B return. In such cases, the auditor is required to verify the invoices and other documents owned by the recipient tax payer (auditee) in this regard to ensure that such documents are in line with the requirements of GST law and conditions to avail ITC as laid down under section 16 of CGST Act, 2017 have been satisfied.
b) The list of suppliers whose invoices are reflected in GSTR-2A return but no ITC availed in GSTR-3B returns. In such cases, the auditor is required to verify the invoices and other documents owned by recipient tax payer (auditee) to ensure whether ITC can be claimed on these invoices or not. If it is decided that ITC can be claimed in these cases, then ITC can be availed while filing the GSTR-3B return for the month of September 2018 in view of the time restriction under section16(4) of CGST Act, 2017. In case the deadline is missed out, these cases are to be considered to quantify the amount of eligible ITC reflected in GSTR-2A but no ITC has been availed as required for reporting under Sl.No 9(E) of Annual Return (GSTR-9) as mentioned above.
c) There could be instances where supplies are reflected in GSTR-2A but no ITC has been availed in GSTR-3B return for the reason that such supplies are ineligible for ITC in terms of section 17(5) of CGST Act, 2017. These amounts are required to be quantified for reporting under Sl.No 9(F) of Annual Return (GSTR-9) as discussed above.
d) The other reasons for mismatch could be because of failure to account for invoices, debit notes or credit notes properly. In such cases, the auditor is expected to examine these transactions and appropriate action shall be taken.

The reconciliation of ITC availed between GSTR-2A returns and GSTR-3B returns could be considered as an appropriate audit procedure to ensure completeness of the ITC availment by the tax payer (auditee).

RECONCILE THE INPUT TAX CREDIT AS PER BOOKS OF ACCOUNT AND GSTR-3B FILINGS:

Sl.No 12A to 12F of Part IV of GSTR-9C provides for reconciliation of input tax credit availed between financial statements and the annual return under GSTR-9. ITC availed and disclosed in GSTR-3B returns filed for the months of July 2017 to March 2018 are aggregated and disclosed in GSTR-9 return. Effectively, GSTR-9C requires reconciliation of ITC availed as per books of accounts and the ITC availed in GSTR-3B returns filed up to March 2018.

The said reconciliation as prescribed under Sl.No 12A to 12F of GSTR-9C requires to disclose the amount of input tax credit booked in earlier Financial Years but claimed in current Financial Year and the amount of input tax credit booked in current Financial Years but claimed in subsequent Financial Years. This could be because of the reason that invoices are received from vendors between the period April 2018 to September 2018 but the expenditure pertains to Financial Year 2017-18.

In order to quantify these amounts for the purpose of GSTR-9C, it would be appropriate to prepare a reconciliation statement of ITC availed as per input ledgers maintained in finalised books of account for FY 2017-18 and the ITC availed as per GSTR-3B returns filed upto September 2018. This reconciliation will help us in understanding the following;

a) The amount of ITC availed in books of accounts but not reflected in GSTR-3B returns. The taxpayer is required to ensure that this amount should be availed in GSTR-3B return to be filed for September 2018. In case failure to disclose in September 2018 return, then the auditor is required to ensure that the amounts shall be expensed out in books of accounts.
b) The amount of ITC not availed in books of accounts but reflected in GSTR-3B returns. The auditor is required to examine these transactions and ensure appropriate changes are to be made in ITC ledgers of the books of accounts. In case the auditor finds that ITC is ineligible but the same is wrongly carried in electronic credit ledger through GSTR-3B returns, ensure that the same is reversed in the GSTR-3B returns to be filed for subsequent months.
c) The amount of ITC availed in books of accounts and reflected in GSTR-3B returns filed for the April 2018 to September 2018. This amount will be considered as ITC booked in current Financial Year but claimed in subsequent Financial Years for disclosure in Sl.No 12C of GSTR-9C.
d) The other differences if any between ITC ledgers as per books of account and GSTR-3B returns shall be examined and appropriate action shall be taken. These differences could be on account of reasons like ineligible credit availed in books and not considered for GSTR-3B returns or reversal of common credits attributable to exempted turnover in terms of section 17.

CONCLUSION:

With the requirement to certify that the reconciliation statement in GSTR-9C as true and correct, there is a great responsibility on the auditor to critically examine all the business transactions of the tax payer (auditee) and the resultant GST compliance. The other reconciliation statements would be handy for auditor as alternative compliance procedures to ensure the accuracy of compliance and thereby safely discharge this responsibility.

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FEMA

A PEAK INTO RECENT AMENDMENTS IN ECB REGUALTIONS

Contributed by CA Murali Krishna G

External Commercial Borrowings (ECB) are governed by Foreign Exchange Management (Borrowing or Lending in Foreign Currency) Regulations, 2000 issued by Reserve Bank of India (RBI), and these regulations have been amended from time to time considering changes in India's macro-economic scenario. Apart from issuing Regulations, RBI has been issuing Master Directions on various aspects connected with foreign exchange management by consolidating related Notifications and AP (DIR Series) Circulars. Master Direction No. 5 on External Commercial Borrowings, Trade Credits, Borrowing and Lending in Foreign Currency by Authorized Dealers / Persons other than Authorized Dealers was issued on January 1, 2016, and RBI has been amending the same in line with amendments to related Regulations, Notifications and new AP (DIR Series) Circulars.

This article throws light on recent amendments to ECB regulations and accordingly to corresponding Master Direction. However, to have better understanding of the amendments, related provisions / guidelines are provided for reference.

For more information on ECB, our article on captioned subject published in SBS Wiki Journal of August 2018 may please be referred, which is available at
https://www.sbsandco.com/wiki/document/sbs-wiki-e-journal-aug-2018.

Definition and Forms of ECB:

ECBs are commercial loans raised by eligible resident entities from recognised non-resident entities and they should conform to parameters such as permitted borrowers, recognised lenders, minimum average maturity, permitted end-uses, maximum all-in-cost ceiling, etc.

The ECB Framework enables permitted resident entities to borrow from recognized non-resident entities in the following forms:

i. Loans including bank loans;
ii. Securitized instruments (e.g. floating rate notes and fixed rate bonds, non-convertible, optionally convertible or partially convertible preference shares / debentures);
iii. Buyers' credit;
iv. Suppliers' credit;
v. Foreign Currency Convertible Bonds (FCCBs);
vi. Financial Lease; and
vii. Foreign Currency Exchangeable Bonds (FCEBs)

The new regime of ECB Framework provides for raising loans under three Tracks the details are as below:

Particulars	Track I	Track II	Track III
Coverage	Medium Term Foreign Currency denominated ECB	Longer Term Foreign Currency denominated ECB	Medium Term Indian Rupee denominated ECB
Minimum Maturity Period	• 3 years for ECB up to USD 50 Mn • 5 years for ECB beyond USD 50 Mn • 5 years for eligible borrowers mentioned in next row of this table, irrespective of amount of borrowing • 5 years for FCCB / FCEB irrespective of amount of borrowing (Call or Put Option on FCCBs shall not be exercisable prior to 5 years)	• 10 years irrespective of the amount	• Same as under Track I
Eligible Borrowers	• Companies in Manufacturing and Software Development • Shipping and Airline Cos. • SIDBI and EXIM Bank • Units In SEZ • NBFC-IFC, NBFC-AFC • Holding Companies and Core Investment Companies • HFC (regulated by NHB) • Port Trusts	• All entities in Track I • Infrastructure Companies • Real Estate Investment Trusts an Infrastructure Investment Trusts	• All entities in Track II • All NBFCs • NBFC-MFI, NPOs engaged in MFI Activity • Cos engaged in R&D, Training • Cos supporting infra and logistic services • Developers of SEZ / NMIZs • Cos engaged in the business of maintenance, repair and overhaul, and freight forwarding.

Recognised Lenders	• Multilateral Financial Institutions (MFI) • International Capital Markets • International Banks • Export Credit Agencies • Suppliers of Equipment • Foreign Collaborators and Foreign Equity Holders (Others than OCBs) • Overseas Long-Term Investors • Overseas Branches / Subsidiaries of Indian Banks	• All entities listed in Track I (except Overseas Branches / Subsidiaries of Indian Banks)	• All entities listed in Track I (except Overseas Branches / Subsidiaries of Indian Banks) - In case of MFIs and NPOs engaged in MFIs, Overseas Organizations and Individuals can lend

Borrowing Limits:

Under Automatic Route, ie., without approval of RBI, entities can raise ECB as below, per financial year:

a. Companies in infrastructure and manufacturing sectors, NBFC-IFC, NBFC-AFC, Holding Companies and Core Investment Companies – Up to USD 750 Mn or equivalent
b. Companies in software development sector – Up to USD 200 Mn or equivalent
c. Entities engaged in micro finance activities – Up to USD 100 Mn or equivalent
d. All other entities – Up to USD 500 Mn or equivalent

Borrowings beyond the above limits shall be under Approval Route. For borrowings under Track III, i.e., rupee denominated borrowings, the limits shall be computed taking exchange rate prevailing on the date of agreement.

End Use of Proceeds - Prohibition:

Regulations governing ECB expressly prohibit usage of such proceeds for below purposes:

a. Borrowings under Track I to III
   - Onward lending
   - Investment in Capital Markets
   - Equity Investment domestically
   - Investment in real estate sector or acquisition of land, except for affordable housing projects, SEZs and Industrial Parks &Integrated Townships
b. Borrowings under Track I and II
   - Working Capital Purpose
   - General Corporate Purpose
   - Repayment of Rupee Loans

Provisions of clause (b) above are not applicable for borrowings with minimum average maturity period of more than 5 years from direct and indirect equity holders of borrowing entities, which means such proceeds can be used for working capital and other purposes mentioned above.

Rupee Denominated Bonds Overseas (RDBOs):

ECB through RDBOs can be raised by any corporate, REIT and INVITs. Any RDBO shall be under approval route only. Minimum average maturity period for RDBOs shall be 3 years for borrowings up to USD 50 Mn or equivalent per financial year, and 5 years for borrowings above USD 50 Mn per financial year. Indian Banks can also raise funds under this mode subject to other prudential norms and can act as arrangers and underwriters for RDBOs raised overseas by others. In case, an Indian bank underwrites any such issue, it should ensure that it doesn't hold more than 5% of issue size after 6 months of such issue.

Hedging Requirements:

Eligible Borrowers as mentioned in table above, shall have a Board approved risk management policy and shall always keep their ECB exposure hedged 100 per cent. Also, the concerned Authorized Dealer Bank shall verify the compliance of this hedging requirement and periodically report to RBI though ECB – 2 returns. Also, the entities raising ECB under the provisions of Tracks I and II are required to follow the guidelines for hedging issued, if any, by the concerned sectoral or prudential regulator in respect of foreign currency exposure.

Recent Amendments:

1. RBI vide its AP (DIR Series) Circular No. 9 dated September 19, 2018 has amended above mentioned Master Direction, and brought the below listed changes:

    a. Companies engaged in manufacturing sector can now raise ECB up to USD 50 Mn or its equivalent with a minimum average maturity period of 1 year, as opposed to 3-year period applicable to others.
    b. Indian banks are now permitted to participate as arrangers/underwriters/market makers/traders in RDBOs issued overseas, subject to applicable prudential norms. And the condition of holding not more than 5% of issue size after 6 months of issue is removed.

2. RBIvide its AP (DIR Series) Circular No. 10 dated October 3, 2018 has further amended above mentioned Master Direction, and brought the below listed changes:

    a. Public Sector Oil Marketing Companies (OMCs), like IOCL, BCPL, HPCL, etc, are now permitted to use ECB proceeds raised from any recognized lenders for working capital purposes with minimum average maturity period of 3/5 years. In case of others, as mentioned above, ECB proceeds from direct or indirect equity holders only can be used for working capital purposes.

b. The individual borrowing limit of USD 750 million or equivalent and mandatory hedging requirements as per the ECB framework have also been waived for OMCs. However, OMCs should have a Board approved forex mark to market procedure and prudent risk management policy, for such ECBs.

c. The overall ceiling for such ECBs by OMCs has been increased to USD 10 billion equivalent with effect from the date of this Circular

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COMPANIES ACT 2013

COMPANIES AMENDMENT ORDINANCE 2018

Contributed by CS D V K Phanindra

All are aware that the provisions of the Companies Act, 2013, came in to force with effect from 12.09.2013, and with other provisions notified in a phased manner from 01.04.2014.

With in a period of 15 months of the commencement, on the pretext of ease of doing business in India, and to overcome some practical difficulties as to implementation of the provisions, some amendments were proposed to the Companies Act, 2013, and accordingly, the Companies Amendment Act, 2015, and the provisions of the same were made effective from 29.05.2015, in a phased manner.

Even after the above amendment, there were lot of provisions which required amendments/relaxations, and accordingly the Ministry had come with 4 notifications Dt:05.06.2015, giving exemptions/relaxation from the applicability of various provisions of the Act to Government Companies, Private Companies, Section 8 Companies and Nidhi Companies.

To sort out any further difficulties, the Ministry had constituted a Corporate Law Committee, to obtain opinion from the various sections in the industry and recommend amendments to the Act, and the Companies Amendment Bill, 2016, was introduced in the parliament for its consideration. After taking their own sweet time, finally the Companies Amendment Bill, 2016, become Companies Amendment Act, 2017, and noticed effect from 26.01.2018, in a phased manner.

With in a span of 4 years of its notification, the Companies Act, 2013, has got amended two times, and don't even talk about the plethora of notifications, circulars, exemption notifications.

Now again, the policy makers had felt it appropriate to amendment the Companies Act, 2013, and as the parliament is not in session, the same has been done through an Ordinance. The said Ordinance, received the assent of the Hon'ble President of India on 02.11.2018.

Sl. No.	Section(s) under the CA, 2013, amended	Amendment relating to	Remarks/Comments /Penalty
1	Amendment to Section 2(41)	Substitution of a new proviso in place of the existing proviso, delegating the authority for change of Financial Year in respect of a Company or Body Corporate which is a holding company or subsidiary or associate Company of a company incorporated outside india to Central Government(CG) (presently powers are vested with NCLT). Applications pending before the Hon'ble NCLT as on the date of notification of the ordinance, shall be disposed-off by the NCLT.	**Welcome amendment in view of reducing the complexity, and in turn the CaGmay delegate the power to the Regional Director or ROC.**
2	Insertion of a new Section 10A.	Re-introducing the requirement of filing declaration, as to receipt of subscription moneys from the subscribers, and Obtaining Certificate of Commencement of Business, **(earlier was contained in Section 11, which was omitted by the Companies amendment Act, 2015),** and penalty for non-compliance. Making mandatory, the requirement of filing of the form for intimating the registered office of the Company within 30 days of Incorporation. Non-filing of declaration to be a ground of Striking Off, by the ROC, in addition to penalty.	**Welcome amendment.** **Will result in only people who are serious of doing business to forma company.**
3	Amendment to Section 12 – Registered office	Insertion of a new sub-section (9) immediately after Sub-Section (8) giving powers to the ROC for physical verification of the Registered office of the company. Non filing of the intimation as to the registered office and non having/maintenance of Registered office, will be a ground of Striking Off, by the ROC.	**Welcome amendment.** **Will result in only people who are serious of doing business to forma company**

4	Amendment to Section-14 – Alteration of Articles	Substitution of a new proviso in place of the existing 2nd proviso to Section 14(1), delegating the authority for conversion of the Public Company to Private Company, to Central Government(CG) (presently powers are vested with NCLT). Applications pending before the Hon'ble NCLT as on the date of notification of the ordinance, shall be disposed-off by the NCLT.	**Welcome amendment in view of reducing the complexity, and inturn the CGmay delegate the power to the Regional Director or ROC.**
5	Amendment to Section 53 – Issue of Shares at Discount	Substitution of Sub-Section 3 to Section 53, (in relation to penalty for contravention on issuing of shares). For non-compliance, the Company and every officer who is in default, shall be liable to a penalty of upto an amount equal to the amount raised through issue of shares or Rs.5,00,000, which ever is less; and amount is also liable to be refunded to the respective persons, along with interest @12% P.A.	**Amendment relaxing from imprisonment of officer in default.**
6	Amendment to Section 64 – Notice to Registrar of Alteration of Capital	Substitution of Sub-section 2 of Section 64, with a new sub-Section-2, rephrasing the penalty provisions i.e., for filing of Form SH-7, beyond 30 days of such alteration, then Company andevery Officer who is in default, shall be liable of Rs. 1000/- per day or Rs.5 Lakhs, which ever is less.	
7	Amendment to Section – 77 – Duty to register charges	Proviso to Section 77 (1) has been amended providing powers to ROC, for allowing registration of creation of charge, (a) within a period of 300 days, from the date of creation of charge, and (b) if created on or after the commencement of the Ordinance, then with 60 days after the commencement of Ordinance, on payment of additional fees. If the charge is not registered within period as specified above, then (a) the charges created before the commencement of ordinance can be registered within 6 months from the commencement of Ordinance, on payment of such additional fees; and (b) the charges created on or after the commencement of ordinance, within a further 60 days after payment of such advalorem fees.	

8	Amendment to Section – 86 - Punishment for Contravention	Insertion of a Sub-Section (2) to Section 86, to provide for punishment for fraud, to any person who wilfully furnishes any false or incorrect information in relation to creation of charge.	
9	Amendment to Section 87 – Rectification of register of charges	Substitution of Section 87 with a new section, with powers being conferred on the Registrar, for rectification of register, relating to omission of filing of satisfaction or misstatement of any particulars forcreation/modification/satisfaction of charge.	
10	Amendment to Section 90 – Investigation of Beneficial Ownership of shares in certain	Substitution of existing Sub-Section (9) of Section 90 with a new sub-section. The amendment/ substitution provides for a period of one year, from the date of the Order of the Tribunal, within which the aggrieved part can make an application for the Tribunal for relaxing/lifting the restrictions. If no such application is filed, then the shares will be transferred to IEPF. Further, Sub-Section 10, stands amended, to include imprisonment for up to 1 year, in additional to fine.	**Welcome amendment to maintain proper governance.**
11	Amendment to Section 92 – Annual Return	Substitution of Sub-Section (5) with a new Sub-Section to provide for only fine on the Company and on every officer in default; and also to provide for a daily penalty for continuous failure to file the required documents. The provision as to imprisonment for non-filing of Annual Return, has been done away with.	**Welcome Amendment**
12	Amendment to Section 102 –Explanatory statement	Rephrasing of the wordings of Sub-Section-5, so as to include the recovery of moneys as per Sub-Section 4.	**Welcome Amendment**
13	Amendment to Section 105 – Proxies	Rephrasing of the wordings of Sub-Section-3, in respect of penalty for non compliance of the provisions of Sub-Section 2.	**Welcome Amendment**

14	Amendment to Section 117 – Agreement and Resolutions to be filed.	Rephrasing of the wordings of Sub-Section-2, in respect of penalty for non compliance of the provisions of Sub-Section 1, and also to provide for a daily penalty for continuous failure to file the required documents.	**Welcome Amendment**
15	Amendment to Section 121 – Report on Annual General Meeting.	Rephrasing of the wordings of Sub-Section-3, in respect of penalty for non compliance of the provisions of Sub-Section 1, and also to provide for a daily penalty for continuous failure to file the Report.	**Welcome Amendment**
16	Amendment to Section -137 – Copy of Financial Statements to be filed with Registrar.	Substitution of Sub-Section (3) with a new Sub-Section to provide for only fine on the Company and on every officer in default; and also to provide for a daily penalty for continuous failure to file the required documents. The provision as to imprisonment for non-filing of Financial Statements, has been done away with.	**Welcome Amendment**
17	Amendment to Section 140 – Removal, Resignation of Auditor	Rephrasing of the wordings of Sub-Section-3, in respect of penalty for non compliance of the provisions of Sub-Section 2, and also to provide for a daily penalty for continuous failure to file the Form with ROC.	
18	Amendment to Section 157 – Company to inform DIN to ROC.	Rephrasing of the wordings of Sub-Section-1, in respect of penalty for non compliance of the provisions of Sub-Section-1, and also to provide for a daily penalty for continuous failure to file the Form with ROC.	
19	Amendment to Section 159 – Punishment for contravention.	Rephrasing of the wordings of Section in respect of penalty for non compliance of the provisions of Section 152, 155, 156; and also to provide for a daily penalty for continuous contravention.	
20	Amendment to Section 164 – Disqualification for appointment of Director	Insertion of a new clause (i), in Sub-Section -1 of Section 164, to provide that a director who has not complied with the provisions of Section 165 (Holding office of Director in not more than 20 companies), is dis-qualified to act as Director.	

21	Amendment to Section 165 – Number of Directorships	Rephrasing of the wordings of Sub-Section-6 in respect of penalty for non compliance of the provisions of Sub-Section-1; and omitting the maximum daily penalty of Rs.25,000/-, thereby the penalty of Rs.5,000/- per day, for the period which the contravention continues, is provided.	
22	Amendment to Section 191 - Payment to Director for Loss of Office, etc.,..	Amendment to Sub-Section-5, thereby the minimum penalty of Rs.25,000/- has been omitted, and accordingly, the directors, not complying with the provisions of Section 191, shall be liable to a penalty of Rs. 1 Lakh.	
23	Amendment to Section 197 – Managerial Remuneration	Omission of Sub-Section -7, which restricts issue of ESP to Independent Director. Henceforth, the same is permitted. Substitution of Sub-Section-15 with a new sub-Section to provide for penalty for non-compliance of Section 197, by any person – Rs.1 Lakh. Non-compliance by the Company then – Rs.5 Lakhs.	
24	Amendment to Section 203 – Appointment of KMP	Rephrasing the words of Sub-Section-5 to provide for penalty for non-compliance of Section-203, by A Director/KMP – minimum Rs.50,000/-, and also to provide for a daily penalty for continuous contravention, and a maximum of Rs. 5 Lakhs. Non-compliance by the Company then – Rs.5 Lakhs.	
25	Amendment to Section 238- Registration of Offer of Schemes Involving Transfer of Shares.	Amendment to Sub-Section-3, thereby the minimum penalty of Rs.25,000/- has been omitted, and accordingly, the directors, not complying with the provisions of Sub-Section (1), shall be liable to a penalty of Rs. 1 Lakh.	

26	Amendment to Section 248 - Power of Registrar to Remove Name of Company from Register of Companies.	Amendment to Sub-Section-1, to include the following additional reasons for the Registrar to remove the name of the Company from the Register of Company, in addition to existing reasons: ➔ Non filing of declaration with in 180 days of incorporation, as to receipt of monies from the subscribers ➔ The Company has not been carrying on any business or operations as revealed after the physical verification by ROC.	
27	Amendment to Section 441 –Compounding of offences	Amendment of Clause (b) of Sub-Section-1, increasing the penalty amount from Rs.5 Lakhs to Rs. 25 Lakhs, thereby all the offences, liable to penalty of upto Rs.25 Lakhs will be compounded by the Regional Director, and any offences liable to penalty beyond Rs.25 Lakhs will be compounded by the Hon'ble NCLT. Amendment to Sub-Section 6, to clearly provide for that the offences liable with imprisonment only or with imprisonment and also with fine shall not be compoundable.	
28	Amendment to Section 446B – Punishment for noncompliance by OPC / Small Companies Notified with effect from 09.02.2018, by the Companies Amendment Act, 2017	Rephrasing of the said section, to provide for the penalties applicable to offences/non-compliances of the provisions of Section 92, 117 and 137 by OPCs and Small Companies and the officers in default of the said companies.	

29	Amendment to Section 447 – Punishment for Fraud	Amendment to the 2nd Proviso to Section 447, thereby it provides for penalty of Rs.50 Lakhs in place of the existing 25 Lakhs, and accordingly, any person guilty of fraud, where the fraud involves an amount less than Rs.10 Lakhs or 1 % of the turnover of the company, whichever is lower, and does not involve public interest such fraud shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to Rs. 50 Lakhs or with both.	
30	Amendment to Section 454 – Adjudication of Penalties.	Substitution of Sub-Section -3, with a new sub-section, to provide for the Adjudicating authority on the Company, Officer, **or any other person**, stating the non-compliance. In addition to the above, the Adjudicating authority shall direct the company, officer in default or any other person to rectify the default. Rephrasing of the words in Sub-Section 8, to give a polished presentation of the section.	
31	Insertion of a New Section 454-A – Penalty for repeated default.	A new section has been inserted, which provides that where a company or an officer of a company or any other person , having already been subjected to penalty for default under any provision of the Act, again commits the said default with in a period 3 years, from the date of imposing of the penalty by the RD or the Adjudicating authority, then such defaulter shall be liable for the second or subsequent defaults for an amount equal to twice the amount of penalty provided for such default under the relevant provisions of the Act.	

From the above, it can be seen that major amendments relate to change of wordings in the section, relating to de-criminalisation of offences, i.e., change of terminology from **"punishable with fine"** to **"Liable to a penalty",** replacing the provisions as to imprisonment with only to fines, and in some extreme offences, the imprisonment provision are retained.

Even after the above ordinance, the Ministry of Corporate affairs, has noted that certain 20 other amendments of urgent nature would be required to strengthen the corporate governance and enforcement framework, and has sought for /comments recommendations from the public at large, and such comments/recommendations are to be submitted on or before 20.11.2018.So, there is every possibility of another amendment to the Act.

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INSOLVENCY & BANKRUPTCY CODE

DECODING SECTION 29A OF IBC

Contributed by CA Sri Harsha & CS D V K Phanindra

The recent judgment of the apex court in the case of ArcelorMittal India Private Limited vs Satish Kumar Gupta and Others has revealed the true ambit and intent of Section 29A of Insolvency and Bankruptcy Code, 2016 (IBC). Section 29A has been introduced with effect from 23.11.17 to restrict persons who are not eligible to become resolution applicants.

Before proceeding to decode the apex court judgment, it is important to understand the intention of introduction of Section 29A into statue book. The intention can be understood from the following words of the Honourable Finance and Minister of Corporate Affairs while moving the Insolvency and Bankruptcy Code (Amendment) Bill, 2017, which is reproduced as under:

The core and soul of this new Ordinance is really Clause 5, which is Section 29A of the Original Bill. I may just explain that once a company goes into resolution process, then applications would be invited with regard to potential resolution proposals as far the company is concerned or enterprise is concerned. Now a number of ineligibility clauses were not there in the original Act and, therefore, Clause 29A introduces those who are not eligible to apply. For instance, there is a clause with regard to an undischarged insolvent who is not eligible to apply, a person who has been disqualified under the Companies Act as a director cannot apply and a person who is prohibited under the SEBI Act cannot apply. So, these are statutory disqualifications. And there is also a disqualification in Clause (C) with regard to those who are corporate debtors and who as on the date of the application making a bid do not operationalise the account by paying the interest itself i.e. you cannot say that I have an NPA. I am not making the account operational. The accounts will continue to be NPAs and yet I am going to apply for this. Effectively this clause will mean that those who are in management and on account of whom this insolvent or non-performing asset has arisen will now try and say, I do not discharge any of the outstanding debts in terms of making the accounts operational and yet I would like to apply and set the enterprise back at a discount value, for this is not object of this particular Act. So Clause 5 has been brought in with that purpose in mind.

The statement of Objects and Reasons of the aforesaid Bill lays down:

2. The provisions for insolvency resolution and liquidation of a corporate person in the Code did not restrict or bar any person from submitting a resolution plan or participating in the acquisition process of the assets of the company at the time of liquidation. Concerns have been raised that persons who, with their misconduct contributed to defaults of companies or are otherwise undesirable, may misuse this situation due to lack of prohibition or restrictions to participate in the resolution or liquidation process, and gain or regain control of the corporate debtor. This may undermine the processes laid down in the Code as the unscrupulous person would be seen to be rewarded at the expense of the creditors. In addition, in order to check that the undesirable persons who may have submitted their resolution plans in the absence of such a provision, responsibility is also being entrusted on the committee of creditors to give a reasonable period to repay overdue amounts and become eligible.

With the above background, let us proceed now to decode the judgment of apex court. The facts of the case are as under:

1. Essar Steel India Limited (ESIL) is the corporate debtor owing approx. Rs 45,000 Crores to various financial creditors. State Bank of India and Standard Chartered Bank has filed application before National Company Law Tribunal (NCLT) under Section 7 of IBC.

2. Shri Satish Kumar Gupta was appointed as Interim Resolution Professional and consequently approved as Resolution Professional (RP). Consequently, RP has published expression of interest (EOI) seeking resolution applicants for revival of ESIL.

3. Pursuant to advertisement, ArcelorMittal India Private Limited (AMIPL) submitted EOI. Simultaneously, RP has also received another EOI from Numetal Limited (Numetal). Meanwhile, the Committee of Creditors (CoC) has requested NCLT for an extension of 90 days to complete the corporate insolvency resolution process, for which NCLT conceded.

4. Numetal being apprehended that the RP may declare them as ineligible, has filed an application (first application) before NCLT, stating that NCLT shall hold them as eligible resolution applicant. However, RP has held that both AMIPL and Numetal are ineligible to be resolution applicants in light of Section 29A of IBC (the reasons for rejection are discussed at appropriate place in this article).

5. Consequent to such order of RP, both AMIPL and Numetal has appealed before NCLT challenging the order of RP. At the same time, RP has published another advertisement seeking EOIs as he found AMIPL and Numetal to be ineligible. In reply to such advertisement, resolution plans were submitted by AMIPL, Numetal and Vedanta Resources Limited (Vedanta).

6. However, NCLT has passed an order stating that the fresh bids shall not be opened until the first application filed by Numetal is disposed by NCLT.NCLT vide its order has stated that RP has obtained a legal opinion and shared the same with CoC and in light of such opinion has concluded that both the parties AMIPL and Numetal are ineligible and on other hand Numetal has obtained legal opinion wherein it was stated that there was no ineligibility under Section 29A on them and accordingly they were eligible and in light of conflicting opinions, the RP's order confirming that both the applicants were ineligible in terms of Section 29A is not a case of patent illegality or arbitrariness and NCLT at this stage is not expected to substitute its view and conclusion of RP.

7. NCLT has remanded the matter to CoC by stating that RP ought to have placed both the resolution plans to CoC with his comments on eligibility of both resolution applicants for consideration of CoC for the purpose of affording the opportunity to resolution applicants before declaring them ineligible and since such procedure is not followed, only to reconsider on such ground alone.

8. Both AMIPL and Numetal has appealed against the order of NCLT before NCLAT. Meanwhile, the CoC has taken up the matter on directions of NCLT and held that both the parties shall be eligible as resolution applicants only if they make payments of the overdue amounts of the connected persons in terms of Section 29A.

9. NCLAT has heard both the resolution applicants and held on various reasons that Numetal is eligible as resolution applicant in terms of application filed during the extended period by CoC, but not eligible as resolution applicant in terms of first application since as on such date it suffers from ineligibility under Section 29A. In the same order, NCLAT has held that AMIPL shall also be eligible resolution applicant if they pay the overdue amount of connected persons in terms of Section 29A.

10. Against such orders of NCLAT, both the applicants have appealed before the apex court to decide the ambit of Section 29A and consequently their eligibility or ineligibility.

Question before Apex Court:

The questions before apex court for consideration are - whether the lifting of corporate veil as done by RP along with CoC is permissible for the purpose of Section 29A of IBC? and whether is there any method apart from payment of NPAs to become eligible as a resolution applicant?

Before examining the answers provided by apex court, let us list down the reasons for ineligibility at various stages as pointed out by relevant authorities:

Stage	AMIPL	Numetal
RP	1. In the resolution plan, it was mentioned that Arcelor Mittal Netherlands BV (AM Netherlands) is a connected person to AMIPL. 2. AM Netherlands has been disclosed as 'promoter' of Uttam Galva Steels Limited (UG) by virtue of its 29.05% of shareholding in UG in 2009. 3. UG's account was classified as NPA on 31st March 2016 by Canara Bank and Punjab National Bank (which classification continued for more than 1 year till 2nd Aug 2017) 4. AM Netherlands have sold its share in UG to other promoters of UG on 7th Feb 2018. AM Netherlands consequently applied to SEBI and BSE for declassifying them from the 'Promoter Group' which did not happen as on the date of AMIPL applying as resolution applicant 5. Accordingly, AMIPL has been held as ineligible in terms of Section 29A(c) and his resolution plan is rejected by RP.	1. As on the date of EOI by Numetal, it relied on Essar Communications Limited (ECL), one of its shareholders to comply with the eligibility requirement relating to its 'Tangible Net Worth (TNW)'. 2. As on the plan submission date, Numetal relied on Crinium Bay, its shareholder to comply with TNW. 3. Numetal is a newly incorporated JV between Aurora Enterprises, Crinium Bay, Indo International Limited and Tyazhpromexport. 4. Since Numetal has at all stages relied on its shareholders to comply with eligibility requirements relating to submission of a resolution plan in respect of CD, for the purposes of ensuring compliance with Section 29A, RP has considered each of the shareholders of Numetal as JV partners to be acting jointly for purposes of submission of resolution plan. 5. Whilst considering the eligibility of shareholders of Numetal, since Aurora Enterprises is held completely by Rewant Ruia and RP thought to examine in light of 29A all Rewant Ruia, Crinium Bay, Indo International Limited and Tyazhpromexport. 6. RP further in light of Regulation 2(q) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, a person is deemed to be acting in concert with amongst others, which includes father of such person. Therefore, in relation to resolution plan

		in respect of CD (which contemplates the acquisition of ESIL by Numetal by way of a merger of ESIL with a wholly owned subsidiary of Numetal), Rewant Ruia is deemed to be acting in concert with his father Ravi Ruia. 7. As on the plan submission date, Ravi Ruia (who Rewant Ruia is deemed to be acting in concert) was promoter of ESIL whose account was classified as NPA for more than 1 year and Ravi Ruia has executed a guarantee in favour of SBI and CIRP application filed by SBI has been admitted by NCLT. 8. In light of all the above, Rewant Ruia who is acting jointly with other shareholders of Numetal is ineligible under 29A, since as on the date of submission of plan, Numetal (which is nothing but an incorporated joint venture investment vehicle through which its shareholders are submitting resolution plan) and was not eligible under 29A.
NCLT (while disposing the first application filed by Numetal)	6. The date on which a person stands disqualified would be the date of commencement of CIRP of ESIL and on such date, AMIPL is disqualified in view of the fact that it is connected persons of AM Netherlands and LN Mittal are disqualified as they have an account of corporate debtor under their management or control or of whom they are a promoter classified as NPA and at least one year has lapsed from date of such classification till the date of commencement of CIRP of CD. 7. The said disqualification starts from the date of commencement of CIRP and only way to remedied in the manner provided in proviso to 29A (c) read with proviso to Section 30(4) and no other manner. The	

	disqualification cannot be relived by merely ceasing to be promoter or by selling shares in the companies whose accounts are NPA such as UG or KSS Petron. 8. On perusal of record it is found that connected person of AMIPL are the promoter of KSS Petron, which has been NPA for more than one year and CIRP has been initiated against the KSS Petron. 9. NCLT also has pursued the minutes of CoC, wherein it was opined by Cyril Amarchand Mangaldas that AM Netherlands exercised positive control over UG and merely divesting the shareholding prior to submission of resolution plan, could not remove the disqualification under 29A(c) unless cured by payment. 10. It is an admitted position that AM Netherlands is an indirect 100% subsidiary of ArcelorMittal Societe Anonyme (AMSA). On the other hand, AMIPL is also an indirect subsidiary of AMSA. Accordingly, AMSA, is a promoter, in management and in control of AMIPL and AM Netherlands is a subsidiary of AMSA in view of which AM Netherlands and AMIPL becomes connected persons and such connected person has a NPA through UG and accordingly AMIPL is ineligible to be a resolution applicant. 11. It is an admitted position that LN Mittal is controlling AMIPL being an indirect subsidiary of AMSA. Accordingly, LN Mittal/AMSA is a promoter in management and in control of AMIPL and LN Mittal is also in management and control of KSS Global BV and KSS Petron, which is a 100% subsidiary of KSS Global BV. Since KSS Petron has an NPA and KSS Petron being connected person to AMIPL, cannot be eligible as resolution applicant.	

CoC (on remand by NCLT)	12. We reiterate that AMIPL is an ineligible resolution applicant under 29A(c), who acting in concert with AM Netherlands (promoter of UG and connected person of AMIPL) and AM Group in attempting to avoid their obligations to make payment under proviso to 29A(c) with reference to UG and KSS Petron. Their unwillingness to make payment in UG or KSS Petron is an avoidance device. 13. In case of UG, AM Netherlands arranged for sale of its shareholding for a nominal value prior to resolution plan is evidence of the fact that AMIPL is in concert with AM Netherlands and such action is manifestation of passage of 29A. As promoter of UG and as member of AM Group, they should have made payments of overdue amounts to its lenders of UG. 14. The same conduct of AM Group acting through Fraselli and KSS Global in terminating in SHA in KSS Global, the holding company of KSS Petron, a device to avoid payment of overdue amounts to lenders of KSS Petron. 15. Hence CoC has opined that payment of such overdue amounts pertaining to UG and KSS Petron shall make AMIPL eligible for filing resolution application and accordingly given extra time to comply such payment and re apply.	9. Numetal and AEL are related as an associate company, on account of the fact that AEL (alias Rewant Ruia) has significant influence over Numetal pursuant to its control of at least 20% of total voting power of Numetal. Since an associate company is considered as a related party to a resolution applicant where such resolution applicant and other persons are acting jointly or in concert, Numetal is clearly said to be acting jointly and in concert with AEL. This in turn means Numetal is acting in concert with Rewant Ruia and hence Ravi Ruia, the promoter and guarantor of ESIL. This inflicts a disability and ineligibility upon Numetal/its consortium and constituent shareholders. 10. Thereby CoC has held that Numetal shall be eligible to be a resolution applicant only if it clears the dues of connected persons which have NPAs and extended certain time for such payment.

NCLAT	16. The question for consideration is whether the action of transferring shares in UG and KSS Petron will make AMIPL eligible to be resolution applicant. NCLAT stated that the only way to become eligible is to clear all the overdues and not just by transferring the shares to another company to escape the provisions of 29A(c). Once the stigma of 'classification of account as NPA' has been labelled on the promoter, the only way to cure is to by making the overdue good and no other way is prescribed under IBC. 17. AMIPL depositing the overdue amounts of UG and KSS Petron amounting to Rs 7,000 Crores in its own current account will not make eligible as resolution applicant. A conditional offer to pay the overdues amount cannot be accepted till it is complied with proviso to 29A(c). 18. NCLAT has held that AMIPL is also eligible for the benefit of 2nd proviso to Section 30(4) and accordingly asked AMIPL to make payment of overdue amounts to make them eligible as resolution applicant	11. As on the date of submission of 1st Resolution Plan was submitted by Numetal, it had four shareholders – crinium bay (40%), Indo (25.1%), TPE (9.9%) and AEL (25%). 12. Admittedly, Rewant Ruia is 100% shareholder of AEL and AEL has 25% shareholding in Numetal. Rewant being son of Ravi, who is the promoter of CD, NCLAT has held that AEL is related party and comes within the meaning of 'person in concert' in terms of Regulation 2(1)(q). In view of the above, NCLAT has held that at the time of submission of 1st resolution plan, AEL being one of the shareholders of Numetal, the resolution plan stands ineligible. 13. At the time of filing of 2nd resolution plan, the shareholding of Numetal has undergone change and consists of 3 shareholders - crinium bay (40%), Indo (34.1%), TPE (25.9%). NCLAT has held that as on the date of filing 2nd resolution plan, AEL is not shareholder of Numetal and accordingly Numetal is eligible to submit a resolution plan.
Arguments before Apex Court	**For AMIPL:** 19. AMIPL has argued that Section 29A disqualifies a person who has an account of a corporate debtor under the management or control of such person, or of whom such person is a promoter, which account was declared as NPA. The further condition is that one year should have elapsed from the date of such declaration till the date of commencement of CIRP of corporate debtor.	**For Numetal:** 14. Numetal has argued that Numetal was a company and therefore separate person in law from its shareholders. Numetal stated on date of submission of 1st resolution plan, AEL held only 25%, which would be below the figure of 26% mentioned in the request for proposal wherein 'control' has been defined more than 26%. 15. In any case, when the 2nd resolution plan was submitted, there was no shareholding in Numetal by AEL and other companies were the shareholders.

20. Hence, the ineligibility under 29A is in relation to submission of resolution plan and not the date of filing EOIs. The amendment in Section 29A in June 18 making clear that the date shall be the date of submission of resolution application is only clarificatory in nature and hence it has to be taken as retrospective effect.	16. Numetal has argued that it cannot be described as joint venture of shareholders since joint venture is a contractual agreement whereby two or more parties undertake economic activity which is subject to joint control, which is missing in the Numetal's case as shareholder in the company is distinct from the company itself.
21. AMIPL argued that since the sale of shares by AM Netherlands in UG was made in 2009, AM Netherlands ceased to be a promoter in UG prior to submission of resolution plan and hence resolution plan is not hit by 29A(c).	17. Numetal stated that as per 29A(c), a person together with any other person acting jointly or in concert, has to have an account of corporate debtor under its management or control, or of whom such person is a promoter which is classified as NPA.
22. As far as KSS Petron is concerned, AMIPL argued that, Fraseli Investments Sarl is a company owned by Mittal Investments Sarl which in turn is owned and controlled by LN Mittal Group, promoter of AMIPL. Fraseli holds 32.22% in KSS Global, which in turn held 100% in KSS Petron.	18. Numetal argued that Mr Rewant Ruia would not fall under any of categories as mentioned in 29A since he does not satisfy definitions of 'control', 'promoter', 'manager' and managing director' as laid down in Companies Act, 2013.
23. The SHA between Fraseli and KSS Global permitted Fraseli to appoint 2 out of 6 nominee directors in KSS Global and provide for an affirmative vote in certain aspects of KSS Global. AMIPL argued that if the definition of 'control' vide Section 2(27) of Companies Act, 2013 is considered, the relationship with KSS Global with KSS Petron would not constitute 'control' over the wholly owned subsidiary in India. In any case, the entire shareholding of Fraseli in KSS Global is sold off to promoters of KSS Global 3 days prior to resolution plan and accordingly AMIPL is not required to pay off the debts of UG or KSS Petron to become eligible.	19. Numetal has argued that even though Rewant Ruia is son of Ravi Ruia, who is a promoter of ESIL and though he may be deemed to 'a person acting in concert' as per Section 2(1)(q) of SAST Regulations, yet he cannot be considered as 'connected person' as per 29A(j), which expression includes 'promoter' or 'management' or 'control', which Rewant Ruia fails to satisfy and accordingly not a 'connected person' in terms of 29A(j). 20. Numetal also stated that the earnest money was not withdrawn by AEL because the matter was sub judice and not for any other interest in Numetal by AEL.

	Against Numetal:	Against AMIPL:
	24. AMIPL argued that Numetal was incorporated before submission of resolution plan by Mr Rewant Ruia son of Mr Ravi Ruia (promoter of ESIL), with the specific objective of trying to acquire ESIL.	21. Numetal submitted that even on literal reading of 29A(c) would make it clear that in the case of UG, AM Netherlands, which is admittedly a LN Mittal Group company, was directly covered under 29A(c), as it has shown as 'Promoter'.
	25. At the time of incorporation, the entire shareholding of Numetal is held by AEL, whereas AEL's entire shareholding is held by Aurora Holding Limited (AHL). AHL's entire shareholding was held by Mr Rewant Ruia, former director of ESIL.	22. Numetal stated that getting out of UG by paying a price of Rs 1 per share when the market value as on dated was Rs 19.5 per share is a fraudulent transaction only to pass muster under 29A.
	26. Few weeks before 29A was introduced, AEL transferred 26.1% shares in Numetal to one Essar Communications Limited (ECL), a group company of corporate debtor. Mr Rewant Ruia settled an irrevocable discretionary trust, called 'Crescent Trust', which purchased the shares of AHL at par value.	23. Further, insofar as KSS Petron is concerned, it is clear that Fraseli 's holding of 32.22% in KSS Global would certainly amount to 'de facto' control, if not 'de jure' control, of KSS Petron, its wholly owned subsidiary, as defined under Section 2(27) of Companies Act, 13. The transfer of Fraseli 's before submission of resolution plan is again dubious and fraudulent act squarely hit by 29A.
	27. Accordingly, when Numetal submitted its EOI, it had two shareholders – AEL (73.9%) and ECL (26.1%). At the time of announcement that code will be amended, AEL transferred 13.9% and ECL 26.9% shareholding in Numetal to Crinium Bay Holdings Limited (Crinium Bay), a 100% indirect subsidiary of VTB Bank, the majority of such shares of VTB bank are held by Russian Government.	24. Numetal has argued that Shri Pramod Mittal, brother of Shri LN Mittal, is a connected person, which would trigger 29A(j).
	28. Subsequent to this, AEL transferred 25.1% of shareholding in Numetal to 'Indo International Trading FZCO' (Indo), a Dubai company, and 9.9% shareholding to JSC VO Tyazhpromexport (TPE), a Russian company.	

	29. AEL was left only with 25% of shareholding in Numetal and consequently divested to Crinium Bay, TPE and Indo to make AEL's holding 'Nil'. 30. AMIPL argued that an important fact was that an amount of Rs 500 Crores was given by AEL to Numetal so that it could deposit the requisite earnest money that had to be made with resolution plan furnished by Numetal. This amount, that was admittedly furnished by AEL, continues to remain with RP and has till date not withdrawn by AEL, showing that Rewant Ruia continues to be vitally interested and linked with resolution plan of Numetal, even after complete exit of AEL from Numetal. Hence, Numetal is ineligible, whereas the NCLAT has held them to be eligible.	

Observations of Apex Court:

1. The apex court on combined reading of 29A at various stages namely at Insolvency & Bankruptcy Code (Amendment) Ordinance, 2017, Insolvency & Bankruptcy Code (Amendment) Act, 2017, Insolvency & Bankruptcy Code (Second Amendment) Act, 2018 (snapshot of relevant provisions is laid beneath the para), Honourable Finance Minister's speech and Statement of Objects and Reasons of the Bill has stated that a purposive reading of Section 29A depending upon the text and context, in which it was enacted, shall guide the interpretation of 29A and the clauses which requires attention are (c), (f), (i) and (j).

IBC (Amendment) Ordinance, 17	IBC (Amendment) Act, 17	IBC (Second Amendment) Act, 18
A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly with such person, or any person who is promoter or in management or control of such person – *(c) whose account is classified as non-performing asset in accordance with guidelines of Reserve Bank of India issued under the Banking Regulation Act, 1949 and period of one year or more has lapsed from the date of such classification and who has failed to make payments of all overdue amounts with interest thereon and charges relating to non-performing asset before submission of resolution plan*	*A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person - with such person, or any person who is promoter or in management or control of such person –* *(c) whose has an account, or account of corporate debtor under the management or control of such person or of whom such person is a promoter, is classified as non-performing asset in accordance with guidelines of Reserve Bank of India issued under the Banking Regulation Act, 1949 and at least period of one year or more has lapsed from the date of such classification and who has failed to make payments of all overdue amounts with interest thereon and charges relating to non-performing asset before submission of resolution plantill the date of commencement of corporate insolvency resolution process of the corporate debtor*	*A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person-* *(c)* ***at the time of submission of resolution plan*** *has an account, or account of corporate debtor under the management or control of such person or of whom such person is a promoter, is classified as non-performing asset in accordance with guidelines of Reserve Bank of India issued under the Banking Regulation Act, 1949 and at least period of one year has lapsed from the date of such classificationtill the date of commencement of corporate insolvency resolution process of the corporate debtor*

2. The apex court on observation that the 'person acting in concert' which appear in opening line of IBC (Amendment) Act, 17 are absent in IBC (Amendment) Ordinance, 17, which signifies that the amendment act is of wider import than the amendment ordinance, evidencing an intention to rope in all persons who may be acting in concert with the person submitting a resolution plan.

3. The apex court also stated that the opening lines of 29A of the Amendment Act refer to de facto (existing or holding a specified position in fact but not necessarily by legal right) as opposed to de jure (existing or holding a specified position by legal right) positions of persons mentioned therein. The apex court stated that this is a typical instance of a 'see through provision', so that one is able to arrive at persons who are actually in 'control', whether jointly or in concert with other persons. A literal interpretation would obviously not permit a tearing of the corporate veil when it comes to 'person' whose eligibility is to be gone into. However, a purposeful and contextual interpretation, such as is the felt necessity of interpretation of such provision as Section 29A, alone governs.

4. The apex court stated that it is well settled that a shareholder is a separate legal entity from the company in which he holds shares which is generally true. But when it comes to a corporate vehicle that is set up for purpose of submission of resolution plan, ***it is not only permissible but imperative for the competent authority to find out as to who are the constituent elements that make up such a company. In such case, the principle laid down in Salomon v. A Salomon and Co Ltd [1897] AC 22 will not apply.*** This is for the reason that it assumes importance in such cases as to who are the real individuals or entities who are acting jointly or in concert, and who have set up such a corporate vehicle for purpose of submission of resolution plan.

5. The apex court after making reference to Salomon, relied on Life Insurance Corporation of India v. Escorts Limited & Others [1986] 1 SCC 264 wherein it was stated vide Para 90 that 'Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern. The apex court also relied on verdicts in case of Union of India v. ABN Amro Bank and Others[2013] 16 SCC 490 and Balwant Rai Saluja & Anr etc v. Air India Ltd & Ors [2014] 9 SCC 407 which relied on Life Insurance Corporation of India v. Escorts Limited & Others [1986] 1 SCC 264. Finally placing reliance on Delhi Development Authority v. Skipper Construction Company (P) Ltd & Another [1996] 4 SCC 622 the court held vide Para 24 as 'where the protection of public interest is of paramount importance or where the company has been formed to evade obligations imposed by the law, the court will disregard the veil'.

6. The apex court by placing reliance on the above judgments and leading commentaries has concluded that, where a statute itself lifts the corporate veil or where protection of public interest is of paramount importance, or where a company has been formed to evade obligations imposed by the law, ***the court will disregard the corporate veil. Further, this principle is applied even to group companies, so that one is able to look at the economic entity of the group as a whole'.***

7. Then the apex court proceeded to examine the phrase 'persons acting in concert' as defined at various times in SAST Regulations and finally concluded that the language in such regulations is widely used, that any understanding, even if it is informal, and even if it is to indirectly cooperate to exercise control over a target company, is included. The apex court observing the sub-clause (2) of (q) of SAST Regulations stated that a deeming fiction is enacted, by which a presumption is raised in the categories mentioned, that a person falling within one category is deemed to be acting in concert with another person mentioned in the same category, unless the contrary is established. The corporate veil is not merely torn but left in tatters by sub-clauses (i) to (iv) of Regulation 2(1)(q)(2) of SAST Regulations.

8. The sub-clause (v) of Regulation 2(1)(q)(2) deals with father and son, brothers, etc and also referred to the definition of 'associate' in the explanation to Regulation 2(1)(q)(2), which subsumes not merely immediate relatives but other forms in which a person can be associated with another – which includes the form of trust, partnership firm and HUF. ***The apex court has stated that what is of great importance is that wherever persons act jointly or in concert with the 'person' who submits a resolution plan, all such persons are covered by Section 29A.***

9. The presumption created by the provision [Regulation 2(1)(q)(2)], the apex court has held that the deeming provision is left open to rebuttal as indicated by the words 'unless the contrary is established'. Finally, the apex court held that when a person is or is not acting in concert would depend upon the facts of each case by placing reliance on Daiichi Sankyo Company Limited v. Jayaram Chigurupati & Others [2010] 7 SCC 449.

10. Examining the date from which 29A(c) is applicable, the apex court stated that Numetal has argued that date shall be the date of commencement of corporate insolvency resolution process and as per AMIPL is the date on which submission of resolution plan was and not at any anterior stage. The apex court has brushed away the argument of Numetal by making reference to the provision of 29A(c) which used the phrase 'a person shall not be eligible to submit a resolution plan…' and concluded that the ineligibility attaches on the date of submission of resolution plan and not on the date of commencement of corporate insolvency resolution process. The apex court has also made an observation that 29A (c) uses the expression 'has', whereas (d) and (g) uses the expression 'has been' by concluding that (c) is dealing at present and whereas (d) and (g) are dealing with anterior point.

11. Hence, the apex court held that the ineligibility to submit a resolution plan attaches if any person, as is referred to in opening lines of 29A, either itself has an account, or is a promoter of, or in the management or in control of, a corporate debtor which has an account, which account has been classified as non-performing asset, for a period at least one year from the date of such classification till the date of commencement of the corporate insolvency resolution process. For the purpose of applying this sub-section, any one of the three things, which are disjunctive, needs to be established:
    a. The corporate debtor may be under the management of person referred in 29A
    b. The corporate debtor may be a person under the control of such person or
    c. The corporate debtor may be a person of whom such person is a promoter

12. The expression 'management' would refer to the de jure management of corporate debtor. The de jure management of a corporate debtor would ordinarily vest in Board of Directors, and would include, in accord with definitions of 'manger', 'managing director' and 'officer' as defined in Companies Act, 2013. The apex court has analysed the definition of 'control' as per Section 2(27) of Companies Act, wherein it stated that the said definition has two parts. The first part deals with de jure control and second part deals with de facto control. So long as a person or persons acting in concert, directly or indirectly, can positively influence, in any manner, management or policy decisions, they could be said to be 'in control'. ***Thus expression 'control' in 29A(c), denotes only positive control, which means that the mere power to block special resolutions of a company cannot amount to control. 'Control' here, as contrasted with the management, means de facto control of actual management or policy decisions that can be or are in fact taken.***

13. Section 29A(c) speaks of a corporate debtor 'under the management or control of such person'. The expression 'under' would seem to suggest positive or proactive control, as opposed to mere negative or reactive control. This becomes even clearer when sub-clause (g) of 29A is read, wherein the expression used is 'in the management or control of a corporate debtor'. Under sub-clause (g), only a person who is in positive control of a corporate debtor can take the proactive decisions mentioned in sub-clause (g), such as entering into preferential, undervalued or fraudulent transactions. It is thus clear that in the expression 'management or control', the two words take colour from each other, in which case the principle of noscitur a sociis must also be held to apply. Thus viewed, what is referred in sub-clauses (c) and (g) is de jure or de facto proactive or positive control and not mere negative control.

14. Then apex court has made an analysis of the definition of 'promoter' as per 2(69) of Companies Act. The apex court stated that sub-clause (a) of definition of 'promoter' refers to de jure position, whereas sub-clauses (b) and (c) speak of de facto position. Under sub-clause (b), so long as the person has 'control' over the affairs of a company, directly or indirectly, in any manner he could be said to be a promoter of such company.

15. The interpretation of 29A(c) is now has become clear. Any person who wishes to submit a resolution plan, if he or it does so acting jointly, or in concert with other persons, which person or other persons happens to either manage or control or be promoters of corporate debtor, which is classified as NPA and whose debts have been not paid off for a period of at least one year before commencement of CIRP, becomes ineligible to submit a resolution plan.

16. Since Section 29A(c) is a see-through provision, great care must be taken to ensure that persons who are in charge of the corporate debtor for whom such resolution plans is made, do not come back in some other form to regain control of the company without first paying off its debts.

17. It is important for the competent authority to see that persons, who are otherwise ineligible and hit by sub-clause (c), do not wriggle out of the proviso to sub-clause (c) by other means, so as to avoid the consequences of proviso. For this purpose, despite the fact that the relevant time of submission of resolution plan, antecedent facts reasonably proximate to this point of time can always be seen, to determine whether the persons referred in 29A are, in substance, seeking to avoid the consequences of proviso to sub-clause (c) before submitting a resolution plan. If it is shown, on facts,

that, at a reasonably proximate point of time before the submission of resolution plan, the affairs of the persons referred to in 29A are so arranged, as to avoid paying off the debts of NPA concerned, such persons must be held to be ineligible to submit a resolution plan, or otherwise both for purposes of sub-clause (c), as well as larger objective sought to be achieved by the said sub-clause in public interest, will be defeated.

18. When we come to sub-clause (j), a 'connected person' is defined as meaning the three categories of person mentioned in the three sub-clauses therein. The first sub-clause of Explanation 1 again takes us back to the same three definitions of 'promoter', 'management' and 'control' of the resolution applicant. Under sub-clause (ii), again, a 'connected person' is a person who is either the promoter, or in management or control, of business of the corporate debtor during implementation of resolution plan. And under sub-clause (iii), holding companies, subsidiary companies and associate companies as defined under Companies Act, 13 or related persons referred to in clauses (1) and 92) also become connect persons and then proceed to examine the resolution plans submitted by Numetal and AMIPL.

Scrutiny of Resolution Plan of Numetal:

19. The apex court analysed the resolution plan of Numetal. Numetal was incorporated in Mauritius,expressly for purposes of submission of resolution plan qua ESIL. Two other companies AHL and AEL were also incorporated on the same day in Mauritius. Mr Rewant Ruia son of Mr Ravi Ruia held the entire share capital of AHK, which in turn held the entire shareholding of AEL, which in turn held the entire share capital of Numetal. It can be concluded that Mr Rewant Ruia being the son of Mr Ravi Ruia, would be deemed to be a person acting in concert with corporate debtor, being covered by Regulation 2(1)(q)(v) of SAST Regulations.

20. AEL transferred its shareholding of 26.1% in Numetal to ECL, which is ultimately owned by Virgo Trust and Triton Trust. The beneficiaries of which are companies owned by Mr Ravi Ruia, his brother Mr Shashikant Ruia and their immediate family members. Mr Rewant Ruia also settled an irrevocable and discretionary trust called 'Crescent Trust' and settled the entire share capital of AHL into the trust, at a par value of 10,000 USD. The beneficiaries of this trust were general charities, as well as entities owned by Mr Shashikant Ruia and entities owned by Mr Rewant Ruia himself.

21. Mr Rewant Ruia settled 'Prisma Trust' another irrevocable and discretionary trust, whose beneficiaries are 'general charities' and one 'Solis Enterprises Limited', a company incorporated in Bermuda, whose share capital is held by Mr Rewant Ruia. The important observation that apex court made was that Mr Rewant Ruia was the ultimate natural person who held the beneficial interest in AEL through Prisma Trust through Solis Enterprises Limited. Numetal vide its resolution plan filed an affidavit wherein the Trustee of Prisma submitted that the trustee confirms that AEL or Rewant Ruia neither nor will, following the implementation of resolution plan, be a promoter or have control or have any management rights in resolution applicant or ESIL or resultant company upon completion of its merger.

22. The RP after looking at this affidavit has correctly observed that the statement of such nature would not have been made by a truly independent trustee of a discretionary trust, which demonstrates that the trustee was under the complete control of Mr Rewant Ruia, which indicates that Prisma Trust is one of smokescreen in the chain of control, which would conceal the fact that the actual control over AEL is by none other than Mr Rewant Ruia himself.

23. 'Curiouser and Curiouser'was the expression of Alice, in Alice in Wonderland. The apex court referred the entire gamut of companies of Numetal as Wonderland and stated that the trustee of Prisma Trust acquired 100% of shareholding of AAHL for a par value of 10,000 UDS from the trustees of Crescent Trust. On the same day, merely one day before the ordinance was brought into force, ECL transferred its shareholding of 26.1% of share capital of Numetal to Crinium Bay, an indirect wholly owned subsidiary of VTB Bank, whose shares are held by Russian Government. AEL also transferred 13.9% of shares of Numetal to Crinium Bay, thus making the stake of Crinium Bay 40%. On the same date, AEL also transferred shares representing 25.1% of Numetal to Indo and 9.9% to TPE as on the date of submission of 1st resolution plan. From the above, it is evident that Mr Rewant Ruia, who is the ultimate beneficiary in the chain of control of the trusts which in turn controlled AEL, was very much on the scene, holding through AEL 25% of shareholding of Numetal.

24. The apex court after observing the portion of resolution plan wherein Numetal has demonstrated its financial, technical and other strengths on the basis of its shareholders has held that, Numetal itself was a newly incorporated entity, with no financial or experience of its own, it therefore relied entirely on the credentials of each of its constituent shareholders. This itself shows Numetal itself revealed in its resolution plan that its corporate veil should be lifted, for without lifting this veil, none of parameters of the request for proposal can be satisfied. It is thus clear that the four shareholders of Numetal were persons 'acting jointly' within the meaning of 29A.

25. Hence, considering the 1st resolution plan submitted by Numetal, there is no doubt, AEL was held by Prisma Trust, whose ultimate beneficiary is Mr Rewant Ruia and this would show that NPA declared over a year before the date of commencement of CIRP of ESIL would render Numetal ineligible to submit a resolution plan. The only manner in which Numetal can succeed in submission of resolution plan is to first pay off the debts of ESIL and other corporate debtors of Ruia group of companies, which were declared as NPAs prior to aforesaid period of one year, before submitting its resolution plan.

26. If the 2nd resolution plan of Numetal is considered, then AEL is not in the picture since AEL walked out from Numetal and hence it can be considered as Mr Rewant Ruia has disappeared from the scene. The apex court has held that Rs 500 crores that has been deposited towards earnest money continues to remain deposited by AEL even after its exist as shareholder from Numetal and further having regard to the reasonably proximate state of affairs before submission of resolution plan, beginning with Numetal's initial corporate structure and continuing with the changes made till date, it is evident that the object of all transactions that have taken place after 29A came into force is undoubtedly to avoid application of 29A(c) and its proviso and stated'***We therefore hold that, whether the first or second resolution plan is taken into account, both would clearly be hit by Section 29A(c), as the looming presence of Shri Rewant Ruia has been found all along, from the date of incorporation of Numetal, till the date of submission of second resolution plan.'***

Scrutiny of Resolution Plan of AMIPL:

27. So far as the UG is concerned, the corporate structure is as follows – AMSA is a listed company in Luxemburg. This company is the ultimate parent company of resolution applicant, through its wholly owned subsidiary AMBD, a company incorporated in Luxemburg., which in turn holds 100% of shares in Oakey Holding BV, a company incorporated in Netherlands, which in turn holds 99.99% shares in AMIPL, a company incorporated in India. AMNLBV is a company incorporated in Netherlands and is a 100% subsidiary of AMSA. It is the group company of Shri LN Mittal that held 29.05% of shareholding in UG.

28. A Co-Promotion Agreement was entered in 2009, between AM Netherlands and UG. As per the said agreement AM Netherlands was entitled to nominate one half of the independent directors on board of UG, the other half being nominated by other promoter group. The Co-Promotion agreement, therefore, not only names AM Netherlands as the foreign promoter of UG, but also makes it clear that UG would be jointly managed and controlled by foreign and Indian promoters. Pursuant to this Co-Promotion agreement, AM Netherlands issued a letter of offer to acquire 25.76% of share capital of UG. In this letter, it was disclosed to public at large that AM Netherlands becoming a promoter of UG, with significant affirmative voting rights. On a subsequent date, a Non-Disposal Undertaking was provided by AM Netherlands, as promoter of UG, to the lender banks of UG, which included State Bank of India. In the year 2016, Canara Bank and Punjab National Bank declared UG accounts as NPA. In all annual returns of UG, the AM Netherlands have been shown as 'Promoter' group. The argument of AMIPL that it has not exercised its voting rights would not help them as that makes no difference to the de jure position of AM Netherlands being a 'promoter'.

29. A few days before submission of 1st resolution plan, the entire shareholding in UG is sold by way of off market sale, to a company of Indian Promoters namely 'Sainath Trading Company Private Limited' for a price of Rs 1 per share, when the market value of share is Rs 19.5 and purchase price was Rs 120 per share. The aforesaid sale of shares was done without making an open offer on the basis that it was an inter se transfer of shares between promoters, and therefore exempt from such requirement.

30. It is absolutely clear that Shri LN Mittal, who is the ultimate shareholder of AMIPL is directly the shareholder of AM Netherlands as well, which is an LN Mittal Group Company. When the corporate veil of the various companies aforementioned is pierced, both AMIPL and AM Netherlands are found to be managed and controlled by Shri LN Mittal and therefore persons deemed to be acting in concert as per Regulation 2(1)(q)(2)(i) of SAST Regulations.

31. AM Netherlands is a promoter of UG is clear from the abovementioned facts, being expressly stated as such in UG's annual returns. The reasonably proximate facts prior to submission of both resolution plans by AMIPL would show that there is no doubt whatsoever that AM Netherlands shares in UG were sold only in order to get out of the ineligibility mentioned by 29A(c) and consequently the proviso thereto and hence the resolution applicant is ineligible.

32. Insofar as the transaction with regard to KSS Petron isconcerned, the facts are as follows- In 2011, Fraseli, anentity registered and incorporated in Luxemburg, which ismanaged and controlled by Shri LN Mittal, held 32.22% of theshareholding of KSS Global, a company domiciled in theNetherlands. On 19.5.2011, by a SHA was entered into between KSS Holding, KSS Infra EALQ, Fraseli andKSS Global, the first three companies were each given a right toappoint an equal number of directors on the board of directors ofKSS Global, which in turn held 100% of the share capital of KSSPetron, a company incorporated in India. Fraseli was also grantedaffirmative voting rights on decisions regarding certain specifiedmatters, both at the board and the shareholder level, in respect ofKSS Global and all companies controlled by it, which would include KSS Petron. The account of KSS Petron has become NPA in 2015. As in case of UG, Fraseli divested its shareholding in KSS Petron, three days before AMIPL submitted its 1st resolution plan.

33. From the above, it is evident that there can be no doubt whatsoever that Fraseli, being a company managed and controlled by LN Mittal, holding 1/3rd shares in KSS Global, which in turn held 100% share capital of KSS Petron, was in joint control of KSS Petron, if the corporate veil of all these companies is disregarded. Hence, the resolution application submitted by AMIPL suffers from in

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DIRECT TAXES

RELEVANCE OF POSSESSION OF IMMOVABLE PROPERTY

Contributed by CA Ramaprasad T

Section 45(1) of Income Tax Act, 1961 provides for taxability of profits or gains on transfer of Capital Asset in the year of transfer. The term 'transfer' inter-alia includes any transfer allowing the possessing of immovable property in part performance of contract referred to in 53A of Transfer of Property Act,1882 ('TOPA').

Sec 53A of TOPA protect the interest of the transferee in case where he as part of contract has performed his part either in full or part and any enjoying the possession of the property pending registration.

This Section was used against the transferor under the Income Tax Act, 1961 to conclude that once provisions of Sec 53A of TOPA are complied with he has to pay tax on capital gain even in the absence of registration [1].

The chargeability of Capital Gains under Section 45(1) is subject to rollover of the taxability under Section 54/54F etc.

The moot question that would arise is whether the handing over possession of property with a right to enjoy being relevant both for purpose of chargeability of Capital Gain and as well for compliance of provisions enabling the rollover benefit?

The Mumbai Tribunal[2] has recently dealt with the issue and held that for compliance with the provisions of Section 54 date of possession with a right to enjoy is relevant consideration.

Facts of the Case: - Assessee has sold an immovable property on 28.03.2013 for a consideration of Rs. 74 Lakhs and claimed exemption under Section 54 by purchasing a new residential property.

Assessing Officer (AO) has disallowed the exemption on the ground that the assessee had entered into an agreement to purchase on 29.01.2009 which was beyond One Year prior to the date of transfer. However, possession of the same was handed over on 18.05.2012.

Assessee contend that purchase of a new residential property would be substantially affected on the date of the payment of full consideration on property becoming ready for occupation and the possession of the same.
Since all these conditions were fulfilled on the date of handing over possession i.e 18.05.2012 which was well with in one year prior to the date transfer and is a sufficient of compliance of provisions of Sec 54.

[1] Amendment to Sec 17A of Registration Act requires registration of document even in cases covered U/S 53A of TOPA.
[2] Smt.Ranjana R.Deshmukh vs ITO 11 TMI 511

Verdict: - Tribunal relying on the judgement of High Court of Bombay held the relevant date for determining allowing benefit of Sec 54 is the date on which full consideration was paid and handing over the possession. Since these conditions were fulfilled on 18.05.2012 which is well with in the period of one year prior to date of transfer allowed the benefit.

The date of possession is a relevant for both fixing the liability and as well as allowing benefit under Section 54 or 54F though the registration was not complete on that date.

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